PS LA 2007/22 - Remission of penalties for failure to withhold

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PS LA 2007/22
Remission of penalties for failure to withhold

This Law Administration Practice Statement provides guidance on remitting penalties for failure to withhold.

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

This practice statement is about the remission of penalties imposed on a payer for the failure to withhold and pay an amount from payments.[1] A payer that does not withhold an amount is liable to a penalty equal to the amount that they failed to withhold. You can exercise the Commissioner's decision to remit the penalty or part of the penalty.[2]

2. Principles to consider in the remission of penalties

Your decision to remit the penalty is to be made when it is imposed and before a notice is issued. You should not remit the penalty where you consider the case warrants referral to prosecutions.[3] Where payers are prosecuted, they cannot be made liable for a penalty for the same offence.[4]

Your decision to remit should:

- consider the merits of each case, the matters relevant to the penalty and not irrelevant matters
- be made with just cause and not arbitrarily
- be made in good faith
- consider the payer's behaviour consistent with the principles of the *Taxpayers' Charter* and the *ATO Compliance Model*.

Keeping in mind that the pay as you go withholding (PAYG(W)) provisions are a collection system, and not a tax, failure to withhold may not result in a loss to the revenue, unless the payee does not otherwise declare the income and pay the tax.

[1] Division 12 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) for pay as you go withholding (PAYG(W)) obligations and subsection 16-30(1) of Schedule 1 to the TAA for liability for failure to do so. It does not cover failure to withhold imposed on an exempt Australian Government entity.
[2] See section 298-20 of Schedule 1 to the TAA.
[3] See Chief Executive Instruction CEI 2014/05/09 *Tax Crime and External Fraud.*
[4] See section 8ZE of the TAA.

3. How to make the decision to remit the penalty for failure to withhold other than on dividend, interest and royalty payments to overseas persons

Your decision is a two-step process. Initially, consider the payer's behaviour leading up to, and at the time that the failure to withhold occurred. Then, consider any additional factors to increase or decrease the resulting penalty. The following table is a guide on initial remission levels.

Behaviour of the payer	Level of remission	Penalty amount
Intentional Disregard A payer knowingly decides not to withhold the correct amount.	25%	75%
Recklessness A payer's actions demonstrate gross carelessness showing a disregard or indifference to their obligations	50%	50%
Failure to take reasonable care A payer fails to exercise the care that a reasonable, ordinary entity would exercise to fulfil the payer's tax obligations	75%	25%
Voluntary disclosure On their own initiative, before being told of anticipated audit action, a payer brings their failure to withhold to the attention of the ATO. Note that repeated voluntary disclosures may indicate the payer is being careless. If so, this level of remission will not apply.	100%	0%

Factors that increase or decrease the penalty amount

You then need to consider if there are other factors warranting further increase or decrease of the penalty amount. You may increase (aggravating factors) the penalty by 20% where the payer:

- has taken steps to prevent or obstruct the ATO from finding out about the failure to withhold, or
- has been penalised in a previous period for failing to withhold and there has been no improvement with respect to their compliance.

You may decrease (mitigating factors) the penalty by 20% where the payer:

- tells the ATO of their failure to withhold after the ATO has advised of an intention to conduct an audit, and
- you estimate the disclosure is likely to have saved the ATO a significant amount of time or resources in the conduct of the audit.

4. Examples

Kevin runs a labour hire firm supplying secretaries and administrative assistants to clients. He is aware that he is required to withhold amounts of PAYG(W) from payments to the workers and admitted as much when queried, upon audit, of his failure to do so.

Kevin has chosen to disregard his obligation to withhold amounts of PAYG(W) and has offered no explanation or reason to mitigate against a finding that he has intentionally disregarded the law. Therefore, provided it is decided not to prosecute, the failure to withhold penalty is remitted by 25% from 100% to 75%.

