*PS LA 2006/15 - Consolidation regime - administration of * the administrative penalty for shortfall amounts resulting from a false or misleading statement * the shortfall interest charge, and * the shortfall general interest chargearising from certain adjustments required under the consolidation regime.*

This cover sheet is provided for information only. It does not form part of *PS LA 2006/15 - Consolidation regime - administration of * the administrative penalty for shortfall amounts resulting from a false or misleading statement * the shortfall interest charge, and * the shortfall general interest chargearising from certain adjustments required under the consolidation regime.*

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Law Administration Practice Statement

PS LA 2006/15

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This Practice Statement is an internal ATO document and an instruction to ATO staff.

Taxpayers can rely on this Practice Statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty, nor will they have to pay interest on the underpayment provided they reasonably relied on this Practice Statement in good faith. However, even if they do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

SUBJECT: **Consolidation regime – administration of:**

- **the administrative penalty for shortfall amounts resulting from a false or misleading statement**
- **the shortfall interest charge, and**
- **the shortfall general interest charge**

arising from certain adjustments required under the consolidation regime

PURPOSE: **To provide guidance on:**

- **the application of the administrative penalty for shortfall amounts resulting from a false or misleading statement, and**
- **the remission of the shortfall interest charge and the shortfall general interest charge**

when a member entity's income tax assessment is amended to reflect the adjustments required under section 701-70 of the *Income Tax Assessment Act 1997*.

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BACKGROUND

1. All legislative refences in this Practice Statement are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Sections 701-70 and 703-50 (or 719-50)

2. Section 701-70 applies when, at the time of joining a consolidated group[1], a member entity[2] is or has been receiving or incurring amounts under an ongoing arrangement it has with either the head company[3] or another member of the consolidated group. The purpose of section 701-70 is to align each entity's tax position at the joining time with the proportion of all things it has actually provided or received. Under this provision, the member entity may be required to include certain amounts in assessable income or claim allowable deductions in respect of all things done under arrangements for the income year ended (or taken to have ended) just before the joining time.

3. Section 703-50 (or section 719-50 in the case of a multiple entry consolidated (MEC) group) allows a head company to make a choice (in writing) that a consolidatable group is taken to be consolidated on and after the day that is specified in the choice (and is after the 30 June 2002). Section 703-58 (or section 719-76) requires the head company to notify the Commissioner (in the approved form) of the choice at any time after the date on which the choice is to take effect (on or after 1 July 2002) up until the day on which it lodges the first tax return for the consolidated group. It was the intent of the legislation that head companies be given sufficient time to make the choice to consolidate, particularly since the choice, once made, is irrevocable. The law allows a head company to choose a retrospective start date for consolidation.

4. The interaction between section 701-70, the choice provision in section 703-50 and the section 703-58 notification of that choice can give rise to some

[1] For the meaning of 'consolidated group', see section 703-5.
[2] For the purposes of this Practice Statement, a 'member entity' means a subsidiary member of a consolidated group, see section 703-15. For multiple entry consolidated (MEC) groups, see section 719-25.
[3] The term 'head company' is defined in subsection 703-15(2) and, for MEC groups, in section 719-75.

unintended consequences. This is because the decision to consolidate, its date of effect and the notification of that choice are within the control of the head company and are likely to be outside the control of a subsidiary member entity. Consequently, a member entity may have lodged its tax return for the income year in which the adjustment under section 701-70 is required before the head company gives the Commissioner the notice (in the approved form) setting out its choice to consolidate under section 703-50 (or section 719-50 in the case of a MEC group). Alternatively, a member entity may not fully appreciate the implications of the adjustments required under section 701-70 and lodge its relevant tax return after the choice to consolidate is made.

Interest charges

5. The shortfall interest charge (SIC) replaces the shortfall general interest charge (shortfall GIC) for the period between the due date for an original assessment and the correction of a tax shortfall. SIC for amended assessments only applies to income tax shortfalls for the 2004–05 and later income years.

6. Our general approach to the remission of penalties and the SIC and shortfall GIC is reflected in relevant practice statements. This Practice Statement should be read in conjunction with Law Administration Practice Statements PS LA 2006/8 *Remission of shortfall interest charge and general interest charge for shortfall periods* and PS LA 2011/12 *Remission of general interest charge.*

STATEMENT

7. For ease of reference, the remainder of this Practice Statement focuses on the choice made by the head company of a consolidated group under section 703-50 (that is notified under section 703-58). However, the principles set out in this document apply equally in the case of MEC groups where the choice to consolidate is made under section 719-50 (and notified under section 719-76).

When this Practice Statement applies

8. This Practice Statement applies to the 2001–02 income year and all later years.

9. The principles in this Practice Statement apply where a member entity's most recent assessment for an income year requires an amendment to reflect the adjustments required under section 701-70 and those adjustments were not incorporated in the member entity's tax return for that relevant income year because:

   (a) at the time of lodgment of that return (by the member entity), the head company had not formally given us the notice (in the approved form) setting out its choice to consolidate, or

   (b) the head company gave us the notice (in the approved form) setting out its choice to consolidate not more than 14 days (subject to paragraph 22 of this Practice Statement) before the member entity lodged its tax return.

10. This Practice Statement applies to interest charges that are imposed on tax shortfalls and that accrue during the shortfall period.[4] This is:

- the SIC – payable in respect of amended income tax liabilities for the 2004–05 and later income years
- shortfall GIC – payable in respect of amended income tax liabilities for the 2000–01 to 2003–04 income years. Shortfall GIC is the GIC accrued during the shortfall period on the tax shortfall.

