PS LA 2007/10 - Making default assessments: section 36 of the Superannuation Guarantee (Administration) Act 1992

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Practice Statement Law Administration

PS LA 2007/10

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FOI status: may be released

This practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs ATO staff must follow their business line's escalation process.

SUBJECT:	**Making default assessments: section 36 of the *Superannuation Guarantee (Administration) Act 1992***
PURPOSE:	**To outline when a default assessment can be made and the factors the Commissioner will consider in making the default assessment**

BACKGROUND

1. All legislative references are to the *Superannuation Guarantee (Administration) Act 1992* (SGAA) unless otherwise stated.

2. The SGAA provides that an employer is required to make contributions for their employees to avoid paying the superannuation guarantee charge (SGC).[1] These contributions should be in accordance with the minimum prescribed level[1A] and in compliance with the choice of fund requirements set out in section 32C.

3. An employer will have an individual superannuation guarantee (SG) shortfall for a quarter when they do not make sufficient contributions to a complying superannuation fund or Retirement Savings Account (RSA) or they do not satisfy the choice of superannuation fund obligations in respect of each employee.

4. Under section 17, if an employer has one or more individual SG shortfalls for a quarter, the employer has an SG shortfall for the quarter worked out by adding together:

   - the total of the employer's individual SG shortfalls for the quarter

[1] SGC means the charge imposed by the *Superannuation Guarantee Charge Act 1992* (SGCA). The charge is imposed on an employer's SG shortfall for a quarter under section 5 of the SGCA and is payable by the employer under section 16 of the SGAA.
[1A] See subsection 19(2).

- the employer's nominal interest component for the quarter, and
- the employer's administration component for the quarter.

5. An employer who has an SG shortfall for a quarter must lodge an SG statement for the quarter on or before the date specified in subsection 33(1), that is the 28th day of the second month after the end of the quarter.[2]

6. Section 35 states that the first SG statement for a quarter has effect as an assessment of the employer's SG shortfall for the quarter if:

   - an employer lodges an SG statement for a quarter, and
   - an SG statement has not previously been lodged, and an assessment has not previously been made, for the quarter in relation to the employer.

7. Where the employer fails to lodge an SG statement by the specified date, the Commissioner, by written notice under section 34, may require a person to give the Commissioner a written statement within a specified period of not less than 14 days. This statement should:

   - state whether the person has an SG shortfall for the quarter,[3] and
   - set out relevant details (as detailed in subsection 33(2)) of any SG shortfall.

   Note: Subsection 35(2) states that a statement given to the Commissioner under section 34 which indicates that an employer has an SG shortfall for a quarter, will be an SG statement[4] and therefore this has effect as an assessment.

8. If:

   - an employer has not lodged an SG statement for a quarter, and
   - the Commissioner is of the opinion that the employer is liable to pay SGC for the quarter,

   then the Commissioner may, under section 36, make a default assessment of the employer's SG shortfall for the quarter and of the SGC payable on the shortfall. The SG shortfall is taken to be the amount that in the Commissioner's opinion might reasonably be expected to be the shortfall.

9. For periods beginning 1 July 2003 and later, default assessments are made on a quarterly basis, when appropriate.

10. Where a default assessment is made on or after 1 July 2003 (irrespective of the period of the shortfall) the SGC is payable on the day on which the default assessment is made (subsection 36(3)). As soon as practicable after this day, the Commissioner must give written notice of the assessment to the person liable to pay the SGC.

[2] The Commissioner may allow an employer to lodge an SG statement on a later date under subsection 33(1A).
[3] Subsection 35(2).
[4] Subsection 35(1).

STATEMENT

Points to consider before making section 36 default assessments

11. Where an employer has given the Commissioner an SG statement, this includes a statement under section 34 that indicates that an employer has an SG shortfall for a quarter; the Commissioner cannot make a default assessment under section 36.

    Note: However, subject to section 37, the Commissioner may amend any assessment by making any alterations or additions that the Commissioner thinks necessary. This includes an SG statement given to the Commissioner by an employer and a previously made section 36 default assessment.

12. With very limited exceptions (refer paragraph 32 of this practice statement), employers should be informed of the Commissioner's intention to make a default assessment, as well as the basis upon which it will be calculated, prior to the assessment being made.