Richard has recently immigrated from Eastern Europe and runs a small bakery employing two family members. He is vaguely aware of an obligation by some employers to withhold amounts of PAYG(W) from employees' wages, but had assumed that this just applied to businesses with 100 or more employees, that is, those to whom the unfair dismissal laws applied.

Upon audit, he is informed of his obligation to withhold from wages paid to any employees, and he immediately provides copies of bank statements identifying direct transfers of wages into the employees' accounts.

In this instance, Richard's lack of experience in Australian business and taxation affairs is taken into account, as is the importance of encouraging him to meet his PAYG(W) obligations in future. It is therefore determined that Richard's failure to withhold constituted a lack of reasonable care, warranting the remission of failure to withhold penalty by 75% from 100% to 25%.

Richard's positive co-operation upon realising his error has significantly expedited the resolution of the audit and the penalty is further reduced by 20% of 25%, that is, 5%, resulting in a final penalty of 20%.

Amy runs a small café and employs two full-time staff whom she pays by cheque and from whose wages she withholds amounts of PAYG(W). She also employs one part-time waitperson for the busy periods whom she pays by cash and from whose wages she does not withhold any amounts of PAYG(W).

Amy was aware that she should have been withholding amounts of PAYG(W) from the cash wages but knew that her part-time staff member would not work for her if they were required to pay tax on this income.

However, after a couple of years, she has decided to regularise her business taxation affairs and has advised her part-time staff member that PAYG(W) will be withheld in future and has also alerted the ATO to her past failure to withhold.

As Amy has made a voluntary disclosure that was not initiated by any notified ATO audit action, the failure to withhold penalty is remitted in full.

5. How to make a decision to remit the penalty for failure to withhold under Subdivision 12-F (dividend, interest and royalty payments to overseas persons)

Your decision will have to consider the specific rules for payers withholding from certain dividend, interest and royalty (DIR) payments:

- If a payer fails to withhold from a DIR payment, or withholds less than required, they are liable to a penalty equal to the amount that they failed to withhold
- If the payer has paid the penalty, the payee is entitled to a credit equal to the amount of the penalty.[5]

The combination of the above two points will usually mean that the withholding tax liability has been met, or paid. However, if the payer is granted remission of the penalty, the payee's credit is reduced by the amount of the remission.

This will mean that the withholding tax liability is not paid.

The reason this is important is because if the payer has failed to withhold from an interest or royalty payment (but not a dividend) and they would otherwise get a deduction for the payment, they cannot get the deduction until the withholding tax is paid.

Thus, a penalty remission will usually mean that the interest or royalty payer cannot get a deduction unless they somehow make good the withholding tax deficiency (for example, the payee pays it separately).

[5] See section 18-35 of Schedule 1 to the TAA.

Therefore, we will not normally remit a penalty for failing to withhold from an interest or royalty payment, unless the payer agrees to it.

Further, if amounts are not withheld from DIR payments, the likelihood of a loss to the revenue is high, given that the payees are in overseas jurisdictions, which make enforcement difficult. Non-collection usually means a permanent loss to the revenue.

Therefore, although each case needs to be decided on its facts, a decision to remit penalty for failure to withhold from a DIR payment should only be made in exceptional circumstances. An example might be where a payer was not, and could not be reasonably expected to, have been aware of their withholding obligations.

The remission rate will also depend on the facts.

6. Notifying the payer

You must notify the payer in writing of your decision and, if you decided not to remit all, or any, of the penalty, the reasons why the decision was made. The notice can be in any other notice given to the payer.

You must also make a record of the issued notice to the payer in Siebel and all relevant facts relating to the failure to withhold and the reasons for your decision.

7. More information

For more information, see:

- See CEI 2014/05/09 *Tax Crime and External Fraud* for policy on prosecution decisions
- PS LA 2011/12 for remission of the general interest charge that accrues on any unpaid penalty amounts
- MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard f*or the meaning of the terms mentioned in the table.

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