PS LA 2007/3 - Remission of penalty for failure to comply with requirements in relation to tax invoices, adjustment notes or third party adjustment notes

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This Practice statement contains references to provisions of the *A New Tax System (Goods and Services Tax) Regulations 1999*, which have been replaced by the *A New Tax System (Goods and Services Tax) Regulations 2019*. This LAPS continues to apply in relation to the remade Regulations.

A comparison table which provides the replacement provisions in the *A New Tax System (Goods and Services Tax) Regulations 2019* for regulations which are referenced in this LAPS is available.

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This Law Administration Practice Statement sets out guidelines for the remission of penalty.

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

Schedule 1 of the *Taxation Administration Act 1953* (TAA) imposes administrative penalties

- if an entity fails to issue a tax invoice, adjustment note or third party adjustment note as required under the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)[1], and
- if both an entity and its agent issue separate tax invoices relating to the same taxable supply, or separate adjustment notes or third party adjustment notes for the same decreasing adjustment.[2]

This practice statement provides guidance on how and when remission of the penalties is warranted.

2. About the requirements

The obligations in relation to tax invoices, adjustment notes and third party adjustment notes are as set out below. Note that we are able to make a determination varying the 28 day limits mentioned.

Tax invoices

The supplier of a taxable supply of $75 or greater must give the recipient of the supply a tax invoice within 28 days of the recipient requesting it (unless it is a recipient created tax invoice).[3] If the supply is made through an agent, the tax invoice can be supplied by either the principal or the agent.[4]

Adjustment notes

The supplier of a taxable supply must give the recipient of the supply an adjustment note for an adjustment that arises from an adjustment event[5] which relates to a taxable supply within:

- 28 days of the recipient requesting it, or
- if a tax invoice has been issued, or the recipient has requested a tax invoice, and the supplier becomes aware of the adjustment before an adjustment note is requested, within 28 days after becoming aware of that fact (unless the tax invoice for the supply would have been a recipient created tax invoice).[6]

Third party adjustment notes

The payer of a third party payment must give to the recipient (payee) of the payment a third party

[1] Section 288-45 of Schedule 1 to the TAA. All further legislative references in this practice statement are to the GST Act unless otherwise indicated.
[2] Section 288-50 of Schedule 1 to the TAA.
[3] Subsection 29-70(2) and section 29-80 and Regulation 29-80.02 of the *A New Tax System (Goods and Services Tax) Regulations 1999*.
[4] Section 153-15.
[5] Refer to Division 19 and Goods and Services Tax Ruling GSTR 2000/19 *Goods and services tax: making adjustments under Division 19 for adjustment events* for an explanation of adjustment events.
[6] Subsection 29-75(2).

adjustment note for an adjustment[7] of $75 or more relating to a taxable supply within:

- 28 days after the recipient requests it, or
- if the payer becomes aware of the adjustment before a third party adjustment note is requested, within 28 days after becoming aware of that fact.[8]

3. Liability to a penalty

Liability to a penalty will arise if there is evidence that the above requirements are not met, and there are no facts or circumstances under genuine dispute.

In circumstances where there are multiple failures to issue the required documents, a penalty will arise in relation to each document.

4. Before making the remission decision

You need to make a decision on remission in all instances where the entity is liable to pay an administrative penalty as outlined in sections 1 and 3 of this practice statement.

Before you make your decision, you should provide the entity with an opportunity to comply with the obligations.

You should:

- explain the obligations to the entity
- provide them information on how to comply with their obligations
- allow them a reasonable time to comply.

You should note also that where there are indicators of serious non-compliance such as falsifying records, or where previous penalties have failed to improve the entity's behaviour, you can consider referring the case for prosecution, as an alternative to the penalty.

5. General principles in relation to the remission decision

The following are the general principles you need to bear in mind when making the remission decision:

- your decision should be made based on the individual circumstances of the case
- your decision should be consistent with the principles of the taxpayers' charter and the compliance model, including
  - most entities want to comply with tax laws if they are helped to understand them and they are treated fairly
  - an entity should be treated as honest unless there is reason to conclude otherwise
  - the more evidence of reluctance by an entity to comply with their obligations under the law, the higher the likelihood of compliance activity, and the less likely penalty remissions will be appropriate
  - the more evidence of improvement in an entity's willingness to comply with their obligations under the law, the higher the likelihood of penalty remission.
- penalties imposed should not be remitted without just cause, arbitrarily or as a matter of course. Your decision needs to be made in good faith and must be reasonable. You need to consider all relevant matters and no irrelevant matters
- we must administer the discretion to remit penalties in a way that affects improvements in future compliance by taxpayers and provides certainty for those taxpayers. But this objective should be achieved without causing unintended or unjust results.

