PS LA 2011/19 - Administration of the penalty for failing to lodge documents in the approved form on time

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This document has changed over time. This version was published on *13 June 2014*

Generated on: 4 November 2026, 09:45:32 PM

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2011/19

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SUBJECT: **Administration of the penalty for failing to lodge documents in the approved form on time**

PURPOSE: **To provide guidelines on:**

- **how the Commissioner applies the penalty for failing to lodge documents in the approved form on time (the FTL penalty)**
- **how the FTL penalty is administered and calculated**
- **when a safe harbour exemption from the FTL penalty applies**
- **when the Commissioner will remit the FTL penalty, and**
- **the FTL penalty objection and appeal rights.**

TABLE OF CONTENTS **Paragraph**

STATEMENT **1**

EXPLANATION **7**

How the Commissioner applies the FTL penalty 8

How FTL penalty is administered and calculated 12

Administering the penalty 12

Calculating the amount of the FTL penalty 20

Base penalty amount 22

Increase in the base penalty amount 24

When subsection 286-75(1A) of Schedule 1 to the TAA, which is a safe harbour provision that provides exemption from the FTL penalty, applies 28

When remission of the FTL penalty under section 298-20 of Schedule 1 to the TAA is warranted 33

Circumstances beyond the control of the entity 37

Unjust result 39

Fair and reasonable 41

Requests for remission 44

STATEMENT

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

2. 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.

3. Subsection 286-75(1) of Schedule 1 to the TAA, which came into effect from 1 July 2000, imposes a penalty for failing to lodge returns, notices, statements or other documents (for the purposes of this practice statement they will be referred to as 'taxation documents') in the 'approved form'[1] by a particular day (referred to in this practice statement as the FTL penalty).

4. The following are examples (not exhaustive) of taxation documents to which subsection 286-75(1) of Schedule 1 to the TAA 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 Australian Prudential Regulation Authority (APRA) regulated funds[3]
   - lost member statements required under section 24C of the *Superannuation (Unclaimed Money and Members) Act 1999.*

5. Taxation documents required under the following Acts are excluded from the 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.*

[1] See section 388-50 of Schedule 1 to the TAA 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 of Schedule 1 to the TAA.
[4] See subsection 286-75(2) of Schedule 1 to the TAA.

6. The general interest charge (GIC) will be imposed on any amount of the 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 the 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

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

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

How the Commissioner applies the FTL penalty

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

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

- places the efficient operation of the taxation and superannuation systems at risk, or
- provides a benefit or advantage to the late or non lodger over the general community, or
- erodes community confidence in the taxation and superannuation systems.

10. In deciding whether to apply the FTL penalty, the Commissioner will have regard to (not exhaustive):

- the compliance history of the entity
- the effort taken by the ATO to obtain lodgment
- the value of the information to be disclosed in the taxation document
- whether the entity is aware of their lodgment obligation and the consequences of not meeting that obligation
- whether the entity has had an opportunity to comply
- the length of time the taxation document was overdue
- 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, and
- the likelihood that application of an FTL penalty will improve on time lodgment behaviour.

[5] See section 298-25 of Schedule 1 to the TAA.

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

- revenue collections are often contingent on timely lodgments
- PAYG withholding annual reports reconcile amounts withheld from employees
- large entities may gain cash flow advantages by delaying lodgment (by delaying updates to PAYG instalment rates)
- information from large entities is valuable to the ATO in managing compliance risks
- 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.

How the FTL penalty is administered and calculated

Administering the penalty

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

13. The automated process uses a system of filters to exclude certain taxation documents and entities which represent a low risk. The automated system also accounts for short delays caused by either the postal service or electronic transmission systems.

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

- in cases that are excluded from the automated system
- on taxation documents that remain overdue
- in situations of escalating non-compliance
- to higher risk entities.

15. At law, liability to the FTL penalty arises separately for each lodgment or notification obligation. Generally, the Commissioner will only apply one FTL penalty to a taxation document where separate obligations in respect of one entity are required to be reported on the one taxation document, for example, on a business activity statement.

16. Multiple penalties may apply when lodgment obligations in respect of multiple entities are required to be reported on the one taxation document. A Member Contributions Statement (MCS) is an example of a taxation document that APRA regulated funds use to report information they have for each of their contributing members. An APRA regulated fund that submits Member Contribution Statements after the due date, may be liable for multiple FTL penalties equivalent to the number of individual member statements lodged after the due date.