When this Practice Statement does not apply

11. This Practice Statement does not apply where the:

- head company of an existing consolidated group acquires a new member entity
- head company is required to give us, under subsection 703-60(1), a notice in the approved form within 28 days of the new member joining the group, and
- new member entity is required to make adjustments under section 701-70.

This is because the new member entity will lodge its tax return for which an amendment will be required under section 701-70 after the head company gives us the approved form advising of the joining of a new member entity. In such cases, the new member entity joining the group will be aware of any adjustments that need to be included in its tax return for the income year in which the joining time occurs.

Example 1 – where this Practice Statement does not apply

12. *Head Co (the head company) of an existing consolidated group acquires New Sub Co (a new member entity) on 1 November 2005. Head Co is required to advise the Commissioner by 29 November 2005 that it has acquired a new member entity. New Sub Co will need to make adjustments required under section 701-70 in its tax return for the period 1 July 2005 to 31 October 2005, which will need to be lodged by 15 January 2007.*

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13. This Practice Statement does not apply to adjustments required under section 701-75 when an entity ceases to be a member of the consolidated group. In such cases, the member entity leaving the group should be aware of any adjustments that need to be included in its tax return for the income year in which the leaving time occurs.

14. This Practice Statement does not apply where an amendment request is made to include the section 701-70 adjustment in an earlier assessment – that is, not the most recent assessment for an income year. In this case, you should be guided by our general approach to the remission of penalties and the SIC and shortfall GIC (see paragraph 6 of this Practice Statement).

[4] The shortfall period starts from the day the tax debt was due for payment or would have been due for payment had the shortfall been correctly reported and ceases on the day before the Commissioner gives the taxpayer an amended notice of assessment (or an equivalent notification for taxes other than income tax). See also paragraph 24 of PS LA 2006/8.

15. This Practice Statement does not apply to GIC that is not shortfall GIC – that is, where there is a late payment of the tax shortfall or interest charges and the GIC may be imposed (see Part IIA of the *Taxation Administration Act 1953* (TAA)). Guidelines for remission of this GIC for late payment are contained in PS LA 2011/12.

Imposition of penalty and remission of interest charges

16. A penalty for a shortfall amount for a false or misleading statement will not arise under subsection 284-75(1) of Schedule 1 to the TAA merely because the amendment of a member entity's assessment to account for an adjustment required under section 701-70 has the effect of increasing the member entity's assessed tax. The imposition of a penalty will depend on whether all the conditions in subsection 284-75(1) are satisfied and whether any exceptions apply.

17. When a member entity applies to have its income tax assessment amended to include an adjustment required under section 701-70, you need to have regard to all of the relevant facts in determining whether the administrative penalty for shortfall amounts resulting from a false or misleading statement is imposed or the SIC or shortfall GIC remitted, including the:

- day on which the head company gave us the notice (in the approved form) setting out its choice to consolidate under section 703-50
- day on which the member entity lodged its tax return for the income year in which the adjustment required is made
- reason an adjustment required under section 701-70 was not incorporated in the relevant tax return
- day on which the member entity lodges its amendment request, and
- day on which the member entity pays the tax shortfall.

Where, at the time of lodgment of the member entity return, the head company had not given us the approved form setting out its choice to consolidate

18. Where the features in paragraph 9(a) of this Practice Statement are present and the adjustment required under section 701-70 has the effect of increasing the income tax assessed to a member entity:

- An administrative penalty for a shortfall amount under subsection 284-75(1) of Schedule 1 to the TAA for a false or misleading statement will not arise because at the time the statement was made, it was not false or misleading (subject to paragraph 31 of this Practice Statement).
- Remission of the SIC or shortfall GIC will be decided for each case on its own merits. It is expected that the discretion under section 280-160 of Schedule 1 to the TAA in respect of the SIC and under subsection 8AAG(3) of the TAA in respect of shortfall GIC would ordinarily be exercised to remit the relevant interest charge in full where the member entity seeks an amendment of its assessment, within a reasonable period (see paragraphs 20 and 21 of this Practice Statement) after the head company has given the Commissioner the approved form setting out its choice to consolidate.

  We would generally exercise the power to remit the SIC or shortfall GIC that has accrued from the date that the income tax was due and payable on the original assessment of the member entity until the end of the shortfall period.

This paragraph should be read in conjunction with PS LA 2006/8 in respect of the advanced payment of the tax shortfall and the remission of the SIC.

Where the head company gave the notice to us (in the approved form) setting out its choice to consolidate not more than 14 days before the member entity lodged its tax return

19. Where the features in paragraph 9(b) of this Practice Statement are present and the adjustment required under section 701-70 has the effect of increasing the income tax assessed to a member entity:

- An administrative penalty for a shortfall amount under subsection 284-75(1) of Schedule 1 to the TAA for a false or misleading statement will not arise as, even though there is a false or misleading statement and there is a shortfall amount, the taxpayer has exercised reasonable care because they have lodged their return shortly after (see paragraph 21 of this Practice Statement) the head company has lodged its choice to consolidate.
- The remission of the SIC or shortfall GIC will be decided for each case on its own merits. It is expected that the SIC or shortfall GIC would generally be remitted in full where the member entity seeks an appropriate amendment of its assessment within a reasonable period (see paragraphs 20 and 21 of this Practice Statement) after the head company has given the notice to us (in the approved form) setting out its choice to consolidate. The member entity should, if the head company notifies us of the choice to consolidate not more than 14 days before the member entity has lodged its tax return, seek an amendment within the reasonable period.

