PS LA 2011/19 - Administration of the penalty for failure to lodge on time

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PS LA 2011/19
Administration of the penalty for failure to lodge on time

This Law Administration Practice Statement explains how to administer the penalty for failing to lodge documents in the approved form on time.

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?

Subsection 286-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)[1] imposes a failure to lodge (FTL) penalty for failing to lodge returns, notices, statements or other documents (referred to as 'taxation documents'[2]) in the 'approved form'[3] by a particular day.

This Practice Statement provides guidance on how the FTL penalty is applied and administered. It also provides guidance on exercising the discretion to remit the FTL penalty.[4]

2. Why do we have an FTL penalty?

You should be aware of the reasons why we have a FTL penalty when applying the policy in this Practice Statement. These include:

- revenue collections are often contingent on timely lodgments
- pay as you go (PAYG) withholding annual reports reconcile amounts withheld from employees and failing to lodge these can prevent individuals from lodging correctly using prefilling
- businesses 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
- partly as cost recovery where the ATO has undertaken compliance action to bring the lodgment in.

3. Types of documents to which the FTL penalty applies

An FTL penalty can apply to any document which must be lodged in the approved form under a taxation law. Some of the most common documents to which an FTL penalty applies are:

- activity statements
- annual goods and services tax (GST) returns and information reports
- income tax returns
- fringe benefits tax returns
- PAYG withholding annual reports
- taxable payments annual reports
- member statements.[5]

[1] All legislative references in this Practice Statement are to Schedule 1 of the TAA unless otherwise specified.
[2] The term 'taxation documents' is used in this Practice Statement to refer to returns, notices, statements or other documents.
[3] See section 388-50 and Law Administration Practice Statement PS LA 2005/19 *Approved forms*.
[4] Changes made by *Treasury Legislation Amendment (Repeal Day) Act 2015* to insert new provision section 2B into the TAA 1953 has resulted in the Commissioner no longer imposing penalties and interest on the Crown. For more information on how the Commissioner now administers this law, please refer to MT 2011/1 *Miscellaneous taxes: application of penalties and interest charges to the Commonwealth, States, Northern Territory and Australian Capital Territory* or PS LA 2011/26 *Administration of penalties and interest charges in relation to the notional liabilities of the States.*
[5] For example, for Australian Prudential Regulation Authority regulated funds under section 390-5 and for lost member statements under section 24C of the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

Note: it is generally important that entities lodge using the approved form. If photocopies or other documents are lodged, we may return them and advise that they need to be lodged using the approved form. If we have to repeatedly return forms, the FTL penalty may be imposed.

Documents required under the following Acts are specifically excluded from the FTL penalty[6]:

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

4. How the FTL penalty is applied

The FTL penalty can be applied either:

- automatically (using a system of filters to exclude certain documents and entities which represent a low risk), or
- manually – in those cases which are excluded from the automated system. This includes situations where the documents remain overdue, in situations of escalating non-compliance, and where the entities are higher risk.

5. When an FTL penalty should be applied

Overall, you should seek to apply the FTL penalty in such a way as to improve lodgment behaviours.

The general principles are that the FTL penalty will be applied if the failure to lodge:

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

Some of the factors you should consider in deciding whether to apply the FTL penalty are:

- the compliance history of the entity
- the effort it took 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 representative may have had with the ATO prior to the due date for lodgment.

This list is not exhaustive.

Generally, the following rules also apply:

- Where multiple obligations are reported on the one document (for example an activity statement) – we will only apply one FTL penalty, although, at law, the entity is liable to a separate FTL penalty for each obligation.
- Where multiple entities are required to be reported on the one document, multiple FTL penalties, equivalent to the number of obligations not lodged, can be applied. At the date of publication, this approach was applied only to Member Contribution Statements.

6. Notifying the entity of the FTL penalty

We must give written notice to the entity of the amount of FTL penalty and why they are liable for it. The penalty does not become payable until at least 14 days after the notice is given.[7]

Notice of the FTL penalty may be made before or after the entity has lodged the document. If it is made before, we can later increase the penalty (up to the statutory maximum)[8] either when the document is lodged, or if it remains unlodged.