6. Making the remission decision

Tax invoices and adjustment notes are key integrity measures under the GST system. They provide an audit trail and allow parties to the transaction to fulfil their obligations.

In making your decision about remission, you need to distinguish between those entities that are making a genuine effort to comply, and those entities that make little or no effort to comply.

Consider what steps the entity has taken to satisfy its obligations. The amount of remission should reflect the efforts the entity has made.

- Full remission may be appropriate for entities that have a good overall compliance attitude and make a genuine attempt to comply with their tax invoice, adjustment note or third party adjustment note obligations.
- In cases where an entity has made some attempt to understand its obligations, the entity's compliance history has been good, however the efforts made by the entity are considered insufficient for the penalty to be remitted in full, a 50% remission may be appropriate.
- Where an entity makes no effort to comply, no remission would be appropriate.

[7] Refer to Division 134 and GSTR 2000/19 for an explanation of third party adjustments.
[8] Subsections 134-20(2) and (3).

- Where there is evidence of fraud or evasion or deliberate avoidance, remission will also not be appropriate.

If an entity has previously been penalised for failing to meet its tax invoice, adjustment note or third party adjustment note obligations and it continues to deliberately avoid or ignore its obligations, no remission of the penalty will be warranted.

7. Specific considerations relevant to the remission decision

The following provide specific situations which you may come across and the considerations relevant to each.

Where we have exercised the discretion to treat a document as a tax invoice

We have the discretion in certain instances to treat a document as a tax invoice, adjustment note or third party adjustment note, even if that document doesn't otherwise meet the requirements. Guidelines in relation to the exercising of this discretion are set out in Law Administration Practice Statement PS LA 2004/11 *Treating a document as a tax invoice or adjustment note*. However, even if this discretion is exercised, the supplier will still be liable to a penalty. You should apply the guidelines in this practice statement to your decision.

Where there are multiple failures to issue required documents

A penalty will be imposed on each occasion that an entity fails to fulfil its obligations. Often though, there is a singular offence which leads to the multiple failures, and in these instances it may be appropriate to only raise a penalty once. This will not apply though where the entity has a history of disregarding their obligations.

Where there is genuine uncertainty about the need to issue documents

In some cases, the supplier may have failed in their obligations because they genuinely believed that their supply was not a taxable supply. In these instances, you should provide the supplier a reasonable opportunity to comply with their obligations. A reasonable opportunity is usually 28 days from the time they become aware, but this will depend on the circumstances of the case.

If they have still failed in their obligations after this time has elapsed, then it will usually be appropriate not to remit the penalty.

8. Recording your decision

Your remission decision must be documented, and this should include:

- facts relating to the failure to comply with the obligations in relation to tax invoices, adjustment notes or third party adjustment notes, and any evidence (or other material) relating to that failure
- facts relating to the entity's effort to comply and any evidence (or other material) relating to their efforts
- whether the entity was aware of its obligations, and details of any opportunity provided to the entity to comply with their obligations in relation to tax invoices, adjustment notes or third party adjustment notes
- the remission decision
- the reasons for the remission decision (that is, the tax officer's consideration of the circumstances relevant to the remission decision)
- any other relevant information.

9. Notifying the entity

If you have not remitted the penalty in full, you are required[9] to give the entity written notice of their liability to pay the penalty and of the reasons why. However, even if the penalty is remitted in full, you should advise the entity of your decision in writing.

In order to encourage future compliance this notice should outline:

- the opportunity provided for them to comply
- why they are liable to the penalty
- the amount of the penalty imposed by law
- the Commissioner's discretion to remit the penalty
- the factors considered in the remission decision
- the evidence (or other material) relied on in making the remission decision
- reasons for decision
- the remission decision
- the amount of remission, if any
- the amount of penalty payable, if any, after remission.

