PS LA 2007/4 - Remission of penalty for failure to comply with GST registration obligations.

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Practice Statement Law Administration

PS LA 2007/4

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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: **Remission of penalty for failure to comply with GST registration obligations.**

PURPOSE: **To set out guidelines for the remission of penalty for failure to apply to register for GST or failure to apply to cancel GST registration.**

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STATEMENT

1. The administrative penalty regime in Part 4-25 of Schedule 1 of the *Taxation Administration Act 1953* (TAA) imposes uniform penalties for certain acts or omissions which relate to matters arising under taxation laws.

2. All legislative references in this practice statement are to Schedule 1 to the TAA unless otherwise stated.

3. The administrative penalty regime consists of three distinct components:

   - penalties relating to statements and schemes[1]
   - penalties for late lodgement of returns and other documents;[2] and
   - penalties for failing to meet other taxation obligations.[3]

4. Section 288-40 imposes a penalty of 20 penalty units if an entity fails to apply to register for GST when required by the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), or if it is registered, to apply to cancel a GST registration as required. These penalties may be remitted under subsection 298-20(1).

5. In this practice statement the term 'registration obligations' includes applying to be registered when required to do so and applying for cancellation of registration when required to do so.

6. This practice statement:

   - explains that failure to comply with registration obligations as required under the GST Act will give rise to an administrative penalty
   - provides guidance on how and when remission of the penalty is warranted, and
   - expands upon discussion of this matter in paragraph 24 of Law Administration Practice Statement PS LA 2000/9 and paragraphs 56 and 57 of Law Administration Practice Statement PS LA 2002/8.

7. This practice statement does not deal with the administration of other types of penalties imposed under Division 288. Nor does it deal with the imposition or remission of the general interest charge (GIC), which is independent of the administrative penalty.

8. A decision to remit all or part of the penalty under subsection 298-20(1) should be made with regard to the following objectives of the penalty regime:

   - decisions should be made based on the individual circumstances of the case
   - decisions should be consistent with the principles of the taxpayers' charter and the compliance model
   - to promote consistent treatment in respect of the penalty imposed - penalties imposed should not be remitted without just cause, arbitrarily or as a matter of course. The Commissioner must ensure that the decision to remit in part or full or not to remit at all is made in good faith and is reasonable. All relevant matters and no irrelevant matters must be taken into consideration in making the decision, and

[1] Division 284.
[2] Division 286.
[3] Division 288.

- the discretion to remit penalties should be administrated in a fashion to affect improvements in future compliance by taxpayers and to provide certainty for those taxpayers. These objectives should be achieved without causing unintended or unjust results.

9. In all cases where an entity is liable to pay an administrative penalty, remission of the penalty should be considered.

10. Generally the entity should be provided with an opportunity to comply with its registration obligations prior to making a remission decision. In giving an entity the opportunity to comply a tax officer is to:

    - explain to the entity its registration obligations
    - provide information on how to comply with these obligations, and
    - allow a reasonable time to comply.

EXPLANATION

Application for registration

11. Section 25-1 of the GST Act specifies when an entity must apply for GST registration. An entity must apply, in the approved form, to be registered if the entity:

    - is not registered, and
    - is required to be registered.

12. The following table contains the provisions of the GST Act that specify when an entity is required to be registered.

Section	Description
23-5	Entity carrying on an enterprise[4] and the GST turnover meets the registration turnover threshold[5]
57-20	A resident agent acting as an agent for a non-resident that is registered or required to be registered
144-5	If, in carrying on the enterprise, the entity supplies taxi travel, regardless of the entity's GST turnover
58-20	A representative of an incapacitated entity if the incapacitated entity is registered or required to be registered

13. Subsection 25-5(2) of the GST Act requires the Commissioner to register an entity, even if the entity has not applied for registration, if the Commissioner is satisfied the entity is required to be registered.

14. Section 54-5 of the GST Act requires the Commissioner to register a branch of a registered entity as a separate GST branch if certain conditions are met.