13. This practice allows employers the opportunity to ensure an accurate assessment of any SG liability. This will ease the costs for employers in meeting their SG obligations and reduce the risk of costly disputes for the ATO.

14. Should an employer lodge an SG statement after they have been advised of the Commissioner's intention to make a default assessment, then a default assessment cannot be made. However, an amended assessment can be issued under section 37.

Factors to consider when gathering information to make an assessment

15. When gathering information to ascertain whether the employer has an SG liability,[5] and if so, estimating any such liability, tax officers should keep in mind that employers must keep relevant records for five years, in accordance with section 79. Therefore, employers will be the best starting point for obtaining information relevant to their SG obligations.

16. While the Commissioner has formal access and information gathering powers,[6] the preferred approach when gathering relevant SG information from an employer, is that tax officers firstly contact the employer on an informal basis to request that information.

[5] Law Administration Practice Statement PS LA 2007/1 (GA) should be referenced, and the impact of any 'late payment offset', when ascertaining this.
[6] For further details tax officers should refer to the *Access and Information Gathering Manual*.

17. If an employer does not respond to informal requests for information or the information provided is unsatisfactory, tax officers are required to consider whether the Commissioner is more likely to be successful in obtaining information or documents that will assist in estimating an employer's SG liability using formal powers. These formal powers are:

- a notice under section 34 requiring a person who was at any time during a quarter an employer and who has not lodged an SG statement for that quarter, to give the Commissioner within a specified period of not less than 14 days, a written statement for the quarter stating:
  - whether the person has an SG shortfall for the quarter, and if so,
  - setting out the matters referred to in subsection 33(2).
- a notice under paragraph 77(1)(a) requiring a person to give to the Commissioner, within a reasonable period, and in a reasonable manner, specified in the notice, any information that the Commissioner requires, and
- a notice under paragraphs 77(1)(b) and (c) requiring a person to attend and answer questions and to produce any documents in the custody or under the control of the person.

18. Where no information is provided by the employer or the information provided is unsatisfactory and the Commissioner is of the opinion that the employer is liable to pay the SGC, and considering paragraph 17 of this practice statement, the Commissioner may make a default assessment based on information the Commissioner has available.

19. Subject to section 37, the Commissioner may also amend any assessment by making any alterations or additions that the Commissioner thinks necessary.

20. Information sources that may provide a reasonable basis for making default assessments or the amendment of assessments include information obtained from:

- either the employer or employee
- ATO systems, and
- third parties.

The making of sustainable default or amended assessments

21. As the Commissioner exercises his judgment in forming an opinion that a default assessment or amendment of an assessment is appropriate, these decisions must be defensible, sound, and in accordance with the:

- relevant laws
- commitments made in the taxpayers' charter
- principles of the compliance model, and
- good decision-making model.

22. When aligning ATO decisions with the compliance model, employers should be given every opportunity to get it right. This model is about recognising that employers meet their obligations differently. Tax officers need to consider an employer's compliance history and take their individual circumstances into account. However, it should be remembered that employers can move up and down the compliance model over time.

23. The decision to make a default or amended assessment must satisfy the principles set out in the good decision-making model. These principles require that decisions be:

- legal
- ethical
- equitable
- overt
- sensible
- timely, and
- in accordance with the principles of natural justice.[7]

24. Tax officers must properly document in ATO case management systems, the rationale behind the judgement they made as to whether or not an employer has an SG shortfall, as well as the process they used to estimate the SGC.[8] This is especially significant when officers act on the basis of information provided by third parties, such as superannuation funds.

25. While the Commissioner may make a default assessment or amend an assessment when an employer has either not provided information in the timeframes allowed, or the information provided is unsatisfactory, tax officers must have a reasonable basis for the SGC they determine.

26. As a general rule, the Commissioner will only make assessments for the periods for which the employer is required to have retained records. An exception to this is when there is irrefutable evidence to show that the employer has an SG liability for a prior period and this liability can be quantified with a fair degree of certainty.

27. When the employer has avoided the SGC and the Commissioner is of the opinion that the avoidance is due to fraud or evasion, the Commissioner may amend any assessment at any time.

28. When decisions are made in accordance with the guidelines in this practice statement, the resulting default assessments or amended assessments are more likely to be upheld if challenged.

