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

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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contains references to provisions of the *A New Tax System (Goods and Services Tax) Regulations 1999*, which have been replaced by the *A New Tax System (Goods and Services Tax) Regulations 2019*.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.

This document has changed over time. This version was published on *25 September 2015*

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Australian Government
Australian Taxation Office

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This Law Administration Practice Statement sets out guidelines for the remission of penalty for failure to apply to register for GST or failure to apply to cancel GST registration.

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

A penalty is imposed under section 288-40 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)[1] if an entity fails to:

- apply to register for GST, or
- cancel a GST registration,

when required by the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

This penalty may be remitted under subsection 298-20(1).

This practice statement provides guidance on how and when remission of the penalty is warranted.[2]

2. What are an entity's GST registration obligations?

The legislative requirements in regard to registering for GST or cancelling GST registration are provided in the Attachment to this practice statement.

3. Remission of the penalty – general principles

You need to consider remission in all cases where an entity is liable to pay the penalty. Generally (unless there is evidence of fraud or evasion), before making your remission decision, you should give the entity the opportunity to comply with its registration obligations. You should explain the registration obligations and how to comply with them, and allow them a reasonable time to comply.

When making a decision about remission of the penalty, you should have regard to the objectives which underpin the penalty regime, meaning your decision should:

- be made based on the individual circumstances of the case
- be consistent with the principles of the Taxpayers' Charter and the compliance model. Most entities want to comply if they are helped to understand the rules and are treated fairly. They should be treated as honest, unless there is a reason to conclude otherwise. However, if there is evidence of reluctance by the entity to comply with their obligations, the less likely it is to remit the penalty. Similarly, if the entity has a history of non-compliance, it would be likely that no penalty remission would be appropriate, unless there was clear evidence that non-remission of the penalty would be unfair or unjust
- promote consistent treatment in respect of the penalty – the penalty should not be remitted without just cause, arbitrarily or as a matter of course
- be made in good faith and be reasonable – you should follow the good decision making model
- take into account all relevant facts and circumstances, and
- aim to improve future compliance by the taxpayer.

At all times, over and above the above factors, your decision should ensure that there are no unintended or unjust results.

[1] All legislative references in this practice statement are to Schedule 1 of the *Taxation Administration Act 1953*, unless otherwise specified.
[2] This penalty is also discussed in PS LA 2000/9 and PS LA 2002/8.

4. Amount of remission – considerations

It is envisaged that the penalty will generally be imposed in full or remitted in full. However in some cases only partial remission may be warranted.

Remission decisions should be made after considering all of the circumstances relevant to the failure of the entity to comply with its registration obligations including:

- the entity's efforts and willingness to comply with other taxation obligations
- whether the entity was aware of their registration obligations
- any opportunity provided to the entity to comply with their registration obligations, and
- unjust result.

The amount of penalty remitted should generally reflect the level of effort made by the entity to comply with its registration obligations and its overall compliance attitude.

No remission of penalty is appropriate in cases exhibiting indicators of fraud or evasion or the deliberate and on-going avoidance of an entity to comply with their registration obligations.

Full remission of penalty may be appropriate for entities that have a good overall compliance attitude and make a genuine attempt to comply with their obligations.

Partial remission of 50% of penalty may be appropriate where an entity has made some attempt to understand or comply with its registration obligations, its overall compliance history has been good, however, the efforts made are considered insufficient for full remission.

Factors that may be relevant to determining only partial remission of penalty is warranted include:

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

5. Remission of the penalty – specific examples

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

If an entity complies with its registration obligations **after** it was required to do so, but **before** being contacted by the ATO, we would, unless there is evidence to the contrary, consider that they are making a genuine attempt to comply. Therefore, in these instances, you should generally remit any penalty in full.

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

If, having been advised of its registration obligations an entity complies within a reasonable timeframe, full remission of the penalty may be appropriate.

A 'reasonable timeframe' depends on the circumstances of the case but 28 days would normally be considered reasonable.