17. An example of how multiple FTL penalties may arise is provided in the following example. If an APRA regulated fund has 500 contributing members, they have 500 separate information reporting obligations. If a combined MCS is lodged by this APRA regulated fund on or before the due date that only contains information relating to 450 of its 500 contributing members, the fund may be liable to 50 FTL penalties unless a further MCS containing the remaining 50 information reporting obligations is submitted by the due date.

18. 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.[6] The penalty does not become payable until at least 14 days after the notice is given to the entity.[7]

19. Notification of the FTL penalty may be made either before or after lodgment of the late taxation document. If the entity is notified of the penalty before the lodgment of the relevant taxation document, the Commissioner may later increase the penalty up to the date the taxation document is lodged in the approved form (to the statutory maximum).[8] Where the taxation document remains unlodged the penalty can be increased to the statutory maximum.

Calculating the amount of the FTL penalty

20. If an entity is liable for an FTL penalty, then the penalty is worked out in accordance with subsection 286-80(1) of Schedule 1 to the TAA.

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

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

Base penalty amount

22. The base penalty amount, as determined under subsection 286-80(2) of Schedule 1 to the TAA, is calculated as one penalty unit[9] for every 28 days (or part thereof) that the taxation document is late up to a maximum of five penalty units. The amount of a penalty unit is the amount applying at the start of the relevant 28 day period.[10]

23. The FTL penalty is calculated from the due date for lodgment of the taxation document. In cases where the due date for lodgment has been deferred,[11] the 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, the FTL penalty is calculated from the original due date for lodgment.

Increase in the base penalty amount

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

25. The base penalty amount is multiplied by two under subsection 286-80(3) of Schedule 1 to the TAA if:

- the entity is a medium withholder[12] in the month the taxation document was due

[6] See section 298-10 of Schedule 1 to the TAA.
[7] See section 298-15 of Schedule 1 to the TAA.
[8] See subsection 286-80(6) of Schedule 1 to the TAA.
[9] See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit.
[10] See subsection 286-80(5) of Schedule 1 to TAA.
[11] See section 388-55 of Schedule 1 to the TAA.
[12] See section 16-100 of Schedule 1 to the TAA.

- the entity's assessable income for the income year in which the taxation 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 taxation document was due.

26. The base penalty amount is multiplied by five (subsection 286-80(4) of Schedule 1 to the TAA) if:

- the entity is a large withholder[13] in the month the taxation document was due
- the entity's assessable income for the income year in which the taxation document was due is $20 million or more
- the entity's current GST turnover is $20 million or more in the month the taxation document was due.

27. 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) of Schedule 1 to the TAA. In these circumstances, the Commissioner will use the entity's withholder status to determine an entity's size. Where an entity is either not a withholder or if they are a withholder, 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.

When subsection 286-75(1A) of Schedule 1 to the TAA, which is a safe harbour provision that provides exemption from the FTL penalty, applies

28. In certain circumstances, entities are not liable to the FTL penalty because of the safe harbour provision under subsection 286-75(1A) of Schedule 1 to the TAA. This safe harbour provision applies[14] where:

- the entity engaged a registered tax agent or BAS agent (registered agent), and
- the entity provided all relevant information to the registered agent to enable the taxation document to be lodged on time (the onus is on the entity to prove that they met this requirement),[15] and
- the registered agent does not give the taxation document to the Commissioner in the approved form by that day, and
- the failure to lodge on time was not due to either:
  - (a) intentional disregard of a taxation law by the registered agent, or
  - (b) recklessness by the registered agent as to the operation of a taxation law.

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

- the taxation document is lodged, and
- an FTL penalty has been applied to the entity's account.

[13] See section 16-95 of Schedule 1 to the TAA.
[14] If the late lodged document had a due date for lodgment of 1 March 2010 or later.
[15] See subsection 286-75(1B) of Schedule 1 to the TAA.

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

31. Where the Commissioner determines that the safe harbour provision 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*.

32. 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 of Schedule 1 to the TAA (see paragraphs 41 to 47 of this practice statement).