[9] Section 298-20 of Schedule 1 to the TAA.

The due date for any remaining penalty must be at least 14 days after the notice is given to the entity.[10]

10. Right of review

If the penalty remaining after your decision is more than 2 penalty units, an entity has the right to object against your decision.[11]

11. Examples

Example 1

Tom and Jeff operate a GST registered partnership that manufactures toys. The partnership has been issuing tax invoices since the start of GST to recipients who are generally wholesalers registered for GST. Jeff discovered there is a transposition error in the partnership ABN on the system which produces the tax invoices and the partnership ABN cannot be clearly ascertained.

The partnership has requested the Commissioner treat the invoices issued as valid tax invoices. The guidelines contained in PS LA 2004/11 are satisfied and having given consideration to the administration costs related to correcting these documents, and as these supplies were correctly treated by the supplier, the Commissioner exercises the discretion to treat the invoices as valid tax invoices.

In this situation section 444-30 of Schedule 1 to the TAA applies making each partner jointly and severally liable for a penalty for failing to issue tax invoices as required since the tax invoices issued do not provide sufficient information to clearly ascertain the correct ABN of the supplier. Given the Commissioner has exercised the discretion to treat these documents as valid tax invoices the penalty should be remitted in full.

Example 2

Angela is registered for GST. She makes supplies in the course of her enterprise both directly and through an agent. It was established during an audit that Angela and her agent had both issued tax invoices in relation to the same supplies. Angela and her agent were subsequently provided with education and assistance. The penalty which was imposed was remitted in full for this occurrence due to her good compliance history and because Angela was new to the GST system. Angela is advised of the decision to remit the penalty in full, the evidence relied on, and the reasons to support this decision.

Angela and her agent discussed methods of avoiding the issuance of separate tax invoices for the same supply. Angela and her agent established procedures where Angela would issue tax invoices for the supplies she made directly to recipients, and no tax invoices would be issued by Angela for supplies made through her agent. While this procedure was implemented, systems were not updated sufficiently to ensure this occurred in relation to 100% of supplies made through her agent.

Example 3

Another occurrence of Angela and the agent issuing tax invoices in relation to the same supply is discovered. Angela is liable to a penalty. The penalty is remitted to 50% as:

- *Angela has made some effort to comply but in the circumstances she has not made a sufficient effort to be compliant. She put in place a process but did not ensure the system supported the process, nor did she take steps to test if it worked.*
- *While one occurrence of non-compliance does not in itself establish a 'past history', it would in this case support the finding of insufficient effort given the educative support provided.*

The decision, the evidence relied on, and the reasons for partial remission would be provided to Angela in a written notice.

Example 4

Elisa is registered for GST. During an audit it was brought to Elisa's attention that the tax invoices she was issuing in relation to her supplies did not satisfy the requirements for a valid tax invoice. While Elisa had upgraded her systems at the introduction of GST, there were deficiencies including the lack of the recipient's ABN or identity, a description of the supplies, and the quantity of goods supplied. As the correct amount of GST had been reported on each supply, and because of Elisa's good compliance history, the penalty was remitted in full. Elisa was subsequently provided with education and assistance. Elisa was advised of the decision to remit the penalty which arose including the reasons for this decision.

Elisa revised the system that generates tax invoices in relation to her supplies. This new system was fully compliant in all but one aspect in that the description of the goods supplied was ambiguous. As such, there was not sufficient information to clearly ascertain what is supplied. This was written into the template by Elisa in the genuine belief that the description given to the supply was correct.

Elisa issued several invoices that used the insufficient description. A review of one of Elisa's customers brought this to the attention of the ATO. Elisa

[10] Section 298-15 of Schedule 1 to the TAA.
[11] Subsection 298-20(3) of Schedule 1 to the TAA.

explained the full extent of the actions she had undertaken to revise the tax invoices.

Elisa is liable to a penalty for failure to issue a tax invoice as required. However, Elisa has made a genuine attempt to comply and the penalty is remitted in full. Elisa is advised of this decision, the evidence relied on, and the reasons for the decision. In this case the reasons for the decision to remit the penalty would have included the efforts made by Elisa following the earlier audit. Elisa made a reasonable effort to improve her systems within a short timeframe once becoming aware of the problem.

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