This paragraph should be read in conjunction with PS LA 2006/8 in respect of the advanced payment of the tax shortfall and the remission of the SIC.

Reasonable period

20. A 'reasonable period' is considered to be, in most cases, a period of 28 days after the day on which the head company gives the notice to us (in the approved form) setting out its choice to consolidate.

21. However, there may be circumstances where a member entity can establish that a period longer than 28 days would be considered reasonable. Examples of such circumstances include, but are not limited to, natural disasters such as fire, floods or drought, and industrial action. Generally, the 28-day period will not be extended where the delay was caused by a breakdown in communication between the head company and its subsidiary entity regarding the notification of the choice to consolidate. You should therefore clarify the reason for the member entity's delay in seeking an appropriate amendment if this is not adequately explained in the amendment request. Any further references in this Practice Statement to a period of 28 days in the context of 'reasonable period' should be read as subject to the potential application of an extension due to these reasonable circumstances.

Shortly after

22. 'Shortly after' is considered to be, in most cases, a period of not more than 14 days after the day on which the head company gives the notice to us (in the approved form) setting out its choice to consolidate. However, there may be circumstances, such as those outlined in paragraph 21 of this Practice Statement, where a member entity can establish that a period longer than 14 days would be considered shortly after. Any further references in this Practice

Statement to a period of 14 days in the context of 'shortly after' should be read as subject to the potential application of an extension due to these reasonable circumstances.

Where the member entity's amendment request is not lodged within a reasonable period

23. Entities that do not lodge an appropriate amendment request within a reasonable period in the circumstances described in paragraph 9 of this Practice Statement will not necessarily be entitled to a full remission of the SIC or shortfall GIC payable.

24. Where the entity has not lodged the amendment request within a reasonable period, we will generally exercise the power to remit the SIC and shortfall GIC that has accrued from the date that the income tax was due and payable on the original assessment of the member entity:

- Remission in full will be granted until the expiration of the reasonable period after the head company lodges its choice to consolidate.
- From that date until the date the amendment request is received (if within a further reasonable period – another 28 days), the SIC or shortfall GIC will be remitted to the base interest rate.[5]
- After this date, the SIC or shortfall GIC will revert to the full statutory rate. Any further remission of the SIC or shortfall GIC accruing after that day will be determined in accordance with the general principles set out in PS LA 2006/8.

Example 2 – member entity's amendment request is not lodged within a reasonable period

25. *Head Co decides to consolidate on 1 July 2005 and advises us of its choice to consolidate on 1 December 2005. Member entity lodges its 2004–05 tax return on 9 December 2005 and lodges a request for amendment to this return on 24 June 2006.*

26. *In this example, we remit the SIC in full from the date the assessment for 2004–05 was due and payable until 29 December 2005.*

27. *From 30 December 2005 to 26 January 2006 (a further 28 days), we remit the SIC to the base interest rate.*

28. *After 26 January 2006, any remission of the SIC is determined in accordance with the general principles set out in PS LA 2006/8.*

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29. This approach promotes a fairer tax system. You should ensure that entities which do not make a genuine attempt to comply with the provisions of section 701-70 do not receive the same level of remission as entities that have made a genuine attempt to comply.

[5] The term 'base interest rate' is explained in paragraph 34F of PS LA 2006/8. It is a rate set by law which is used as a base for calculating SIC and GIC. For each day in a particular quarter of the year, the base interest rate equals the monthly average yield of 90-day Bank Accepted Bills for a prescribed previous month. For example, for the quarter 1 January to 31 March, the base interest rate is the monthly average yield of 90-day Bank Accepted Bills for the preceding November (subsection 8AAD(2) of the TAA).

Where the member entity lodges its tax return more than shortly after the head company notifies the choice to consolidate

30. If a head company notifies us (in the approved form) of its choice to consolidate more than 14 days before the member entity is required to lodge its return, the member entity should make the adjustment required under section 701-70 in its return.

31. Where the member entity fails to make the adjustment required under section 701-70 in its tax return lodged more than shortly after the head company notifies its choice to consolidate and subsequently makes a section 701-70 amendment request:

- An administrative penalty for a shortfall amount for a false or misleading statement will arise, as it would be considered that the member entity has not exercised reasonable care in not including the adjustments required under section 701-70 in its tax return. However,
  - even if the facts show that reasonable care was not taken, the penalty imposed by the legislation is still reduced by at least 80% under subsection 284-225(2) of Schedule 1 to the TAA if an unprompted voluntary disclosure is made.
  - any penalty which remains after the statutory reduction will generally be remitted in full unless there is information to indicate that the entity did not make an honest mistake or it can be reasonably inferred that it was not an honest mistake.[6] It is considered that the circumstances described in paragraph 65 of this Practice Statement would generally warrant remitting the remaining penalty to nil where the amendment request is made shortly after the member entity lodges its tax return.
- We may remit any SIC or shortfall GIC charged. Where a taxpayer makes an unprompted voluntary disclosure of a shortfall through an amendment request, remission of interest charges to the base interest rate may be considered in accordance with PS LA 2006/8.