[4] Miscellaneous Taxation Ruling MT 2006/1.
[5] Section 23-15 of the GST Act, Regulations 23-15.01 and 23-15.02.

15. Division 63 of the GST Act provides special rules allowing some kinds of non-profit entities to choose to have some (or all) of their separately identifiable branches treated as separate entities for GST purposes. The sub-entities may fall below the non-profit sub-entity registration threshold and thus be exempt from registration.

16. Section 83-25 of the GST Act specifies a non-resident need not apply to be registered despite section 25-1 of the GST Act if certain conditions are met.

Cancellation of registration

17. There are also provisions under the GST law that require an entity that is registered for GST to apply for cancellation of its GST registration, or the registration of one of its branches.[6] These provisions within the GST Act are set out in the following table.

Section	Description
25-50	A registered entity that is not carrying on an enterprise
54-70	An entity that has a GST registered branch and the entity is not carrying on an enterprise through the branch
63-30	A GST registered non-profit sub-entity that does not meet the requirements of paragraphs 63-15(1)(a), (b) and (c) of the GST Act

18. When an entity applies for cancellation of its GST registration in the approved form, the Commissioner must cancel that registration when, at the time the entity applied for cancellation of registration, the entity had been registered for 12 months and the Commissioner is satisfied that the entity is not required to be registered.[7] If the entity has been registered for less than 12 months at the time the entity applies for cancellation of their registration in the approved form, the Commissioner may cancel the registration if satisfied that the entity is not required to be registered.[8] The Commissioner must cancel the GST registration of an entity, even if the entity has not applied for cancellation of its registration, if satisfied that the entity is not carrying on an enterprise and the Commissioner believes on reasonable grounds that the entity will not do so for at least 12 months.[9]

19. Divisions of the GST Act provide that section 25-50 and subsection 25-55(2) of the GST Act do not apply to certain classes of entities and provide special rules relating to cancellation of registration for these classes of entities. The following table outlines these divisions:

Divisions	Class of entity
54	GST branches
57	Resident agents acting for non-residents
63	Non-profit sub-entities
58	Representatives of an incapacitated entity
149	Government entities

[6] Division 54 of the GST Act.
[7] Subsection 25-55(1) of the GST Act.
[8] Subsection 25-57(1) of the GST Act.
[9] Subsection 25-55(2) of the GST Act.

Administration of penalties

20. Failure to comply with its registration obligations results in an entity being liable to an administrative penalty of 20 penalty units. Penalty units are quantified in section 4AA of the *Crimes Act 1914*. On the date of issue of this practice statement the value of a penalty unit is $110.

21. An important principle contained in the taxpayers' charter and the compliance model is that the Commissioner will adopt a fair and reasonable approach in the administration of the tax system, and in doing so will take into consideration the issues faced by entities in meeting their obligations. This principle is applied by the Commissioner when making decisions on administering penalties.

22. Generally an entity may be assisted to voluntarily comply with its obligations through education and assistance. However, in circumstances when it can clearly be established that an entity is aware of its obligations and is deliberately ignoring or avoiding its obligations, or seeking to gain an advantage, education and assistance are unlikely to achieve the desired results. Generally remission of the penalty will not be appropriate where an entity makes no attempt to comply or deliberately fails to comply with the registration obligations.

23. The following principles from the taxpayers' charter and the compliance model should be considered when making remission decisions:

    - 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 remission will be appropriate, and
    - 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.

24. Where an entity has a history of non-compliance clear evidence that the imposition of a penalty would be unfair or unjust will be necessary before any remission is considered.

25. Tax officers must ensure their remission decisions are consistent with the good decision making model. That is, the decision must be legal, ethical, equitable, overt, sensible, timely and in accordance with the principles of natural justice. Although the law provides penalties to be imposed at a certain level, the facts and circumstances of a case may be such that maintaining the penalty at that level might produce an unfair or unreasonable outcome.

26. The particular facts of each case will determine whether or not the Commissioner should exercise the discretion to remit.

