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

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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contains references to provisions of the *A New Tax System (Goods and Services Tax) Regulations 1999*, which have been replaced by the *A New Tax System (Goods and Services Tax) Regulations 2019*.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 *17 December 2014*

Generated on: 22 November 2026, 06:01:19 AM

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2011/2

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This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

SUBJECT: **Administration of the penalty for the non-electronic notification (NEN penalty) and the penalty for non-electronic payment (NEP penalty)**

PURPOSE: **To provide guidelines on:**

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

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BACKGROUND

The penalties

1. Division 288 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) imposes a range of miscellaneous administrative penalties.

2. Section 288-10 of Schedule 1 to the TAA imposes a penalty for:

   - non-electronic lodgment of a GST return
   - non-electronic notification to the Commissioner under section 45-20(2A) of Schedule 1 to the TAA, or
   - non-electronic notification of another business activity statement (BAS) amount covered by section 388-80 of Schedule 1 to the TAA.

   In this practice statement, this penalty is referred to as the NEN penalty.

3. Section 288-20 of Schedule 1 to the TAA 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] a withheld amount,[2] or an instalment[3] electronically. In this practice statement, this penalty is referred to as the NEP penalty.

4. The penalty is for each offence. That is, the penalty arises separately for each activity statement amount that is notified or paid in a way that is not electronic.

Electronic lodgment

5. The provisions of the *A New Tax System (Goods and Services Tax) Act 1999* (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[4]
   - any entity with base assessment instalment income of $20 million or more to electronically notify and pay its monthly PAYG instalment 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 pay as you go (PAYG) withholding system.[8]

[1] Section 8AAZMA of the TAA.
[2] Subsection 16-85(1) of Schedule 1 to the TAA.
[3] Section 45-72 of Schedule 1 to the TAA.
[4] Subsections 31-25(2) and 33-10(2) of the GST Act.
[5] Section 45-20(2A) and 45-72 of Schedule 1 to the TAA.
[6] Paragraphs 33-15.06(1)(b) and 33-15.06(1)(c) of *A New Tax System (Goods and Services Tax) Regulations 1999.*
[7] Section 388-80 of Schedule 1 to the TAA.

6. 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.

7. An entity, whose turnover is below the electronic lodgment turnover threshold, may choose[9] to lodge its GST return[10] electronically. If so, it is considered that it makes an informed decision to do so and accepts it is bound to notify electronically all other BAS liabilities that are due on the same day.

8. Where an entity chooses to lodge the GST return electronically, it is not liable to a penalty.

9. Payment of GST on any taxable importations is generally collected by Australian Customs and Border Protection Service but this has no effect on an entity's other electronic lodgment and payment obligations.[11]

GST and PAYG branches

10. 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.

11. GST branches[12] and PAYG withholding branches are classified according to the parent entity's classification. Income tax consolidated groups (for the purposes of monthly PAYG instalment electronic notification and payment obligations[13]) are classified according to the head company's classification.

12. In respect of GST branches, PAYG withholding branches[14] and PAYG instalments the legal obligation remains with the parent entity[15] or head company to:

    - pay GST, PAYG withholding and PAYG instalment amounts
    - receive GST refunds, and
    - receive notification of liabilities.

13. 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.[16]

GST groups[17]

14. Members of GST groups are not required to lodge a GST return unless they are also the 'representative member'[18] of the GST group. The representative

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[8] Subsection 8AAZMA(2) of the TAA and the definition in subsection 16-95(1) of Schedule 1 to the TAA.
[9] Subsection 31-25(1) of the GST Act.
[10] GST return means a return of the kind referred to in Division 31 of the GST Act that complies with all the requirements of sections 31-15 and 31-25 of the GST Act and section 388-75 of Schedule 1 to the TAA.
[11] The Commissioner may make an assessment under subsection 155-5(1) of Schedule 1 to the TAA of the amount of indirect tax payable on an importation of goods and seek recovery of this amount.
[12] Section 54-5 of the GST Act.
[13] Section 45-703 of Schedule 1 to the TAA.
[14] Section 16-142 of Schedule 1 to the TAA.
[15] Subdivision 54-B of the GST Act.
[16] Section 54-55 of the GST Act.
[17] Section 48-5 of the GST Act.
[18] Section 48-60 of the GST Act.

member is required to pay any GST liability for the GST group and is entitled to receive any refund payable to the GST group.[19]

GST joint ventures[20]

15. The joint venture operator is required to lodge a GST return in relation to each GST joint venture.[21] 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.[22]

Exemption from electronic lodgment of GST return

16. 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'.