[7] Natural justice exists when a sound decision has been made and the decision-maker has acted fairly, in good faith, and without bias.

[8] Law Administration Practice Statement PS LA 2002/16 Mandatory use of Information Technology systems for interpretative work – inclusion in performance agreements.

EXPLANATION

Points to consider before making section 36 default assessments

29. Where an employer has given the Commissioner an SG statement for a quarter, this includes a statement under section 34 that indicates that an employer has an SG shortfall for a quarter; this has effect as an assessment of the employer's SG shortfall and of the SGC payable on the shortfall. That is, the employer has self-assessed their liability. If:

    - it is the first SG statement for a quarter, this statement is taken to be an assessment (section 35), or
    - it is not the first SG statement lodged for a quarter, this SG statement is an amendment of a previous assessment, and

    the Commissioner cannot make a default assessment.

30. When:

    - an employer has not given the Commissioner an SG statement for a quarter
    - a default assessment has not previously been made for a quarter, and
    - the Commissioner is of the opinion the employer is liable to pay SGC for the quarter,

    the Commissioner may make a default assessment of an employer's SG shortfall for the quarter and of the SGC payable on the shortfall.

31. With very limited exceptions, employers should be advised of the intention of the Commissioner to make a default assessment and the basis upon which it will be calculated.

32. The most likely exceptions will be:

    - when there is an urgent need to make an assessment so that revenue can be protected. Examples of this may be where:
        - there is a risk of flight by the employer, dilution of assets, or movement of funds outside Australia,
        - the employer has a history of being uncooperative, or
    - information has been provided by the employer. For example, during an audit process an employer has been requested to complete an SG Audit form and they have been advised that the information contained on the form may be used to make a default assessment.

33. Advising an employer of the Commissioner's intention to make a default assessment gives the employer an opportunity to put forward alternative bases of calculation or to rebut the basis upon which the Commissioner proposes to make the calculations.

34. Giving an employer the opportunity to self assess their SG liability is designed to reduce the costs to employers in meeting their SG obligations. In addition, it will reduce the risk of disputes and the associated costs of these to the ATO.

35. If an employer lodges an SG statement after they have been advised of the Commissioner's intention to make a default assessment, then a default assessment cannot be made.

36. However, the Commissioner can amend the figures provided by an employer on an SG statement by issuing an amended assessment. The SG shortfall is taken to be the amount that, in the Commissioner's opinion, might reasonably be expected to be the shortfall.

37. In deciding whether or not to make a default assessment, reference should be made to PS LA 2007/1 (GA) Assessing superannuation guarantee charge where the employers have done what they could reasonably be expected to do to comply with the law by the due date.

38. In addition to the situations outlined in PS LA 2007/1 (GA), the following are examples of documents the employer can provide which may demonstrate that there is no SGC liability. The following list is illustrative rather than exhaustive:

- statements from superannuation funds, showing details of SG contributions made
- records, such as bank statements, showing that payments were deducted from the employer's account by the due date and it can be shown the money was transferred directly to an appropriate superannuation fund, and
- records showing the relevant SG contributions have been paid to the superannuation fund or RSA, although the contributions have either not been reported correctly, or the employer has not received confirmation of the contributions.

Factors to consider when gathering information to make an assessment

39. In accordance with section 79, employers must keep records for five years. The records must be relevant and kept in English. As relevant records must include any documents related to ascertaining the individual SG shortfalls of the employer for a quarter, the employer will be the best starting point for information relating to their SG liability.

40. In the event that an employer does not keep the required records, or the records are not in a form sufficient to show that the employer has no SGC liability, then they are unable to raise their own failure as a defence against the making of a default assessment. Or, in the words of Isaacs J in *Stone v. Federal Commissioner of Taxation* (1918) 25 CLR 389 at 393 '... if he chooses to keep them so as to afford no sufficient internal evidence of the nature of the transaction they record, he must be prepared to take the consequences of his own omission'.

41. The Commissioner's preferred approach is that the first step should be to contact the employer informally to request information be supplied. This strategy is in line with the compliance model approach of giving employers every opportunity to 'get it right'.