27. Section 298-10 requires the Commissioner to give written notice to the entity of the entity's liability to pay the penalty and of the reasons why the entity is liable to pay the penalty.

28. For the purposes of encouraging future compliance the entity should be provided with a written explanation of:

- 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 to make the remission decision
- reasons for decision
- the remission decision
- the amount of remission, if any, and
- the amount of penalty payable, if any, after remission.

29. The amount of penalty notified should be the amount remaining after any remission of the penalty. This advice may be included in any other notice.[10] The due date must be specified being at least 14 days after the notice is given to the entity.[11]

30. When the penalty is remitted in full, a formal notice of the decision is not required under the legislation. However for the purpose of encouraging future compliance behaviour and in accordance with the taxpayers' charter, the entity should still be advised of the decision in writing and that advice should contain the information specified in paragraph 28 of this practice statement. This advice may be included in any other written communication such as a case finalisation letter.

31. If an entity fails to comply with its registration obligations and is liable to a penalty, the entity may object against the Commissioner's decision not to remit the penalty in whole or part.[12] However, an entity may only object against the remission decision under section 298-20 if the penalty payable after remission is more than 2 penalty units.[13]

Remission framework

32. All decisions on whether to exercise the discretion to remit penalty in part or in full, or not to remit penalty, should be made after considering all the circumstances relevant to the failure of the entity to comply with its registration obligations. Tax officers should understand that there may be grounds for full or partial remission in circumstances consistent with the principles of the taxpayers' charter, and the compliance model.

[10] Section 298-10.
[11] Section 298-15.
[12] Section 298-20.
[13] Subsection 298-20(3).

33. Tax officers making remission decisions should record the following information on the appropriate case management system:

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

34. Other than in cases where the facts and evidence clearly show indicators of fraud or evasion or deliberate avoidance, the entity will be contacted and given the opportunity to comply with its registration obligations. The fact that an entity subsequently complies with its registration obligations, after those obligations have been clearly explained, will be considered as an indication of the entity's willingness to comply with its obligations. This will be considered with other case factors when determining if remission of the penalty in full or in part is appropriate.

35. Decisions in relation to the remission of administrative penalties will be directly linked to the entity's compliance attitude. In cases which exhibit indicators of fraud or evasion or deliberate avoidance remission of the penalty will not be appropriate.

36. It is envisaged that generally the penalty will be imposed in full or remitted in full. However there may be situations where partial remission of the penalty is warranted. Factors that are relevant to determining if a partial remission of the penalty is warranted include:

- overall compliance attitude of the entity
- advantage gained by not complying
- period of non compliance, and
- disruption to other participants in the tax system.

37. In determining the appropriate level of remission the tax officer should consider what steps the entity has taken to satisfy its obligations. The amount of remission should reflect the efforts made by the entity to comply with its obligations.

- Full remission may be appropriate for entities that have a good overall compliance attitude and make a genuine attempt to comply with their registration obligations.
- In cases where an entity has made some attempt to understand its registration 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.

Entity complies with its registration obligations before being contacted by the ATO

38. If an entity complies with its registration obligations at a time after it is required to do so, but before being contacted by the ATO, any applicable penalty generally will be remitted in full. In these instances, unless there is clear evidence to the contrary, it is considered that the entity, by coming forward, is making a genuine attempt to comply with its registration obligations.

Entity complies with its registration obligations after being contacted by the ATO

39. When, after being advised by a tax officer of its registration obligations and given the opportunity to comply, an entity complies with its registration obligations within a reasonable time frame, remission of the penalty would generally be appropriate. In determining what would constitute a reasonable opportunity, regard will be given to the circumstances of each case. A period of 28 days from the date the tax officer made the entity aware of its obligations would be considered a reasonable period for the entity to comply with its registration obligations.

Example 1

Phillip purchased a franchise and attended training provided by the franchisor. This training included the requirement that each franchisee obtain an ABN and register for GST if required to do so.