17. 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:

- the telecommunication infrastructure[23] 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
- the telecommunication infrastructure is not accessible without prohibitive expense to the entity or all branches of the entity.

STATEMENT

18. This practice statement explains how the Commissioner administers the NEN penalty and the NEP penalty.[24] It provides guidance on:

- how the Commissioner applies the NEN penalty and the NEP penalty
- how the Commissioner may remit the NEN penalty and the NEP penalty under section 298-20 of Schedule 1 to the TAA, and
- the NEN penalty and the NEP penalty objection and appeal rights.

How the Commissioner applies the NEN penalty and the NEP penalty

19. 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 the relevant penalty calculated as follows:

- a NEN penalty of 5 penalty units[25] where an entity has made the notification in another way,[26] or
- a NEP penalty of 5 penalty units where an entity has made the payment in another way.[27]

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[19] Sections 48-40 and 48-45 of the GST Act.
[20] Section 51-5 of the GST Act.
[21] Subsection 51-50(1) of GST Act.
[22] Sections 51-30 and 51-35 of the GST Act.
[23] Telecommunication infrastructure includes telephone lines, satellite transmission or other third party medium.
[24] Sections 288-10 and 288-20 of Schedule 1 to the TAA.
[25] Section 4AA of the *Crimes Act 1914* describes the current value of a penalty unit.
[26] Section 288-10 of Schedule 1 to the TAA .
[27] Section 288-20 of Schedule 1 to the TAA.

20. The Commissioner must notify the entity in writing of its liability to pay the relevant 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.[28]

21. The general interest charge (GIC) is applied to the balance of any unpaid relevant penalty from the due date for payment of that penalty.[29]

When the Commissioner will remit the NEN penalty and the NEP penalty

General

22. Under section 298-20 of Schedule 1 to the TAA, the Commissioner has a discretion to remit the NEN penalty and the NEP penalty.

23. A decision on a request for remission of the NEN penalty and the NEP penalty will be made having regard to the following:

    (a) the relevant facts of each individual case including the information provided by the taxpayer or their agent[30]

    (b) the principles of natural justice and those outlined in the Taxpayers' Charter.

Requests for remission

24. An entity has a right to request a remission of the NEN penalty and the NEP penalty. The entity will need to demonstrate that remission is fair and reasonable.

25. It may be appropriate to remit the NEN penalty and the NEP penalty if the Commissioner is satisfied on the basis of all the relevant information that there are special circumstances by reason of which it would be fair and reasonable to remit the NEN penalty and the NEP penalty or part of the penalty.

26. 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 for special circumstances where the entity can show the inability to electronically lodge and/or pay is directly attributed to:

    - the entity not having access to the appropriate public infrastructure
    - 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
    - the serious illness of those responsible for electronically notifying or paying for the entity and where there is no other person that could have notified or paid, or

[28] Section 298-10 of Schedule 1 to the TAA.
[29] Section 298-25 of Schedule 1 to the TAA.
[30] Registered tax agent or BAS agent.

- where action by the Commissioner has resulted in the delay in the electronic lodgment and payment of the activity statement.

27. Generally, it would be inappropriate to exercise the discretion to remit the NEN penalty and the NEP penalty in the following circumstances:

    - as an inducement to comply with other taxation laws, or finalise a dispute, for example, a disputed assessment
    - a deliberate act or omission of the entity resulted in non-electronic lodgment and/or payment
    - where the entity chose not to pay installation and/or software costs to enable electronic lodgment and/or payment, or
    - where the entity did not take steps to seek finance or to direct funds from income or cash flow to enable electronic lodgment and/or payment.