42. Where employers have been given every opportunity to comply with informal requests for information and they have not responded tax officers are required to consider whether or not to use the Commissioner's formal powers. Formal powers should be used when it is considered the use of these is likely to result in the Commissioner obtaining relevant information or documents. These formal powers are:

- section 34 which gives the Commissioner power to require information when no SG statement has been lodged
- a notice under paragraph 77(1)(a) requiring a person to give to the Commissioner, within a reasonable period, and in a reasonable manner, specified in the notice, any information that the Commissioner requires, and
- a notice under paragraphs 77(1)(b) and (c) requiring a person to attend before the Commissioner, or an authorised officer, at a reasonable time and place specified in the notice, and then and there to answer questions and to produce any documents in the custody or under the control of the person.

43. If it is not considered appropriate to use the Commissioner's formal powers, information sources that may provide data to enable the forming of reasonable bases for making sustainable default assessments, include those listed below. It is a matter of fact and degree as to which information source will provide the most reliable and defensible data:

- From either an employer or employee:
  - An employee notification (EN) where the employee is required to give relevant details. For example: gross wages earned during the relevant period; wages slips; the basis of employment; any records of any contributions made by their employer to a fund; or workers' compensation paid.
  - Information advised during telephone contact with an employer. After an EN is received a tax officer may telephone an employer to establish if the employer has an SG liability. If the employer accepts that they do have a liability, any relevant information obtained during this conversation can be used to form a reasonable basis for making a sustainable default assessment.
  - SG Audit Forms[9] completed by an employer. These forms are included with a letter notifying an employer of an audit of their SG obligations.
  - Responses to either employee or employer SG questionnaires. These questionnaires are sent by the ATO when further details are required regarding a dispute between an employee and employer relating to SG obligations.

[9] Previously named Desk Audit Forms.

- ATO systems:
  - Employee payment summaries. These give details of gross wages earned and of the employer that paid the wages.
  - SG statements lodged by employers for previous periods. In the absence of an SG statement for the relevant period, data from SG statements lodged in relation to previous periods may be used to form a reasonable basis for a default assessment for another period.
  - Default assessments issued for previous periods.
  - Employee or employer income tax returns.
  - Information gathered from the audit activities of other ATO business lines.
  - SG contribution data reported by superannuation funds to the ATO on superannuation member contributions statements.
- Third party information:
  - Superannuation fund data. Superannuation funds have records of SG contributions paid for the benefit of an account holder (employee) by an employer.
  - Australian Bureau of Statistics (ABS) data. For example, statistical data available regarding the industry of the employer. Comparisons may be made on the performance of an employer of similar size and scale in the same industry.

Examples of sustainable default or amended assessments

44. Provided the Commissioner can show that a reasonable basis has been used for making a default assessment or the amendment of an assessment, the decision to make such an assessment will be upheld if challenged. For example:

- *Pye v. FC of T* [2004] AATA 143; 55 ATR 1024; 2004 ATC 2029

In this case, default assessments were made based on copies of payment summaries lodged by the applicant with the Commissioner. The figures obtained from the payment summaries were used to calculate the shortfall, which represented an amount that, in the Commissioner's opinion, was reasonably expected to be the shortfall. The SGC had thus been correctly imposed.

- *Christie (as trustee for the Moreton Bay Trading Company) v. FC of T* [2004] AATA 1396; 58 ATR 1142; 2005 ATC 2009

In this case the Commissioner relied on payment summaries and some pay records to make default assessments. The employer objected against the default assessments and the objection decisions were affirmed. McCabe J was unable to fault the reasoning or calculations contained in the objection decisions.

45. As mentioned in paragraph 43 of this practice statement, an example of third party information that may be used to form a reasonable basis is ABS data. It should be noted that statistical information, as with information from any source, should be related to the circumstances of each particular taxpayer.

46. The cases listed below are instances where ABS data, such as cost-of-living figures, have been successfully argued in support of default assessments. While these cases relate to default income tax assessments made under section 167 of the *Income Tax Assessment Act 1936*, the same principles may be applied to section 36 default assessments:

- *Favaro v. Federal Commissioner of Taxation* (1996) 34 ATR 1; 96 ATC 4975

The ATO used ABS Household Expenditure Survey data to estimate the applicants' living and personal expenses. The applicants claimed that they lived, in the relevant years, more frugally than the hypothetical average individual. However, the Federal Court held that the Commissioner had not acted on a wrong basis so far as his estimates of the applicants' living and personal expenses were concerned.