Multiple adjustments

32. To the extent that the SIC or shortfall GIC has accrued in respect of multiple adjustments made to the member entity's assessment or from other underestimated instalment amounts, only that portion of the SIC or shortfall GIC that relates to the adjustment required under section 701-70 should be remitted in accordance with the principles set out in this Practice Statement.

Processing section 701-70 amendment requests and general interest charge and shortfall interest charge remissions

33. When applying for an amendment, the member entity's request should clearly indicate that the amendment arises from the operation of section 701-70. If the amendment request deals with multiple adjustments, the member entity should identify the extent to which the request relates to an amendment required under section 701-70.

34. As the processing of the amendment request will automatically generate imposition of an administrative penalty and liability to the SIC and the shortfall GIC under the law, ATO staff responsible for considering the amendment request should ensure the simultaneous processing of the administrative

[6] See paragraph 17AD of PS LA 2012/5.

penalty and the SIC and shortfall GIC impositions and remissions, having regard to the principles outlined in this Practice Statement.

35. Under Part IIIA of the *Taxation (Interest on Overpayments and Early Payments) Act 1983*, the Commissioner may be liable to pay interest on the amount of the SIC and the shortfall GIC that has been paid by a member entity and remitted to the entity where the remission takes place more than 30 days after a request for remission is made.

Recording requirements when considering amendment requests required under section 701-70

36. You must record all the factors you take into account when exercising the discretion to remit the administrative penalty and the SIC or shortfall GIC. You also have to record:

- whether reasonable care has been exercised
- whether a voluntary disclosure has been made
- the reasons for accepting a voluntary disclosure, and
- the factors taken into account in remitting any penalty that remains after the voluntary disclosure statutory reduction.

37. The reason for the amendment request should also be recorded on the relevant case management system by way of a note in accordance with local procedures, so that the member entity is not prejudiced in the remittance of any future liabilities.

Administrative penalty

38. If a decision is made not to remit the penalty or to remit only part of the penalty, we must give written notice of the decision to the member entity. The member entity should be provided with written reasons as to why the penalty has not been remitted in full.

Shortfall general interest charge

39. If, after applying the principles of this Practice Statement, a member entity is still liable to pay an amount of shortfall GIC, the member entity should be provided with a notice which sets out their liability and, where appropriate, the extent to which the GIC has already been remitted.

Shortfall interest charge

40. In respect of the SIC, we must provide reasons for the decision where a taxpayer requests remission of the SIC and a decision is made not to remit the entire amount. See section 280-165 of Schedule 1 to the TAA and section 25D of the *Acts Interpretation Act 1901*, which outlines the rules about the contents of a statement of reasons.

Review rights

41. A member entity that is dissatisfied with an assessment or our refusal to remit an amount of administrative penalty (and the amount of penalty payable after

the refusal is more than 2 penalty units) imposed under Division 284 may object against it in the manner set out in Part IVC of the TAA.[7]

42. Where the unremitted SIC exceeds 20% of the tax shortfall, the objection, review and appeal rights in Part IVC of the TAA will be available.[8]

43. A member entity that is dissatisfied with our decision on the remission of the shortfall GIC may only seek a review of that decision under the *Administrative Decisions (Judicial Review) Act 1977*.

EXPLANATION

When section 701-70 applies

44. Section 701-70 applies where there is a pre-existing arrangement between:

- entities which become subsidiary members of a consolidated group at the same time, or
- the head company and a joining entity.

45. Specifically, the arrangement must be one where the entity incurring expenditure under the arrangement and the entity deriving the corresponding amount as income are:

- entities that become subsidiary members of the consolidated group at the same time, or
- the head company and a member entity that is joining the consolidated group.

46. The types of arrangements to which section 701-70 would typically apply include loan arrangements, leasing arrangements or other arrangements involving expenditure incurred for goods or services to be provided in the future.

Adjustments required under section 701-70

47. Where the period of the arrangement extends beyond the time when an entity becomes a member of a consolidated group, section 701-70 seeks to align the income tax position of each consolidating entity at the point just before they consolidate. This is achieved by adjusting each entity's taxable income so that the following amounts equate to the amount that is attributable to the period over which services were provided under the arrangement, up until the joining time:

- deductions for expenditure incurred under the arrangement, and
- amounts derived under the arrangement that have been included in assessable income.

48. The income year in which the adjustment required under section 701-70 arises will depend on when the joining time occurs (subsection 701-70(3)). In the case where the entity becomes a member of the consolidated group at the start of its income year, any adjustments required under section 701-70 will need to be included in the member entity's tax return for the income year ended just before the entity became a member.

[7] See subsection 298-20(3) of Schedule 1 to the TAA.
[8] See section 280-170 of Schedule 1 to the TAA.

Interaction between section 701-70 and the choice rule in section 703-50

49. The interaction between section 701-70 and the choice to form a consolidated group provision in section 703-50 can give rise to some unintended consequences.

50. Section 703-50 allows a head company to make a choice in writing that a consolidatable group is taken to be consolidated on and after the day that is specified in the choice (and is after the 30 June 2002). This choice (in writing) may be made by the head company *after* the day the group is specified or taken to be consolidated on and from (*after* the date of effect) but before or by no later than the date on which the head company lodges the first tax return for the consolidated group. Section 703-58 also requires the head company to notify the Commissioner (in the approved form) of the choice at any time after the date of effect up until the day on which it lodges the first tax return for the consolidated group

51. Once a valid and effective section 703-50 choice to consolidate a consolidatable group (on and after a particular day) has been made in writing by the head company, it cannot be revoked, nor can the date from which consolidation is to take effect be varied.