Phillip obtained an ABN. However, he was unsure whether he was required to register for GST. Phillip contacted the franchisor for a further explanation and also contacted one of his mates who had been involved with this industry for several years. Both individuals provided Phillip with erroneous advice when they told him that he only needed to register for GST when his enterprise made a profit of $75,000 per year.

Phillip was certain the expenses associated with the enterprise were of a sufficient level to keep the profit for the first year well below $75,000. Phillip issued invoices for their services, but these were not tax invoices and did not include a specific GST component.

The ATO conducted an audit of Phillip's enterprise and it was determined that he was required to be registered for GST. When questioned why he had not registered for GST he explained how he had contacted the franchisor and another business operator in this industry and the advice he received was that the requirement to register was determined by the amount of profit. Phillip voluntarily registered for GST once the obligation was clearly explained to him.

Phillip was liable to a penalty because:

- the enterprise was required to be registered in the first month of operation based upon the projected GST turnover of the enterprise exceeding the registration turnover threshold, and
- the enterprise did not apply for registration within 21 days after becoming required to be registered.

The following factors would be considered in making any remission decision:

- Phillip had sought advice on whether he was required to be registered from both the franchisor and another enterprise in the industry indicating a genuine attempt to comply
- Phillip had no previous history of non-compliance
- although the advice Phillip had received from the franchisor and the other business operator was incorrect Phillip had no reason to believe the advice was incorrect, and
- there was no evidence to suggest that Phillip had sought to gain an advantage by not registering for GST.

The tax officer determined that Phillip was confused about his registration obligation but had made a genuine attempt to understand his obligation. There was no reason for Phillip not to accept the advice as correct. When provided with a clear explanation of the registration obligation, Phillip promptly applied for registration.

Full remission of the penalty would be appropriate in such a case.

Entity does not comply with its registration obligations after being contacted by the ATO

40. When, after being contacted by the ATO, an entity does not comply with its registration obligations, the tax officer should make the necessary decision/s regarding the entity's registration obligations and provide the entity with the decision/s and reasons for the decision/s. This will give rise to one or more reviewable GST decisions against which the entity can object.[14]

41. If the entity is successful in its objection in regard to a requirement to register or to cancel its registration, there will be no liability to a penalty under section 288-40. If the entity is required to register or cancel its registration, but is successful in an objection in regard to the date of effect, it may still be liable to a penalty.

Unjust result

42. There will inevitably be exceptional cases where the prescribed rate of penalty may not provide a just result to the entity. In such cases, the Commissioner may remit, in whole or part, the penalty imposed under section 288-40. It is envisaged that any such remission would be infrequent, that is, where on the facts of the particular case the result is patently unjust.

Example 2

JZE Pty Ltd operates a number of enterprises through independent branches of the company. One of the branches, XEL's, which is registered as a GST branch of JZE Pty Ltd, ceases to operate an enterprise. The directors of JZE Pty Ltd decide that they will not de-register XEL's for GST purposes as a new enterprise was to be purchased and would operate through the branch, XEL's.

[14] Section 110-50.

A number of factors result in a change of business direction and the new enterprise is not purchased. JZE Pty Ltd does not carry on an enterprise through the branch, XEL's, for a period of six months when an audit is commenced by the ATO. There are no current plans for JZE Pty Ltd to operate an enterprise through the registered branch, XEL's. As the Commissioner is satisfied that JZE Pty Ltd is not carrying on an enterprise through XEL's and unlikely to carry on an enterprise for a period of 12 months, the GST registration is cancelled. JZE Pty Ltd is correctly reporting its taxation obligations, keeps good records and is current in its lodgments.

While JZE Pty Ltd is aware of its registration obligations, they have not sought to gain an advantage nor disrupted other participants in the tax system by failing to apply for cancellation of XEL's GST registration. The decision not to cancel the registration as required was made on the basis that JZE Pty Ltd would commence carrying on an enterprise through XEL's within a short period.