- *Case A17* 1 NZTC 60,144 Board of Review

A similar result was found in this case, where the taxpayer's earnings were estimated by comparison with the earnings of other taxi drivers, although the assessment was reduced on the basis of evidence of greater than average fuel consumption for that particular taxpayer.

47. Subject to section 37, the Commissioner may at any time amend any assessment by making any alterations or additions that he thinks necessary, whether or not SGC has been paid in relation to the assessment. This includes default assessments under section 36 and SG statements given to the Commissioner by an employer.

48. *Example 1*

The Commissioner has made a default assessment that relates to five employees. Information comes to hand that clearly shows the employer has an SG obligation for a sixth employee. The Commissioner may amend the default assessment.

49. *Example 2*

The employer has given the Commissioner an SG statement showing details of an SG liability for five employees. It is identified, either by the ATO or the employer, that there is an obligation for a sixth employee. The Commissioner may amend the assessment to make additions or corrections that the Commissioner thinks necessary to correct the assessment, or he may amend the assessment at the request of the employer.

Penalties – additional SGC

50. Under section 59, if an employer other than a government body refuses or fails to provide, when and as required under the SGAA, an SG statement or information relevant to assessing the employer's liability to pay SGC for a quarter, the employer is liable to pay, by way of penalty, additional SGC equal to double the amount of SGC payable by the employer for the quarter.

51. The Commissioner may remit all or part of the additional SGC payable by an employer, as provided for in subsection 62(3).

52. When considering remitting additional SGC, tax officers should refer to PS LA 2011/28 Superannuation guarantee – remission of additional superannuation guarantee charge imposed under subsection 59(1) of the *Superannuation Guarantee (Administration) Act 1992*

Objections

53. An employer who is dissatisfied with a default assessment or amended assessment may object against the assessment in the manner set out in Part IVC of the TAA.

Amendment history

Date of amendment	Part	Comment
28 October 2011	Paragraph 16, 17, 25, 43 & footnote 6 Paragraph 52	Some references of the term 'tax officer/s' were unnecessarily capitalised, which is inconsistent with the Style Guide Paragraph 52 now refers to PS LA 2011/28 instead of the now withdrawn PS LA 2006/1
12 May 2010	Various	Minor revisions to update 'Tax Office' to 'ATO' and improve the technical currency of the document.
	Footnote 1A	Inserted to reference ssec 19(2) (minimum prescribed level of super contributions to avoid the SGC).
	Contact details	Updated.
7 September 2009	Footnote 5	LAPS reference updated.
	Contact details	Updated.

Subject references	Amendment of assessments Default assessments Superannuation guarantee Superannuation guarantee charge
Legislative references	SGAA 1992 16 SGAA 1992 17 SGAA 1992 19(2) SGAA 1992 32C SGAA 1992 33(1) SGAA 1992 33(1A) SGAA 1992 33(2) SGAA 1992 34 SGAA 1992 35 SGAA 1992 35(1) SGAA 1992 35(2) SGAA 1992 36 SGAA 1992 36(3) SGAA 1992 37 SGAA 1992 Pt 7 SGAA 1992 59 SGAA 1992 62(3) SGAA 1992 77(1)(a) SGAA 1992 77(1)(b) SGAA 1992 77(1)(c) SGAA 1992 79 SGCA 1992 5 ITAA 1936 167 TAA 1953 Pt IVC TAA 1953 Sch 1 284-75(3)
Related public rulings	
Related practice statements	PS LA 1998/1; PS LA 2002/16; PS LA 2007/1 (GA); PS LA 2011/28
Case references	Case A17 1 NZTC 60,144 Board of Review Christie (as trustee for the Moreton Bay Trading Company) v. FC of T [2004] AATA 1396; 58 ATR 1142; 2005 ATC 2009 Favaro v. Federal Commissioner of Taxation (1996) 34 ATR 1; 96 ATC 4975 Pye v. FC of T [2004] AATA 143; 55 ATR 1024; 2004 ATC 2029 Stone v. Federal Commissioner of Taxation (1918) 25 CLR 389
Other references	Access and Information Gathering Manual Compliance Model Good Decision-Making Model Taxpayers' Charter
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