52. The operation of section 703-50 allows for a group to be consolidated retrospectively from the start of an income year and section 703-58 notification of that choice to be made (to the Commissioner) sometime later or by the time the first tax return for the consolidated group for that income year is lodged by the head company. This means the choice may be made after a member entity has lodged its return for the income year that ended before the date the group is taken to be consolidated.

53. The effect of choosing to consolidate retrospectively from the start of an income year is that a member entity joining the consolidated group would need to seek an amendment of its assessment for the income year that preceded consolidation if section 701-70 requires adjustments to its taxable income for that year.

Example 3 – interaction between sections 701-70 and 703-50

54. *In the case of a 30 June balancing subsidiary and head company, if a choice to consolidate is made with effect from 1 July 2002 and the head company gives us the approved form showing it is making this choice when it lodges its 2002–03 return on 15 January 2004, any section 701-70 adjustment would arise for the 2001–02 income year. As the member entity would already have lodged its return for the 2001–02 year, it would need to seek an amendment to the relevant assessment.*

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55. The following discussion explains the application of the penalty provisions and provides guidance on our approach to the remission of the SIC and shortfall GIC in the situations to which this Practice Statement applies.

Imposition of administrative penalty under subsection 284-75(1) of Schedule 1 to the TAA

56. Subsection 284-75(1) of Schedule 1 to the TAA imposes an administrative penalty on an entity where:

- a statement is made to the Commissioner by the entity or its tax agent

- the statement is false or misleading in a material particular, and
- there is a shortfall amount as a result of the statement.

For a detailed discussion of administrative penalties in respect of false or misleading statements, see Law Administration Practice Statement PS LA 2012/5 *Administration of the false or misleading statement penalty – where there is a shortfall amount*.

57. Importantly, a penalty in respect of a false or misleading statement will not arise merely because the amendment of a member entity's assessment to account for an adjustment required under section 701-70 has the effect of increasing the member entity's assessed tax. The imposition of a penalty will depend on whether all the conditions in subsection 284-75(1) of Schedule 1 to the TAA are satisfied and whether any exceptions apply.

58. Where an adjustment required under section 701-70 affects a member entity's most recent income tax assessment, you will need to consider all the facts of the case to establish whether the prerequisites for the imposition of an administrative penalty exist, including the:

- day on which the head company gave us the notice (in the approved form) setting out its choice to consolidate under section 703-50
- day on which the member entity lodged its tax return for the income year in which the adjustment required is made
- reason the adjustment required under section 701-70 was not incorporated in the relevant tax return
- day on which the member entity lodges its amendment request, and
- day on which the member entity pays the tax shortfall.

Where, at the time of lodgment of the member entity return, the head company had not given us the notice (in the approved form) setting out its choice to consolidate

59. Where the features of paragraph 9(a) of this Practice Statement are present, a member entity will not be liable for a false or misleading statement penalty. This is because for the purposes of subsection 284-75(1) of Schedule 1 to the TAA it is the nature of the statement at the time that it was made that is relevant. On the basis of the facts at the time the statement was made, the statement was not false or misleading.

Where the head company gave us the notice (in the approved form) setting out its choice to consolidate not more than 14 days before the member entity lodged its tax return

60. Where the features of paragraph 9(b) of this Practice Statement are present, whether a false or misleading statement penalty applies would depend on whether the member entity has exercised reasonable care in making the statements in their return.

61. Reasonable care is not a new concept. It is explained in Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*. The test continues to be whether, in making a statement, or in acting or omitting to act, the member entity has exercised the level of care that a reasonable person in the member entity's circumstances would have taken to fulfil the member entity's tax obligations (see also PS LA 2012/5).

62. A member entity would generally be considered to have exercised reasonable care if the head company only lodged its notification to consolidate with us not more than 14 days before the member entity lodged its tax return. It would be reasonable in these circumstances for us to consider that a member entity had exercised reasonable care in lodging its return having not made the adjustments. Therefore, in this situation, no administrative penalty would arise for a false or misleading statement.

Where the member entity lodges its tax return more than shortly after the head company has given us the notice (in the approved form) setting out its choice to consolidate

63. An administrative penalty in respect of a shortfall amount would arise if the adjustments required under section 701-70 were not incorporated in the member entity's tax return for the relevant income year and the head company had lodged its choice to consolidate more than 14 days before the member entity's return was lodged.

64. This is because it would be considered that the member entity had not exercised reasonable care in making the statements in their return. It is expected that a member entity or agent would not have exercised reasonable care if it did not have in place procedures that would enable it to establish whether a member entity's head company had made a decision to consolidate prior to the lodging of any relevant return of the member entity. Such procedures may include discussions with the head company, prior to lodging the member entity's return, as to whether the head company was thinking of consolidating. If the notice was lodged more than 14 days before the member entity return was lodged, these procedures should have alerted the member entity or its agent to make the required adjustments.

Where a member entity makes a voluntary disclosure

65. As mentioned in paragraph 31 of this Practice Statement, even if the facts show that reasonable care was not taken, the penalty imposed by the legislation is still reduced by at least 80% under subsection 284-225(2) of Schedule 1 to the TAA if an unprompted voluntary disclosure is made. Further, any penalty which remains after the statutory reduction will generally be remitted in full unless there is information to indicate that the entity did not make an honest mistake or it can be reasonably inferred that it was not an honest mistake. It is considered that the circumstances described in paragraph 63 of this Practice Statement would generally warrant remitting the remaining penalty to nil where the amendment request is made shortly after the member entity lodges its tax return.

