PS LA 2011/2 - Administration of penalties for the non-electronic notification (NEN penalty) and non-electronic payment (NEP penalty)

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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 the non-electronic notification (NEN penalty) and non-electronic payment (NEP penalty)**

PURPOSE: **To provide guidelines on:**

- **how the Commissioner applies NEN & NEP penalties**
- **when the Commissioner will remit NEN & NEP penalties**
- **NEN & NEP penalty objection and appeal rights**

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STATEMENT

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

2. Division 288 imposes a range of miscellaneous administrative penalties. Section 288-10 imposes a penalty for non-electronic lodgment of a GST return or for non-electronic notification of another BAS amount covered by section 388-80. Section 288-20 imposes a penalty for non-electronic payment, where an entity is required to either pay a net amount for a tax period electronically or pay a debt [1] or a withheld amount,[2] electronically.

3. This practice statement explains how the Commissioner administers the NEN penalty and the NEP penalty.[3] It provides guidance on:

   - how the Commissioner applies NEN and NEP penalty
   - how the Commissioner may remit the NEN and NEP penalty under section 298-20, and
   - NEN and NEP penalty objection and appeal rights.

4. In general, it would be considered that an entity that is required to lodge, notify and/or pay electronically by virtue of the level of turnover or amount withheld would normally have sufficiently sophisticated communications, banking and accounting systems to enable it to comply with the law. It is recognised that there may be exceptions.

5. If an entity chooses to lodge its GST return[4] electronically, it is considered that it makes an informed decision to do so and accepts it is bound to notify electronically all other Business Activity Statements (BAS) liabilities that are due on the same day.

6. It is considered that choices made by entities in regards to branching and grouping are made with the knowledge that electronic notification and payment may be required.

7. The provisions of the GST Act and the TAA mandate the electronic notification and/or payment for each of the following:

   - any entity with turnover of $20 million or more to electronically notify and pay its GST obligations[5]
   - any entity that is participating in the 'Deferred GST Scheme' to notify and pay its GST obligations electronically[6]
   - any entity that chooses or is required to lodge its GST return electronically must also notify electronically all other BAS amounts due on the same day[7], or
   - any entity classed as a 'large withholder' under the PAYG withholding system.[8]

8. Payment of GST on any taxable importations is generally collected by Customs but this has no effect on an entity's other electronic lodgment and payment obligations.

[1] Section 8AAZMA of the TAA.
[2] Subsection 16-85(1).
[3] Sections 288-10 and 288-20.
[4] GST return means a return of the kind referred to in Division 31, that complies with all the requirements of sections 31-15 and 31-25 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) and section 388-75.
[5] Subsections 31-25(2) and 33-10(2) of the GST Act.
[6] A New Tax System (Goods and Services Tax) Regulations 1999 subregulations 33-15.06(1)(b) and (c).
[7] Section 388-80.
[8] Section 8AAZMA(2) of the TAA and the definition in subsection 16-95(1).

GST & PAYG branches

9. GST branches[9] and PAYG withholding branches are classified according to the parent entity's classification.

10. In respect of GST branches and PAYG withholding branches:[10]

    - the legal obligation to pay GST and PAYG withholding amounts
    - the legal right to receive GST refunds, and
    - the legal obligation for notification of liabilities

    remains with the parent entity and is not transferred to the branch[11].

11. An entity must lodge a GST return for each branch. PAYG withholding branches and GST branches may prepare their own GST returns, but the legal obligation to lodge and pay still rests with the parent entity.[12]

GST groups[13]

12. Members of GST groups are not required to lodge a GST return unless they are also the 'representative member' [14]of the GST group. The representative member is required to pay any GST liability for the GST group and is entitled to receive any refund payable to the GST group.

GST joint ventures[15]

13. Members of GST joint ventures are not required to lodge a GST return unless they are also the 'joint venture operator'. The joint venture operator is responsible for paying the GST liability of the joint venture, and is entitled to any GST refund payable by the Commissioner to the joint venture.[16]

Exemption from electronic lodgment of GST return

14. Subsection 31-25(2) of the GST Act states that an entity with a turnover of $20 million or more may not be required to lodge electronically if the Commissioner 'otherwise approves'.

15. The Commissioner will approve an exemption from electronic lodgment of a GST return (and consequently the non-electronic notification of other BAS amounts due on the same day) in the following circumstances:

    (i) the telecommunication infrastructure has not been installed by the independent suppliers of telecommunications networks in the location where the entity or branches accounting work for these liabilities is conducted, or

    (ii) the telecommunication infrastructure is not accessible without prohibitive expense to the entity or all branches of the entity

    By way of example relevant telecommunication infrastructure includes telephone lines, satellite transmission or other third party medium.

[9] Section 54-5 of the GST Act.
[10] Section 16-142.
[11] Subdivision 54-B of the GST Act.
[12] Section 54-55 of the GST Act.
[13] Section 48-5 of the GST Act.
[14] Section 48-40 of the GST Act
[15] Section 51-5 of the GST Act.
[16] Section 51-30 of the GST Act.

Calculating the amount of NEN and NEP penalty

16. If an entity is required to lodge, notify or pay electronically but instead chooses to lodge or pay by another means (for example paper lodgment), the entity will be liable for a penalty calculated as follows:

    - a penalty of 5 penalty units[17] for non-electronic notification where an entity has made the notification in another way[18]
    - a penalty of 5 penalty units for non-electronic payment where an entity has made the payment in another way.[19]

17. The Commissioner must notify the entity in writing of its liability to pay the penalty and the reasons why the entity is liable to pay the penalty. The notification may be included in any other notice the Commissioner gives to the entity.[20]

18. The general interest charge (GIC) is applied to the balance of any unpaid penalty from the due date for payment of that penalty.[21]

Remission of penalties

19. The Commissioner has a discretion to remit penalty for non-electronic notification and/or payment under section 298-20.

