PS LA 2011/19 - Administration of penalties for failing to lodge documents on time

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Practice Statement Law Administration

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This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs tax officers must follow their business line's escalation process.

SUBJECT: **Administration of penalties for failing to lodge documents on time**

PURPOSE: **To provide guidelines on:**

- **how the Commissioner applies failing to lodge on time penalty**
- **when a safe harbour exemption applies**
- **when the Commissioner will remit failure to lodge (FTL) penalty**
- **FTL penalty objection and appeal rights**

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STATEMENT

1. All legislative references in this practice statement are to Schedule 1 to the *Taxation Administration Act 1953* (TAA) unless otherwise specified.

2. The administrative penalty regime in Part 4-25 imposes uniform penalties for certain acts or omissions which relate to matters arising under taxation laws.

3. The penalty regime consists of three distinct components:

   - penalties relating to statements and schemes
   - penalties for failing to lodge returns and other documents on time
   - penalties for failing to meet other tax obligations.

4. Subdivision 286-C imposes penalties for failing to lodge returns and other documents on time (FTL penalty).

5. This practice statement explains how the Commissioner administers the FTL penalty. It provides guidance on:

   - how the Commissioner applies FTL penalty
   - when subsection 286-75(1A) provides a safe harbour exemption from FTL penalty
   - when remission of the FTL penalty under section 298-20 is warranted
   - objection, review and appeal rights in relation to FTL penalty remission decisions.

6. The FTL penalty provisions came into effect from 1 July 2000. The penalty is imposed at law for late lodgment or non-lodgment of any return, notice, statement or other document that is required to be given to the Commissioner in an 'approved form'[1] by a particular day. The following are examples (not exhaustive) of approved forms to which the FTL penalty provisions may apply:[2]

   - activity statements
   - annual goods and services tax (GST) returns for taxpayers who choose to pay by instalments or pay annually
   - annual GST information reports
   - income tax returns
   - fringe benefits tax returns
   - pay as you go (PAYG) withholding annual reports
   - departing Australia superannuation payment annual reports
   - member contributions statements for APRA regulated funds[3]
   - lost member statements required under section 24C of the *Superannuation (Unclaimed Money and Members) Act 1999*

[1] See section 388-50 and Law Administration Practice Statement PS LA 2005/19 Approved forms.
[2] The time from which FTL penalty applies may vary. Refer to relevant transitional provisions pertaining to various approved forms that came into effect on or after 1 July 2000.
[3] See section 390-5.

7. Documents required under the following Acts are excluded from FTL penalty:[4]

   - *Superannuation Contributions Tax (Assessment and Collection) Act 1997*
   - *Superannuation Guarantee (Administration) Act 1992,* and
   - *Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991*

8. General interest charge (GIC) will be imposed on any amount of FTL penalty that remains unpaid.[5] This practice statement does not deal with the imposition or remission of the GIC. The ATO policy on the remission of GIC is set out in Law Administration Practice Statement PS LA 2011/12 Administration of general interest charge (GIC) imposed for late payment or under estimation of liability.

EXPLANATION

Outline of Division 286 – penalties for failing to lodge documents on time

9. The penalty regime in Part 4-25 sets out the uniform administrative penalties that apply to entities[6] for failing to satisfy obligations under taxation laws. Uniform penalties will apply where an entity fails to satisfy the same type of obligation under different taxation laws.

10. An entity is liable to an administrative penalty (referred to in this practice statement as an FTL penalty) where it is required under a taxation law to give a return, statement, notice or other document to the Commissioner in the approved form by a particular day, and it fails to do so.[7]

11. The Commissioner seeks to apply FTL penalty in such a way as to positively influence lodgment behaviours.

12. An FTL penalty will be applied if a document is not lodged in the approved form by a particular day, and it:

    (i) places the efficient operation of the taxation and superannuation systems at risk

    (ii) provides a significant benefit or advantage to the late or non lodger over the general community, or

    (iii) erodes community confidence in the taxation and superannuation systems.

13. In deciding whether to apply FTL penalty the Commissioner will have regard to:

    (i) the compliance history of the entity

    (ii) the effort taken by the Australian Taxation Office (ATO) to obtain lodgment

    (iii) the value of the information required

    (iv) whether the entity has had an opportunity to comply

    (v) whether the entity is aware of their lodgment obligation and the consequences of not meeting that obligation

[4] See subsection 286-75(2).
[5] See section 298-25.
[6] Entity includes an individual.
[7] See subsection 286-75(1).

(vi) any contact the entity, or their registered tax agent or BAS agent, may have had with the ATO prior to the due date for lodgment

(vii) the length of time the document was overdue

(viii) the likelihood that application of FTL penalty will improve on time lodgment behaviour.