Shortfall interest charge and shortfall general interest charge

66. The SIC regime is contained in Division 280 of Schedule 1 to the TAA. For a discussion of the SIC regime, see PS LA 2006/8.

67. Section 8AAB of the TAA lists the various provisions and taxation laws under which a taxpayer may be liable to pay the GIC.

68. A member entity may be liable to the GIC under one or more of the following provisions where an assessment is amended to incorporate the adjustment required under section 701-70:

- A member entity would be liable to pay the shortfall GIC under subsection 5-15 where the amendment required under section 701-70

results in an increase in the member entity's taxable income for the 2001–02 to 2003–04 income years. The GIC would also be payable on any increased tax liability that remains unpaid after the statutory due date for tax payable for the relevant income year (this type of GIC is not the subject of this Practice Statement).

- A member entity may also be liable to pay the shortfall GIC under Subdivision 45-G of Part 2-10 of Schedule 1 to the TAA for an underestimation of pay as you go (PAYG) instalments.
  - This is where the member entity has chosen to work out its instalments using a varied instalment rate that is lower than the one notified by us or by using the member entity's own estimate of its benchmark tax that is lower than the gross domestic product-adjusted notional tax or notional tax notified by us for that income year.
  - More specifically, if the member entity's assessment for the income year just before the consolidation transitional year is amended to incorporate an adjustment required under section 701-70, the shortfall GIC is imposed if that adjustment has the effect of increasing the member entity's assessable income (and thus the member entity's benchmark tax for the year) by such an amount that the varied instalment rate or the estimated benchmark tax exceeds the 15% margin of error.

Remission of the shortfall interest charge or shortfall general interest charge arising from section 701-70 adjustments

69. Under section 280-160 of Schedule 1 to the TAA, the Commissioner may remit all or part of an amount of the SIC if the Commissioner considers it fair and reasonable to do so.

70. Section 8AAG of the TAA provides the Commissioner with a general power to remit all, or part of, any GIC payable by a taxpayer.

71. A detailed explanation of the general remission guidelines for the SIC and shortfall GIC are contained in PS LA 2006/8.

Where the member entity lodges the amendment request required under section 701-70 within a reasonable period

72. It is expected that the SIC or shortfall GIC (imposed under subsection 5-15 for the 2001–02 to 2003–04 income years) would generally be remitted in full where the member entity seeks an amendment of its assessment, within a reasonable period (see paragraphs 20 and 21 of this Practice Statement) after the head company has given us its choice to consolidate.

73. Such an approach would ensure that the SIC or shortfall GIC remission policy gives effect to and operates consistently with the way the consolidation legislation is intended to apply. In these unique circumstances, it would be inappropriate for the SIC or shortfall GIC to be payable when the legislation allows for retrospective consolidations and where the liability to further tax (because of an adjustment required under section 701-70) will never arise unless and until the head company makes an effective choice to consolidate.

74. This policy is intended to ensure that entities receive the same treatment in similar situations. Head companies have been encouraged to give us the approved form in which they make their choice to consolidate before they lodge their first consolidated return. If they do so, and a member entity that

does not fully appreciate the implications of the adjustments required under section 701-70 lodges its relevant tax return within a short period of the choice, that entity should not be disadvantaged by the head company's early notification.

Where the member entity does not lodge the amendment request required under section 701-70 within a reasonable period

75. Entities that do not lodge an amendment request within a reasonable period will not necessarily be entitled to a full remission of the SIC or shortfall GIC. However, we would generally remit the SIC or shortfall GIC that has accrued from the date that the income tax was due and payable on the original assessment of the member entity, until the expiration of the reasonable period after the date on which the head company gives us the approved form setting out its choice to consolidate. This is because it is fair and reasonable to give the member entity a reasonable period to make the adjustment by requesting an amendment.

76. From the expiration of the reasonable period until the date the amendment request is received (if within a further reasonable period – another 28 days), the SIC or shortfall GIC will be remitted to the base interest rate. After this date, the SIC or shortfall GIC will revert to the full statutory rate. Any further remission of the SIC and shortfall GIC accruing after that day will be determined in accordance with the general principles set out in PS LA 2006/8.

Where the member entity's return is lodged more than 'shortly after' the head company notifies the choice

77. We would generally not remit any interest charged if the member entity does not make the adjustment in their return where the member entity's return is lodged more than shortly after the head company notifies the choice and the member entity subsequently makes an amendment request. Where a taxpayer makes an unprompted voluntary disclosure through a self amendment of a shortfall, remission of interest charges to the base interest rate may be considered in accordance with PS LA 2006/8.

General interest charge on underestimation of PAYG instalments

78. If the member entity varied down any of its PAYG instalments for the income year for which the adjustments have to be made, an adjustment required under section 701-70 will increase the benchmark tax as worked out by us for that income year. It may have the effect that the member entity has varied to an instalment rate or an estimated benchmark tax that exceeds the 15% margin of error.

79. In such a case, an underestimate of an instalment will have occurred and the member entity is liable to pay the shortfall GIC on underestimated PAYG instalments. Under section 45-240 of Schedule 1 to the TAA, we may only remit the shortfall GIC if there are special circumstances that would make remission fair and reasonable.