28. Where the Commissioner decides not to remit the NEN penalty or the NEP penalty, either in part or in full, the taxpayer must be advised in writing of the decision and the reasons for the decision.[31]

The NEN penalty and the NEP penalty objection and appeal rights

29. 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.[32]

30. 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.

31. 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 is two penalty units or less), the taxpayer may seek a review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*.

32. The Taxpayers' Charter makes commitments related to respecting client's rights to a 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.

Privacy

33. Any personal information collected by the Commissioner must comply with the *Privacy Act 1988*, in particular with the requirements of Australian Privacy Principles 5.2 and the *Tax File Number Guidelines 2011*. The Commissioner's privacy policy is located at ato.gov.au/privacy. The policy includes information on how entities can access and seek correction of information the Commissioner holds about them, how entities may complain about a breach of the Australian Privacy Principles and how the Commissioner will deal with any privacy complaint.

[31] Subsection 298-20(2) of Schedule 1 to the TAA.
[32] Subsection 298-20(3) of Schedule 1 to the TAA.

Amendment history

Date of amendment	Part	Comment
17 December 2014	Paragraphs 2, 5, 11 and 12	Updated to reflect a legislative amendment to section 288-10 to Schedule 1 of the TAA to include monthly PAYG instalment payers.
	Paragraphs 25 to 27	Updated to promote consistency on remission of penalties.
11 March 2014	Paragraph 34	Insert new paragraph 34 to reflect amendments to the *Privacy Act 1988*.
	Legislative references	Include reference to *Privacy Act 1988*.
25 September 2013	Paragraph 4	New paragraph to advise that penalty arises separately for each activity statement.
	Paragraph 8	New paragraph to advise that penalty does not apply to entities that are not under legal obligation to lodge electronically but choose to do so.
	Paragraph 23	Removed reference to example of using compliance history as a factor in remission consideration as per trend in PS LA 2012/5
	Paragraph 26	Removed example in 4th dot point of factors to consider when remitting penalty, as the example has been misconstrued by clients.
	Various	Revised general structure to enhance the readability of the LAPS

Subject references	GST electronic lodgment GST penalties non payment penalty remission of penalties
Legislative references	ADJR 1977 ANTS(GST)A 1999 Div 31 ANTS(GST)A 1999 31-15 ANTS(GST)A 1999 31-25 ANTS(GST)A 1999 31-25(1) ANTS(GST)A 1999 31-25(2) ANTS(GST)A 1999 33-10(2) ANTS(GST)A 1999 48-5 ANTS(GST)A 1999 48-40 ANTS(GST)A 1999 48-45 ANTS(GST)A 1999 48-60 ANTS(GST)A 1999 51-5 ANTS(GST)A 1999 51-30 ANTS(GST)A 1999 51-35 ANTS(GST)A 1999 51-50(1) ANTS(GST)A 1999 Subdiv 54-B ANTS(GST)A 1999 54-5 ANTS(GST)A 1999 54-55 ANTS(GST)R 1999 33-15.06(1)(b) ANTS(GST)R 1999 33-15.06(1)(c) Crimes Act 1914 4AA Privacy Act 1988 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 16-142 TAA 1953 Sch 1 45-20(2A) TAA 1953 Sch 1 45-72 TAA 1953 Sch 1 45-703 TAA 1953 Sch 1 155-5(1) 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 1 298-20(2) TAA 1953 Sch 1 298-20(3) TAA 1953 Sch 1 298-25 TAA 1953 Sch 1 388-75 TAA 1953 Sch 1 388-80
File references	1-5AHLM0M
Date issued	14 April 2011
Date of effect	14 April 2011
Contact email	OperationalPolicyAssuranceandLawWorkManagement@ato.gov.au
Section	Operational Policy, Assurance and Law