14. Examples of the considerations underlying this policy described in the previous paragraphs include:

(i) revenue collections are often contingent on timely lodgments

(ii) PAYG withholding annual reports reconcile amounts withheld from employees

(iii) large entities may gain cash flow advantages by delaying lodgment (by delaying updates to PAYG instalment rates)

(iv) information from large entities is valuable to the ATO in managing compliance risks

(v) the community expects penalties to be administered fairly, with those who avoid reporting on time being penalised, and those who are trying to do the right thing given reasonable opportunity to comply.

Penalty may not apply – safe harbour provision

15. In certain circumstances entities are not liable to FTL penalties. The safe harbour provision under subsection 286-75(1A) applies[8] where:

(i) the document was lodged by a registered tax agent or BAS agent

(ii) the entity provided all relevant information to the agent to enable the document to be lodged on time (the onus is on the entity to prove that they met this requirement)[9]

(iii) the failure to lodge on time was not due to either:

(a) intentional disregard of a taxation law by the agent, or

(b) recklessness by the agent as to the operation of a taxation law.

16. The exclusion of circumstances where the agent has intentionally disregarded a taxation law or has been reckless as to the operation of a taxation law means that a safe harbour exemption applies where the late lodgement results from the agent failing to take reasonable care or occurs despite their exercise of reasonable care.

17. The Commissioner will generally consider a request to apply the safe harbour provision after:

(a) the document is lodged

(b) an FTL penalty has been applied to the entity's account

18. If the request to apply the safe harbour provision is lodged by the entity, the agent who lodged the document late will be contacted and given an opportunity to comment on the entity's claim.

[8] If the late lodged document had a due date for lodgment of 1 March 2010 or later.
[9] See subsection 286-75(1B).

19. Where the Commissioner determines that the safe harbour exemption does not apply, the entity has no objection rights under Part IVC of the TAA, but can seek a review of that decision under the *Administrative Decisions (Judicial Review) Act 1977*.

20. Additionally, where the Commissioner determines that the safe harbour provision does not apply, the Commissioner may consider whether remission of the FTL penalty is warranted under section 298-20 (see paragraphs 37 to 51 of this practice statement).

How FTL penalty is administered

21. FTL penalty is applied using either an automated or a manual process.

22. The automated process uses a system of filters to exclude documents and entities which represent a low risk. The automated system also accounts for short postal service or transmission delays.

23. Low risk documents include those that result in a refund, late lodged income tax returns of non-taxable entities, and activity statements which result in a nil liability.

24. The manual process supplements the automated process and is used to apply penalties:

    (i) in cases that are excluded from the automated system

    (i) on documents that remain overdue

    (ii) in situations of escalating non-compliance, and

    (iii) to high risk entities.

25. At law, liability to FTL penalty arises separately on each lodgment or notification of a tax related liability. However, where separate obligations are required to be reported on the one document, for example, on an activity statement, generally only one FTL penalty will be applied to the document.

26. The Commissioner must give written notice to the entity of the liability to pay the FTL penalty and the reasons why the entity is liable to pay the penalty.[10] The penalty does not become payable until this occurs.

27. Notification of the FTL penalty may be made either before or after lodgment of the late document. If the entity is notified of the penalty before the lodgment of the relevant document, the Commissioner may later increase the penalty up to the date the document is lodged in the approved form (to the statutory maximum).[11]

28. GIC will apply to any FTL penalty which remains unpaid after the due date for payment. Remissions of any GIC applied will be in accordance with the policy outlined in PS LA 2011/12.

Calculating the amount of FTL penalty

29. If an entity is liable to an FTL penalty under subsection 286-75(1), then the penalty is worked out in accordance with subsection 286-80(1).

[10] See section 298-10.
[11] See subsection 286-80(6).

30. Under subsection 286-80(1), there are two stages in the calculation of the penalty:

- calculating the base penalty amount, and
- increasing the base penalty amount if entity size tests are satisfied.

Base penalty amount

31. The base penalty amount, as determined under subsection 286-80(2), is calculated as one penalty unit[12] for every 28 days (or part thereof) that the document is late up to a maximum of five penalty units.

32. FTL penalty is calculated from the due date for lodgment of the document. In cases where the due date for lodgment has been deferred,[13] FTL penalty is calculated from the deferred due date rather than the original due date. If a suspension of lodgment enforcement action has been granted, FTL penalty is calculated from the original due date for lodgment.

Increase in the base penalty amount

33. In applying the FTL penalty, the Commissioner must determine the size of the entity at the time a document is required to be lodged. The base penalty amount is increased if the entity is a medium or large entity.

34. The base penalty amount is multiplied by two under subsection 286-80(3) if:

- the entity is a medium withholder[14] in the month the document was due
- the entity's assessable income for the income year in which the document was due is more than $1 million but less than $20 million, or
- the entity's current GST turnover is more than $1 million but less than $20 million in the month the document was due.