80. The question of what constitutes a 'special circumstance' will depend on the facts of the particular case. The various factors that we would generally consider are outlined in PS LA 2011/12.

81. In the specific cases where this Practice Statement is intended to apply, it is expected that the shortfall GIC on a shortfall of PAYG instalments caused by

an adjustment required under section 701-70 would ordinarily be remitted in full, subject to paragraph 70 of this Practice Statement.

82. This approach recognises that, in most cases, the decision to consolidate, its date of effect and the notification of that choice are likely to be outside the control of a subsidiary member entity. The potential operation of section 701-70 is only triggered once an effective choice to consolidate has been provided to us by the head company of the group.

83. A head company, in choosing a retrospective start date for consolidation, is acting in accordance with the law. It was the intent of the legislation that head companies be given sufficient time to make the choice to consolidate, particularly since the choice, once made, is irrevocable. For this reason, it would generally be considered fair and reasonable for the GIC to be remitted in full where an adjustment required under section 701-70 leads to an underestimation of PAYG instalments.

84. In deciding whether to remit all of the shortfall GIC, you may need to consider whether it was reasonably foreseeable when the approved form setting out the choice to consolidate would be given to us and the date from which consolidation would take effect. The extent to which the shortfall GIC is remitted should take account of a member entity's attempts to remedy a potential underestimation, for example, by increasing later instalments for that income year.

Further examples

Example 4 –where the features of paragraph 9(a) of this Practice Statement are present – within a reasonable period

85. *The following is an example where the features of paragraph 9(a) of this Practice Statement are present:*

- *date of consolidation: 1 July 2002*
- *date of notification of choice to consolidate by head company: 1 November 2002*
- *a member entity lodges its 2001–02 tax return: 31 October 2002*
- *the head company has a pre-existing loan with member entity at the joining time.*

86. *The member entity will need to amend its 2001–02 return to account for any adjustment required under section 701-70.*

87. *Our view:*

- *No penalty in respect of a false or misleading statement will be payable if the shortfall amount arises from a section 701-70 adjustment as the choice to consolidate is not made by the date the member entity lodges their prior-year's return.*
- *Shortfall GIC should be remitted in full subject to an amendment request being made within a reasonable period of the head company notifying the choice to consolidate, namely within 28 days of 1 November 2002 (by 29 November 2002).*

Example 5 – where the features of paragraph 9(b) of this Practice Statement are present – within a reasonable period

88. *The following is an example where the features of paragraph 9(b) of this Practice Statement are present:*

- *date of consolidation: 1 July 2002*
- *date of notification of choice to consolidate by head company*: *31 December 2002*
- *a member entity lodges 2001–02 tax return*: *5 January 2003*
- *the head company has a pre-existing loan with the member entity at the joining time.*

89. *A request for an amended assessment from the member entity is received by us, as the member entity is required under subsection 701-70(3) to amend its 2001–02 tax return by including in its assessable income for that year an amount calculated under subsection 701-70(4).*

90. *Our view:*

- *It is considered that reasonable care has been exercised as the head company lodges its notice of choice to consolidate only 5 days before the member entity lodges its tax return and no false or misleading statement penalty should apply.*
- *The member entity should get 28 days from date of lodgment of the head company's notice to make the adjustment by requesting an amendment.*
- *Shortfall GIC should be remitted in full if the amendment request is made within these 28 days.*

Example 6 – where the features of paragraph 9(a) of this Practice Statement are present – not within a reasonable period

91. *The following is an example where the features of paragraph 9(a) of this Practice Statement are present:*

- *date of consolidation: 1 July 2002*
- *date of notification of choice to consolidate by head company: 15 January 2004*
- *a member entity lodges 2001–02 tax return: 15 January 2003*
- *the head company has a pre-existing loan with the member entity at the joining time.*

92. *On 10 June 2004, a request for an amended assessment is received by us, as the member entity is required under subsection 701-70(3) to amend its 2001–02 tax return by including in its assessable income for that year an amount calculated under subsection 701-70(4).*

93. *On 25 August 2004, we issue a notice of amended assessment in respect of the 2001–02 year, which includes an increase in tax payable.*

94. *The due date for payment of the increase in tax payable is 2 December 2002, being the statutory due date for payment of tax in respect of the 2001–02 year (subsection 5-5).*

95. *On 1 September 2004, we receive payment of the amount of additional tax payable as a result of the section 701-70 adjustment.*

96. *The shortfall GIC accrued is imposed onto the account on 10 September 2004 and a notice issued to the member entity.*

97. *Our view:*

- *No penalty in respect of a false or misleading statement will be payable as the choice to consolidate is not made by the date the member entity lodges their prior-year's return.*
- *Prior to 15 January 2004, there is no practical impact on the member entity in relation to the section 701-70 adjustment and shortfall GIC accrued prior to that date should be remitted in full.*
- *This Practice Statement provides guidance that a reasonable period is considered to be 28 days. It is to be remembered that under self-assessment, the member entity could have paid the amount at any time following 15 January 2004 and the member entity could have paid the amount when the amendment request was lodged.*