20. A decision on a request for remission of the penalty for non-electronic notification and/or payment, will be made having regard to all the relevant facts, including the following:

    (i) the facts of each individual case including:

        (a) information provided by the taxpayer or their agent[22]

        (b) any other information, such as information regarding the entity's compliance with other taxation obligations, and

    (ii) the principles of natural justice and those outlined in the taxpayers' charter.

Requests for remission

21. An entity has a right to request a remission of the penalty for non-electronic notification and/or payment. The entity will need to demonstrate that remission is warranted

22. It may be appropriate to remit the NEN and/or NEP penalties if the Commissioner is satisfied on the basis of all the relevant information that:

    - the circumstances that contributed to non-electronic lodgment, notification and/or payment were not due to, or caused directly or indirectly by, an act or omission of the entity; and the entity has taken reasonable action to relieve, or relieve the effects of, those circumstances

[17] Section 4AA of the *Crimes Act 1914* describes the current value of a penalty unit.
[18] Section 288-10.
[19] Section 288-20.
[20] Section 298-10.
[21] Section 298-25.
[22] Registered tax agent or BAS agent.

- the circumstances that contributed to non-electronic lodgment, notification and/or payment were due to, or caused directly or indirectly by, an act or omission of the entity; and the entity has taken reasonable action to relieve, or relieve the effects of, those circumstances; and having regard to the nature of those circumstances, it would be fair and reasonable to remit the penalty for non-electronic notification and/or payment or part of the penalty, or
- there are special circumstances by reason of which it would be fair and reasonable to remit the penalty, or part of the penalty, for non-electronic lodgment, notification and/or payment.

23. In deciding whether it would be fair and reasonable to remit the penalty for non-electronic notification and/or payment or part of the penalty it may be relevant to have regard to one or more of the following factors (these factors are not intended to be exclusive).

- Wether the entity had access to the appropriate public infrastructure.
- Whether the entity chooses not to pay installation and/or software costs to enable electronic lodgment and/or payment.
- Whether the entity took steps an entity has, or could have, taken steps to seek finance or to direct funds from income or cash flow to enable electronic lodgment and/or payment.
- Whether action by the Commissioner has resulted in the delay in the electronic lodgment of the activity statement (for example, the Commissioner sends a paper activity statement to an entity that has an obligation to lodge electronically.

24. It is not possible to identify every circumstance likely to prevent electronic lodgment and payment that is beyond the control of an entity. However, it can generally be expected that partial or full remission will be granted where the entity can show the inability to electronically lodge and/or pay can be directly attributed to:

- the telecommunication infrastructure having not been installed by the independent suppliers in the location where the entity or branches accounting work for these liabilities is conducted , or the telecommunication infrastructure not being accessible without prohibitive expense to the entity or all branches of the entity
- a fault in the telecommunication network that was not able to be repaired in time
- natural disasters (flood, fire, drought, earthquake and the like)
- other disasters that may have, or have had, a significant impact on an entity or region where the entity or its branches operate, or
- the serious illness of those responsible for electronically notifying or paying for the entity, where there is no other person that can, or could have notified or paid.

25. Generally, it would be inappropriate to exercise the discretion to remit the penalty for non-electronic notification and/or payment as an inducement to:

- comply with other taxation laws, or
- finalise a dispute, for example a disputed assessment.

Objection provisions

26. Where the Commissioner decides not to remit an amount of NEN and/or NEP penalty, either in part or in full, the taxpayer must be advised in writing of the decision, the reasons for the decision, and their objection rights.[23]

27. An objection may be made if the Commissioner has refused, to any extent, to remit a penalty amount and the penalty amount that remains payable after the refusal is more than 2 penalty units.[24]

28. If the taxpayer is dissatisfied with an objection decision, they may:

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

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

29. Where a decision not to remit a penalty cannot be reviewed by objection (that is, the amount of penalty that remains payable after the refusal to remit are 2 penalty units or less) the taxpayer may seek a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.

[23] Subsection 298-20(2).
[24] Subsection 298-20(3).

Legislative references	TAA 1953 8AAZMA TAA 1953 8AAZMA(2) TAA 1953 Sch 1 16-85(1) TAA 1953 Sch 1 16-95(1) TAA 1953 Sch 1 16-110 TAA 1953 Sch 1 16-115 TAA 1953 Sch 1 16-142 TAA 1953 Sch 1 Div 288 TAA 1953 Sch 1 288-10 TAA 1953 Sch 1 288-20 TAA 1953 Sch 1 298-10 TAA 1953 Sch 1 298-20 TAA 1953 Sch 1 298-25 TAA 1953 Sch 1 388-75 TAA 1953 Sch 1 388-80 ADJR 1977 ANTS(GST)A 1999 31-15 ANTS(GST)A 1999 31-25 ANTS(GST)A 1999 33-10(2) ANTS(GST)A 1999 31-25(2) ANTS(GST)A 1999 48-5 ANTS(GST)A 1999 48-40 ANTS(GST)A 1999 51-5 ANTS(GST)A 1999 51-30 ANTS(GST)A 1999 Subdiv 54-B ANTS(GST)A 1999 54-5 ANTS(GST)A 1999 54-55 Crimes Act 1914 ANTS(GST)R 1999 33-15.06(1)(b) ANTS(GST)R 1999 33-15.06(1)(c)
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