When remission of the FTL penalty under section 298-20 of Schedule 1 to the TAA is warranted

33. The Commissioner has the discretion to remit the FTL penalty in full or in part.[16]

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

35. Where circumstances were 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.

36. There may be cases where the FTL penalty imposed may not provide a just result to the entity.

Circumstances beyond the control of the entity

37. An entity (or their registered agent) may be able to demonstrate that the difficulties they experienced were due to circumstances 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.

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

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

Unjust result

39. Generally, it would not be appropriate to apply multiple FTL penalties if the non lodgment occurred as a result of an administrative oversight. However this would depend on the particular facts and circumstances of each case.

40. When considering multiple penalties, the final penalty applied must be defensible, proper and just taking into account the overall circumstances of the entity. Remission provides the administrative flexibility to ensure the penalty imposed is aligned with the observed behaviour.

[16] See subsection 298-20(1) of Schedule 1 to the TAA.

Fair and reasonable

41. A decision by the Commissioner to remit the 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 fail to lodge on time.

42. 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.

43. A decision to remit the 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. For example, it would generally be fair to remit the penalty for a 'one off' occurrence where a client generally has a good compliance history.

Requests for remission

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

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

- the information provided verbally does not clearly demonstrate the circumstances which led to the late lodgment
- it is considered necessary in order for the Commissioner to make an informed decision
- the penalty has been applied on an un-lodged taxation document as a result of compliance action
- the taxation document at the time of making the remission request is still overdue.

46. Generally, the FTL penalty will only be remitted after the overdue taxation document has been lodged in the approved form.

47. It is important that only the approved form is used. These forms are scanned by the ATO and if photocopies are lodged, they lose their OCR (optical character recognition) functionality. Where photocopies are lodged the ATO may return the form[17] and advise that it needs to be lodged using the approved form. Repeated use of photocopies or other documents that are not in the approved form may result in the FTL penalty being imposed.

48. Where the Commissioner decides not to remit the FTL penalty, either in part or in full, the entity must be advised, in writing, of the decision and the reasons for the decision.[18]

[17] Similarly, if a spreadsheet or other document is used to lodge the information rather than using the approved form, it may be returned.
[18] See subsection 298-20(2) of Schedule 1 to the TAA.

The objection, review and appeal rights in relation to FTL penalty remission decisions

49. 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.

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

- apply to the Administrative Appeals Tribunal for review of the objection decision, or
- appeal to the Federal Court against the objection decision.

51. 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.*

52. The Taxpayers' Charter makes commitments related to respecting clients' rights of review. Where there are review rights under the law that the client might reasonably want to use, a letter, with any other material that is sent to the client, should include information on how to get a review.

Amendment history

Date of amendment	Part	Comment
13 June 2014	Para 10	Standardised the meaning of the word ‘taxation document‘ and added legislative reference in footnote
	Para 15	Aligning application of safe harbour more clearly with legislation. Updated use of registered agent with ATO style guide
	Para 25	Clarified under what circumstances the Commissioner may apply multiple FTL penalties.
	Para 47	Clarified the requirement that only the approved form is to be used and the impact of lodging photocopies.
11 March 2014	Paragraph 53	Insert new paragraph 53 to reflect amendments to the Privacy Act 1988.
	Legislative references	Include reference to Privacy Act 1988.

Subject references	Failure to lodge penalty Lodgment enforcement Remission of failure to lodge penalties Remission of penalties
ATOlaw topic	Tax Administration ~~ administrative penalties Income Tax ~~ administration ~~ penalty tax and general interest charge
Legislative references	Administrative Decisions (Judicial Review) Act 1977 Crimes Act 1914 4AA Superannuation (Unclaimed Money and Members) Act 1999 24C Superannuation Contributions Tax (Assessment and Collections) Act 1997 Superannuation Guarantee (Administration) Act 1992 Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991 TAA 1953 Pt IVC TAA 1953 Sch 1 16-95 TAA 1953 Sch 1 16-100 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(5) TAA 1953 Sch 1 286-80(6) 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(2) TAA 1953 Sch 1 298-25 TAA 1953 Sch 1 388-50 TAA 1953 Sch 1 388-55 TAA 1953 Sch 1 390-5
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
File references	1-4J4AKYQ
Date issued	14 April 2011
Date of effect	14 April 2011
Contact email	OperationalPolicyAssuranceandLawWorkManagement@ato.gov.au
Section	Operational Policy, Assurance and Law