6. Recording the remission decision

You should record the following information on the appropriate case management system:

- facts relating to the failure to comply and their efforts to comply or reasons for non-compliance with the registration obligations and any evidence (or other material) relating to that failure
- whether the entity was aware of their obligations
- details of the opportunity provided to the entity to comply with the registration obligations or reasons why this was not appropriate in this case
- the remission decision
- the reasons for the remission decision (that is, the ATO's consideration of the circumstances relevant to the remission decision), and
- any other relevant information.

7. Notifying the taxpayer

If the penalty is not remitted in full, the legislation requires you to give the entity written notice of their liability to pay the penalty and the reasons why they are liable. The amount of penalty notified should be the amount remaining after any remission. This can be included in the penalty notice.

However, in all instances, you should also provide the entity with a written explanation of:

- the opportunity provided for them to comply if appropriate to provide
- 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
- the remission decision
- the amount of remission, if any, and
- the amount of penalty payable, if any, after remission.

8. Review rights

If you make the decision not to fully remit the penalty, the entity may object against that decision,[3] but only if the penalty payable after any remission is more than 2 penalty units.

The entity may also object to the requirement to register or to cancel its registration.[4] If it is successful, there will be no liability to the penalty.

9. Other options available

As an alternative to imposing the penalty, the following options may be considered:

- In cases where there is serious non-compliance such as falsifying records or other fraud, seek to have the offence prosecuted by referring the matter to the Director of Public Prosecutions (DPP).
- If the entity does not register voluntarily when given the opportunity we would 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, assessments can be made of the net amount or assessed net amount[5] of indirect tax payable under the TAA and proceed to recover the amounts. Assessments of the penalty can also be made.[6]
- If an entity is registered when not carrying on an enterprise and the Commissioner is satisfied that it did not carry on an enterprise or it will not do so for the next 12 months, compulsorily cancel the registration under subsection 25-55(2) of the GST Act.

10. Examples

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.

We 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.

[3] Section 298-20.
[4] Section 110-50.
[5] For tax periods that start on or after 1 July 2012 the term assessed net amount applies.
[6] Section 298-30.

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

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.

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.

11. More information

For more information, see:

- Do you need to register – on the requirements in regard to registering for GST.
- Cancelling your GST registration – on when entities are required to cancel their GST registration.

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Amendment history

Date of amendment	Part	Comment
24 September 2015	All	Updated to new LAPS format and style.
7 May 2014	Related practice statements	Updated.
	Contact details	Updated.
13 June 2013	Contact details	Updated.
25 March 2013	Paragraph 12	Inclusion of section 23-20.
	Paragraph 45	Inclusion of assessed net amount under the TAA.
	Legislative References	Updated provisions.
	Related practice statements	Inserted PS LA 2011/8.
21 November 2012	Paragraph 20	Removal of current value of penalty unit.
	Related practice statements	Updated.
21 November 2011	Contact details	Updated.
28 October 2010	Various	'Tax Office' updated to 'ATO'.
	Contact details.	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	Inserted 'ANTS(GST)R 1999 23-15.01 and 23-15.02'.

Attachment – legislative framework in regard to registration obligations

When an entity needs to apply for GST registration

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.

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[7] and the GST turnover meets the registration turnover threshold[8]
23-20	Entity is treated as not having been required to be registered if registration could not take effect because of subsection 25-10(1A)[9]
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

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.

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.

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.

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.

When an entity needs to cancel its registration

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.[10] 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

[7] Miscellaneous Taxation Ruling MT 2006/1.
[8] Section 23-15 of the GST Act, Regulations 23-15.01 and 23-15.02.
[9] Subsection 25-10(1A) of the GST Act provides that from 1 July 2012 the date of effect of GST registration must not be a day that occurred more than 4 years before the day of the decision to register an entity, unless the Commissioner is of the opinion there has been fraud or evasion.
[10] Division 54 of the GST Act.

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.[11] 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.[12] 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.[13]

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

[11] Subsection 25-55(1) of the GST Act.
[12] Subsection 25-57(1) of the GST Act.
[13] Subsection 25-55(2) of the GST Act.