7. Calculation of the FTL penalty

The FTL penalty is calculated in two stages:

- the base penalty amount is determined
- the base penalty amount is increased if entity size tests are satisfied.[9]

Base penalty amount

The base penalty amount is one penalty unit[10] for every 28 days (or part thereof) that the taxation

[6] See subsection 286-75(2).
[7] See sections 298-10 and 298-15.
[8] See subsection 286-80(6).
[9] See subsection 286-80(1).

[10] See section 4AA of the *Crimes Act 1914* for the current value of a penalty unit. The amount of the penalty unit is the amount applying at the start of the relevant 28 day period.

document is late, up to a maximum of five penalty units.

The base penalty amount is calculated from the due date of the document to the date before it is received.

Increasing the base penalty amount

The base penalty amount is increased if the entity is a medium or large withholder (at the time the document is required to be lodged).

The base penalty amount is multiplied by **two**[11] if the entity:

- is a medium withholder[12] in the month the document was due
- has an assessable income for the income year in which the taxation document was due more than $1 million but less than $20 million, or
- has a current GST turnover of more than $1 million but less than $20 million in the month the document was due.

The base penalty amount is multiplied by **five** if the entity:

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

If we do not have current information to apply all three size tests to determine the size of an entity, you should use the entity's withholder status or assessable income to determine their size, whichever imposes the higher penalty.

Where it is determined that the FTL penalty amount has been incorrectly applied to an entity, and the rate of the FTL penalty does not reflect the actual size of the entity, then the following action will occur:

- the FTL penalty notice will be cancelled
- a new FTL penalty notice will be issued with the correct rate for FTL penalty to be applied, and
- a new notice and reasons for the imposition and calculation will be provided to the entity.

8. FTL penalties for significant global entities[14]

The base penalty amount is multiplied by **500** where the entity is a significant global entity.[15]

FTL penalties for significant global entities[16] (SGEs) apply to an entity that fails to lodge a taxation document required to be given at a date that is on or after 1 July 2017.

An entity is an SGE, for the purposes of FTL penalties, according to the most recent income tax assessment (either following lodgment of the entity's tax return or, if the entity has not lodged a tax return, a default assessment). However, if at the time of calculating a penalty amount, the ATO is satisfied that an entity will not be an SGE for the current income year (for example because the entity is no longer a member of the global group), the ATO is able to remit the higher penalty amount to the amount that would otherwise have applied.

In most circumstances, the question of whether an entity is an SGE for the income year in which a penalty is imposed is determined after the year has ended. If a penalty is imposed at the rate applicable to SGEs and the entity was not in fact an SGE for that period according to the assessment for that relevant income year, the penalty amount will be reduced to the amount that would otherwise have applied (refer to subsection 286-80(4B)).

Other than the situation described above, we will apply the same approach for remission of FTL penalties as referred to in section 10 of this Practice Statement to significant global entities.

Remission of FTL penalties is generally considered appropriate where circumstances beyond the control of the entity exist, where it is fair and reasonable or where imposing the FTL penalty would not provide a just result. The increased amount of FTL penalties applying to SGEs is not by itself a relevant factor in considering if a penalty should be remitted.

Lodgment deferral

If the lodgment due date is deferred[17], it is calculated from the deferred due date, not the original due date.

[11] See subsection 286-80(3).
[12] See section 16-100.
[13] See section 16-95.
[14] The term 'significant global entity' is defined in section 960-555 of the *Income Tax Assessment Act 1997*. From 5 December 2019, this higher FTL penalty also applies to a SGE who is subsidiary member of a consolidated group or a multiple entity consolidated (MEC) group where another member of the group has had an income tax assessment: see paragraph 286-80(4A)(b)(iv).
[15] See subsection 286-80(4A).
[16] See subsection 286-80(4A).
[17] See section 388-55.

If a suspension of lodgment enforcement action has been granted, it is calculated from the original due date for lodgment.

9. Requesting remission of the FTL penalty

We have the discretion to remit the FTL penalty, in whole or in part.

A request for remission may be made either verbally or in writing, and should fully outline the reasons for the delay in lodgment and the steps the entity has taken to lodge.