98. *However, in respect of the periods, the following would be the case:*

- *For the period 2 December 2002 to 12 February 2004*
  - *The amendment in respect of the 2001–02 year is raised as a direct result of the member entity entering into a consolidated regime. The member entity could not have been expected to have known on 2 December 2002 of the impending liability that would arise when they were to enter into the consolidated regime at some future time. Further, until 15 January 2004, they would not have known or could have been expected to have known the outcome of entering into a consolidated regime.*
  - *The shortfall GIC accrued from 2 December 2002 to 12 February 2004 would normally be remitted in full as this is the date of head company's notice plus 28 days.*
- *For the period 13 February 2004 to 11 March 2004, after the reasonable period until the date the amendment request is received (if within a further reasonable period – another 28 days), the SIC or shortfall GIC will be remitted to the base interest rate.*
- *For the period 12 March 2004 to 10 June 2004*
  - *After this date, the SIC or shortfall GIC will revert to the full statutory rate. Any further remission of the SIC and shortfall GIC accruing after that day will be determined in accordance with the general principles set out in PS LA 2006/8.*
  - *The member entity applies for further remission for the period 13 February 2004 to 10 June 2004 based on the following circumstances*
    - *this is a one-off event – the member entity otherwise has an exemplary payment record with us and all lodgments have been made in accordance with the statutory provisions*
    - *while the time delay in lodging the amendment is outside the 28-day reasonable period, the reasons provided by the member entity's head company were that the priority was to lodge a correct tax return for the 2002–03 year, being the first consolidated return and the member entity was not advised that the head company had lodged the notification to consolidate until the head company had lodged its consolidated return*

- *the amendment request was lodged within 2 weeks of the completion of the first consolidated return, and*
- *it is also an unprompted voluntary self amendment.*

In this case, it is considered that shortfall GIC should be remitted down to the base interest rate for the period 13 February 2004 to 10 June 2004.

- *For the period 11 June 2004 to 1 September 2004 there would be no remission, as the self-assessment system is based around payments being made by statutory due dates, not on the arrival of amended notices of assessment nor delays in processing. It would not be considered fair and reasonable to remit and it would be expected that the member entity would lodge their payment with their amendment request.*

Example 7 – where the features of paragraph 9(a) of this Practice Statement are present – substituted accounting period – within a reasonable period

99. *The following is an example where the features of paragraph 9(a) of this Practice Statement are present:*

- *the head company and the member entity's income year is based on the 12-month accounting period 1 January to 31 December*
- *date of consolidation: 1 January 2004*
- *date of notification of choice to consolidate: 2 June 2004*
- *a member entity lodges its 2003–04 tax return (1 January 2003 to 31 December 2003): 1 June 2004*
- *the head company lodges its consolidated 2004–05 tax return (1 January 2004 to 31 December 2004): 1 June 2005*
- *the head company has a pre-existing loan with the member entity at the joining time.*

100. *Our view:*

- *The member entity may need to request an amendment to its 2003–04 assessment to account for any adjustments required under section 701-70.*
- *No penalty for a false or misleading statement should be payable if the shortfall amount arises from a section 701-70 adjustment solely because the choice to consolidate had not been made by the date the member entity lodged their prior-year's return.*
- *Shortfall GIC should be remitted in full subject to the amendment request being made within 28 days of the head company notifying us of their choice to consolidate under section 703-50 – that is, by 30 June 2004.*

Date issued: 14 November 2006

Date of effect: 1 July 2002

Amendment history

13 March 2025

Part	Comment
Throughout	Content checked for technical accuracy and currency. Updated in line with current ATO style and accessibility requirements.

13 June 2013

Part	Comment
Generally	Updated to current corporate publishing style.
Contact details	Updated.

16 August 2011

Part	Comment
Paragraphs 5, 14 and 75	Reference to ATO Receivables Policy removed; reference to PS LA 2011/12 added.
Various	Minor editorial amendments as per ATO Style Guide (for example, Tax Office updated to ATO).

1 July 2010

Part	Comment
Paragraph 63, 67 and 82	Updated legislative references (Part VI of the ITAA 1936 rewrite).

11 September 2008

Part	Comment
Paragraph 5 and references	Reference to PS LA 2006/11 removed; references to ATO Receivables Policy added.

6 August 2008

Part	Comment
Contact details	Updated.

References

Legislative references	ITAA 1997 5-5 ITAA 1997 5-15 ITAA 1997 701-70 ITAA 1997 701-70(3) ITAA 1997 701-70(4) ITAA 1997 701-75 ITAA 1997 703-5 ITAA 1997 703-15 ITAA 1997 703-15(2) ITAA 1997 703-50 ITAA 1997 703-60(1) ITAA 1997 719-25 ITAA 1997 719-50 ITAA 1997 719-75 TAA 1953 8AAB TAA 1953 8AAG TAA 1953 8AAG(3) TAA 1953 Pt IVC TAA 1953 Sch 1 Pt 2-10 Subdiv 45-G TAA 1953 Sch 1 45-240 TAA 1953 Sch 1 Div 280 TAA 1953 Sch 1 280-160 TAA 1953 Sch 1 280-165 TAA 1953 Sch 1 280-170 TAA 1953 Sch 1 Div 284 TAA 1953 Sch 1 284-75(1) TAA 1953 Sch 1 284-225(2) TAA 1953 Sch 1 298-20(3) Taxation (Interest on Overpayments and Early Payments) Act 1983 Pt IIIA Acts Interpretation Act 1901 25D ADJR Act 1977
Related practice statements	PS LA 2006/8 PS LA 2011/12 PS LA 2012/5
Related Rulings	MT 2008/1
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