JZE Pty Ltd is liable to a penalty for:

- failing to apply for the cancellation of the registration of the branch, XEL's, within 21 days.

The following factors would be considered in making any remission decision:

- there is no prior history of non-compliance by JZE Pty Ltd in relation to registration or other taxation obligations, and
- there is no evidence to suggest that JZE Pty Ltd had sought to gain an advantage by failing to apply to cancel the registration of the branch.

Full remission of the penalty would be appropriate in such a case.

Further considerations

43. As an alternative to an administrative penalty, the Commissioner may seek to have an offence prosecuted by referring the matter to the Director of Public Prosecutions (DPP). The Commissioner will consider referring a case to the DPP only where the case exhibits indicators of serious non-compliance such as falsifying records and or fraud, or where the imposition of penalties has failed to improve the entity's behaviour. This is in keeping with the principles of the compliance model where the most severe compliance responses are restricted to those entities that are the least compliant.

44. The ATO policy on prosecution is fully explained in the *ATO Prosecution Policy*. If prosecution action is instituted, section 8ZE of the TAA removes the entity's liability to pay an administrative penalty for the same act or omission.

45. Other actions that the Commissioner may take if an entity continues to fail to comply with its registration obligations include:

- compulsorily register the entity under subsection 25-5(2) of the GST Act if satisfied that the entity is required to be registered
- once registered, make assessments under section 105-5 of the net amounts of indirect tax payable and proceed to recover the amounts
- make assessments of penalty under section 298-30 of administrative penalty that are payable under subsection 284-75(3), and
- if an entity is registered when not carrying on an enterprise and the Commissioner is satisfied that it will not do so for 12 months, compulsorily cancel the registration under subsection 25-55(2) of the GST Act.

46. Each of the possible decisions set out in paragraph 45 of this practice statement are reviewable decisions for the purposes of section 110-50 and are subject to review under Part IVC of the TAA.

Amendment history

Date of amendment	Part	Comment
21 November 2011	Contact details	Updated
28 October 2010	Various Contact details.	'Tax Office' updated to 'ATO'. Updated.
7 April 2010	Paragraphs 12 and 19	Update legislative references regarding representatives of incapacitated entities.
	Legislative References	Updated from Div 147 to Div 58 which was amended by 118 of 2009, effective 4/12/2009.
	Contact details	Updated.
5 March 2008	Contact details	Updated.
16 October 2007	Paragraphs 12 and 39	Update the GST registration threshold from $50,000 to $75,000 specified by regulation 23-15.01. Change the term 'annual turnover' to 'GST turnover' as per the *Tax Laws Amendment (Small Business) Act 2007*.
	Legislative references	Add ANTS(GST)R 1999 23-15.01 and 23-15.02

Subject references	remission of penalty Goods and Services Tax GST registration GST required to be registered
Legislative references	TAA 1953 8AAG TAA 1953 8ZE TAA 1953 Sch 1 section 105-5 TAA 1953 Sch 1 110-50 TAA 1953 Sch 1 288-40 TAA 1953 Sch 1 298-10 TAA 1953 Sch 1 298-15 TAA 1953 Sch 1 298-20 TAA 1953 Sch 1 298-20(1) TAA 1953 Sch 1 298-20(3) TAA 1953 Sch 1 298-25 ANTS(GST)A 1999 23-5 ANTS(GST)A 1999 25-1 ANTS(GST)A 1999 25-5(2) ANTS(GST)A 1999 25-55(2) ANTS(GST)A 1999 25-50 ANTS(GST)A 1999 57-20 ANTS(GST)A 1999 54-70 ANTS(GST)A 1999 63-30 ANTS(GST)A 1999 83-5 ANTS(GST)A 1999 83-25 ANTS(GST)A 1999 144-5 ANTS(GST)A 1999 58-20 ANTS(GST)A 1999 149-10 ANTS(GST)A 1999 149-20 ANTS(GST)R 1999 23-15.01 ANTS(GST)R 1999 23-15.02 Crimes Act 1914 4AA
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