You should ask for the request to be in writing where:

- the penalty was manually applied, which indicates an ATO officer has deliberately applied this penalty and has likely already considered remission. Often this is done as part of a compliance action
- the document is still overdue, unless the taxpayer declares there is no obligation to lodge the document
- verbal information provided does not clearly demonstrate a claim for remission or allow you to make an informed decision.

10. Making the decision to remit the FTL penalty

You should generally only remit the FTL penalty after:

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

The following outline instances where remission should be considered.

Circumstances beyond the control of the entity

You should remit the FTL penalty if the entity is able to demonstrate that:

- the FTL was caused by circumstances beyond their control
- those circumstances could not be predicted, and
- they or their agent were not in a position to request further time to lodge.

Where it is fair and reasonable

Even if circumstances were not beyond the entity's control, it may still be appropriate for you to remit the penalty (in full or in part) where you can make a decision that it is reasonable to do so.

The onus is on the entity to demonstrate that it is fair and reasonable to remit, considering the nature of the specific event or decision that prevented lodgment.

In making your decision, you should have regard to the reasons why we have FTL penalty (see section 2 of this Practice Statement).

Unjust result

There may be cases where imposition of the FTL penalty does not provide a just result. For example, 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.

The final penalty applied must be defensible, proper and just, taking into account the overall circumstances of the entity.

11. Examples where remission may be appropriate

The following are examples where remission would ordinarily be appropriate (not exhaustive):

- taxpayer or their agent was sick with a severe life-threatening illness, such as battling cancer
- taxpayer was caring for another person who was sick with a severe life-threatening illness
- taxpayer could not lodge as they had not received information from other parties such as employers (a payment summary for example) that would enable them to lodge - ideally, the taxpayer should be able to demonstrate they have persistently tried to get this information
- taxpayer was affected by a disaster such as fire or flood or state of emergency which took their complete attention and perhaps meant that some records were lost.

12. Examples where remission may not be appropriate

The following are examples where remission would ordinarily not be appropriate (not exhaustive):

- taxpayer claims they could not lodge on time because they were on holiday
- taxpayer claims they could not lodge on time because they were extremely busy
- taxpayer could not lodge because they were sick with a cold (or other short-lived non-severe illness)
- taxpayer requests remission because they claim that they did not receive any reminders to lodge from the ATO

- taxpayer has not yet lodged the document.

13. Legislative exemption from FTL penalty

If subsection 286-75(1A) applies, no FTL penalty should be imposed. The relevant circumstances are:

- 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 document to be lodged on time (note that the onus is on the entity to prove that they met this requirement)[18], and
- the registered agent does not lodge the document on time, and
- the failure to lodge on time was not due to either
  - intentional disregard of a taxation law by the registered agent, or
  - recklessness by the registered agent as to the operation of a taxation law.

If the request to apply the exemption is lodged by the entity, you should contact the registered agent and give them an opportunity to comment on the entity's claim.

Note: if you determine that the exemption does not apply, you can still consider if the circumstances warrant remission of the FTL penalty.

14. Notifying the entity of the remission decision

If your decision is to not remit the FTL penalty, you must advise the entity in writing of the decision and the reasons for making that decision.

15. Review rights

Remission decisions

The entity has rights of review in relation to remission decisions:

- If there are more than two penalty units remaining after the remission decision is made, the entity can object under Part IVC of the TAA.
- If there is less than two penalty units remaining, the entity can seek a review under the *Administrative Decisions (Judicial Review) Act 1977*.

Exemption decisions

The entity has no objection rights if we determine that they are not exempt from the FTL penalty under subsection 286-75(1A), but the entity can seek a review under the *Administrative Decisions (Judicial Review) Act 1977*.

16. More information

For more information, see:

- PS LA 2011/12 *Administration of general interest charge (GIC) imposed for late payment or under estimation of liability* for the ATO Policy on the remission of the GIC
- Chapter 2 - Increasing penalties for significant global entities of the Revised explanatory memorandum to the Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017 and the Diverted Profits Tax Bill 2017

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[18] See subsection 286-75(1B).