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

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PS LA 2007/10

Making default assessments: section 36 of the *Superannuation Guarantee (Administration) Act 1992*

This practice statement outlines the guidelines in relation to issuing a default assessment under section 36 of the *Superannuation Guarantee (Administration) Act 1992*.

This practice statement is an internal ATO document, and is 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 don't 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.

1. What this practice statement is about

Employers are required to make the minimum prescribed superannuation guarantee (SG) contributions for employees. In doing so, they also need to comply with the choice of fund requirements.[1]

If they do not meet either of these obligations, they will have an SG shortfall, and must lodge an SG statement for the relevant quarter by the due date[2] – which is the 28th day of the second month after the end of the quarter. The first statement lodged for a quarter is taken to be an assessment of the SG charge.

If an employer does not lodge the SG statement, and the Commissioner is of the opinion that the employer is liable to pay the SG charge (SGC)[3] for the quarter, the Commissioner may then make a default assessment of the SG shortfall and the SGC payable on the shortfall.[4]

This practice statement outlines when a default assessment can be made, and the factors to consider in making the default assessment.

These principles apply equally to amending an existing assessment – either one lodged by an employer, or a default assessment previously made.

2. Points to consider before making a default assessment under section 36

When making your decision, consideration should be given to:

- Has the employer lodged an SG statement? If so, you cannot make a default assessment under section 36. However you can amend an assessment under section 37.
- In all but very limited circumstances (see below), employers should be informed of your intention to make a default assessment, as well as the basis upon which it will be calculated, prior to the assessment being made.

  This allows employers the opportunity to ensure that an accurate assessment of their SG liability has been made. It will ease costs for the employer in meeting their obligations, and may also lead to a reduction in disputes.
- Exceptions to this general principle would be where there is:
  - a risk of flight by the employer
  - dilution of assets or movement of funds, or
  - a history of the employer being uncooperative.

3. Gathering information to make an assessment

When gathering information to ascertain whether the employer has an SG liability, best practice is to start with the employer themselves.

Before invoking our formal access and information gathering powers, you should initially request the information on an informal basis.

However, if the employer does not respond satisfactorily to informal requests for information, you should then consider whether our formal powers will be more appropriate. Our formal powers include:

- issuing a notice[5] requiring an employer to provide a written statement in the approved form stating if the person has an SG shortfall, and

[1] Section 32C of the *Superannuation Guarantee (Administration) Act 1992* (SGAA). Note: all legislative references are to the SGAA unless otherwise indicated.
[2] Subsection 33(1). **Note:** the Commissioner may allow an employer to lodge an SG statement on a later date under subsection 33(1A).
[3] PS LA 2007/1 (GA) provides additional guidance regarding the SGC and whether it will apply.
[4] Section 36.
[5] Section 34. **Note:** A notice may only be issued under section 34 if the employer did not lodge a SG statement for a quarter during which they were at any time an employer.

- issuing a notice under section 353-10(1) of the *Taxation Administration Act 1953* (TAA), requiring a person to:
  - give the Commissioner any information or documents under their control, and
  - attend and give evidence before the Commissioner.

4. Making the default assessment

Where no information is provided, or the information provided is not satisfactory, you may make a default assessment based on the information we have available.

Information sources, other than the employer, that may provide a reasonable basis for the default assessment to be made include:

- the employee – via an employee notification (EN) form or employee questionnaire
- ATO systems – for example, payment summaries, previous SG statements lodged, employer or employee tax returns or superannuation fund data, and
- third parties – including superannuation funds, and the Australian Bureau of Statistics which has statistical data regarding different industries.

Your decision in relation to the default assessment must be defensible, sound and in accordance with:

- relevant laws
- commitments made in the *Taxpayers' Charter*
- principles of the compliance model, and
- good decision-making model.

Your decision must be documented in the relevant ATO case management systems, outlining why you decided the employer has an SG shortfall, and the process you used to calculate the SGC.

As a general rule, we will only make assessments for quarters that the employer is required to have retained records. However if there is sufficient written evidence of an SG shortfall, and that liability can be determined[6] with a fair degree of certainty, you are able to raise assessments for previous quarters.

Written evidence which may sufficiently quantify an SG shortfall includes, but is not limited to:

- payment summaries
- pay slips, and
- superannuation fund statements.

The Commissioner must give written notice of the default assessment.

5. Employer defences

When formulating your decision to make a default assessment, you must also consider the scenarios outlined in 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*.

The employer may also provide other supporting documentation (for example, bank statements), that may indicate evidence that SG contributions have already been made, which could demonstrate that they do not have an SG liability.

However if the employer does not keep the required records, they are not able to raise their own failure as a defence against the making of a default assessment.[7]

An exception to this may apply where employers are impacted by a natural disaster, and relevant records are lost or damaged. In which case an employer may seek assistance from the Commissioner to estimate how much SG to pay.

If an employer has to wind up their business as a result of a disaster, they will still need to pay any outstanding super obligations for their employees before finishing up. We recommend that employers in this situation lodge an SGC *s*tatement as soon as possible.

6. Penalties – additional SGC

If an employer (other than a government body):

- refuses or fails to provide, when and as required under the SGAA, an SG statement, or
- other information relevant to assessing the employer's liability to pay the superannuation guarantee charge,

the employer is liable to pay a penalty of additional SGC – equal to double the amount of SGC payable for the quarter.[8]

Note that the TAA administrative penalty may also apply where the Commissioner raises a default assessment. However the penalty should generally be

[6] The amount of a shortfall can be more easily determined than a decision as to whether a worker is an employee for superannuation purposes. The status of a worker can generally only be determined with evidence from both parties.

[7] 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'.

[8] Section 59.

remitted in full. PS LA 2011/28 provides guidance on remission of this penalty when additional SGC penalty is assessed.

7. Review rights

An employer who is dissatisfied with a default assessment or amended assessment may object to the assessment under Part IVC of the TAA.

8. Judicial examples of sustainable default or amended assessments

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

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; 2005 ATC 2009; (2004) 58 ATR 1142

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.

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

The ATO used Australian Bureau of Statistics 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.

Armirthalingam v Federal Commissioner of Taxation [2012] AATA 449; 2012 ATC 10-260; (2012) 90 ATR 204

In this case, amended assessments showing understated income were made relying on "player rating transaction reports" and "player monthly transaction reports" created by a casino. The AAT held that the reports were sufficiently accurate to be relied upon when making the assessment.

9. Other examples

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.

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.

You may amend the assessment to make additions or corrections you think necessary to correct the assessment, or you may amend the assessment at the request of the employer.

Example 3

An employee has made a notification to the Commissioner that their former employer has not paid superannuation guarantee for them for a period greater than 5 years ago.

The employer is not required to have retained their records and therefore the Commissioner requires sufficient written evidence from the employee to determine the liability exists.

The employee is able to provide pay slips, a payment summary and their superannuation fund statement which proves an unpaid SG liability exists. As a result the Commissioner may raise a default assessment for the SG shortfall and the SGC payable on the shortfall for the period that the employee has supporting documentary evidence.

10. More information

For more information, see:

- PS LA 2007/1(GA)
- PS LA 2011/28
- PS LA 2014/4

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