35. The base penalty amount is multiplied by five (subsection 286-80(4))

- the entity is a large withholder[15] in the month the document was due;
- the entity's assessable income for the income year in which the document was due is $20 million or more, or
- the entity's current GST turnover is $20 million or more in the month the document was due.

36. The Commissioner will not always have the current information available to determine the correct size of an entity in accordance with the size tests prescribed in subsections 286-80(3) and 286-80(4). In these circumstances, the Commissioner will use the entity's withholder status to determine an entity's size. Where a client does not have a medium or large withholder status and there is no other evidence to justify a higher rate, then the base penalty is applied. The Commissioner can increase the penalty at a later date.[16]

[12] See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.
[13] See section 388-55.
[14] See section 16-100.
[15] See section 16-95.
[16] See subsection 286-80(6).

Remission of FTL penalty

37. The Commissioner has the discretion to remit FTL penalty in full or in part, depending on the circumstances that led to the failure to lodge on time.

38. Remission of FTL penalty will be granted where the delay in lodgment occurred due to circumstances beyond the control of the entity.

39. Where circumstances are not beyond the entity's control, it may still be appropriate for the Commissioner to remit the FTL penalty, in full or in part, where it would be fair and reasonable to do so.

Circumstances beyond the control of the entity

40. An entity (or their agent) may be able to demonstrate that the difficulties they experienced were due to factors beyond their control and clearly could not be predicted, and the entity or their agent was not in a position to request further time to lodge.

41. Such circumstances may include, but are not limited to:

- natural disasters, or
- the serious illness of the entity or their agent, if a sole practitioner.

Fair and reasonable

42. A decision by the Commissioner to remit FTL penalty on the grounds that it is fair and reasonable must be considered in view of the legislative intent that entities should be liable to a penalty if they lodge late.

43. An entity will need to demonstrate that it is fair and reasonable to remit the penalty, having regard to the nature of the specific event or decision that prevented lodgment.

44. A decision to remit FTL penalty must be fair to the entity concerned, and also fair to the whole community. In particular, an entity that habitually lodges late or fails to lodge should not be given any undue advantage over those entities that organise their affairs to ensure they can lodge on time.

45. For example, it would generally be fair to remit the penalty where a client has a good compliance history.

Requests for remission

46. Requests for remission should fully outline the reasons for the delay in lodgment and the steps the entity has taken to lodge the overdue documents.

47. The Commissioner may ask for the remission request to be made in writing. This would be likely where:

(i) the information provided verbally does not clearly demonstrate the circumstances which led to the late lodgment

(ii) it is considered necessary in order for the Commissioner to make an informed decision

(iii) the penalty has been applied on an un-lodged document as a result of compliance action, or

(iv) the document at the time of making the remission request is still overdue.

48. Generally, FTL penalty will only be remitted after the overdue document has been lodged.

49. Where the Commissioner decides not to remit an amount of FTL penalty, either in part or in full, the entity must be advised, in writing, of the decision and the reasons for the decision.

Objection, review and appeal rights – remission decisions

50. An objection under Part IVC of the TAA may be made if an entity is dissatisfied that the Commissioner has refused, in full or in part, to remit a penalty amount and the penalty amount that remains payable after the refusal is more than two penalty units.

51. If an entity is dissatisfied with an objection decision by the Commissioner, the entity may:

    (i) apply to the Administrative Appeals Tribunal for review of the objection decision

    (ii) appeal to the Federal Court against the objection.

52. Where a decision not to remit a penalty cannot be reviewed by objection (for example, if the amount of penalty that remains payable after the refusal to remit is two penalty units or less), the entity may seek a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977.*

Legislative references	TAA 1953 Pt IVC TAA 1953 Sch 1 16-95 TAA 1953 Sch 1 16-100 TAA 1953 Sch 1 Div 286 TAA 1953 Sch 1 Subdiv 286-C TAA 1953 Sch 1 Part 4-25 TAA 1953 Sch 1 286-75(1) TAA 1953 Sch 1 286-75(1A) TAA 1953 Sch 1 286-75(1B) TAA 1953 Sch 1 286-75(2) TAA 1953 Sch 1 286-80(1) TAA 1953 Sch 1 286-80(2) TAA 1953 Sch 1 286-80(3) TAA 1953 Sch 1 286-80(4) TAA 1953 Sch 1 286-80(6) TAA 1953 Sch 1 298-10 TAA 1953 Sch 1 298-20 TAA 1953 Sch 1 298-25 TAA 1953 Sch 1 388-50 TAA 1953 Sch 1 388-55 TAA 1953 Sch 1 390-5 Administrative Decisions (Judicial review) Act 1977 Crimes Act 1914 4AA
Related practice statements	PS LA 2005/19 Approved forms PS LA 2011/12 Administration of general interest charge (GIC) imposed for late payment or under estimation of liability
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