PS LA 2011/25 - Reconstructing records and making reasonable estimates for taxpayers affected by a disaster

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PS LA 2011/25
Reconstructing records and making reasonable estimates for taxpayers affected by a disaster

This Law Administration Practice Statement guides tax officers assisting taxpayers to reconstruct records and make reasonable estimates where the taxpayer has been affected by a disaster.

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.

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1. What is this practice statement about?

When a taxpayer's original records have been destroyed by a natural disaster, we can assist them or their nominated representative to reconstruct the records. This practice statement is to guide you in assisting that process.

In particular, it is to provide guidelines for:

- reconstructing records to lodge returns
- making reasonable estimates to enable the lodgment of returns for:
  - income tax
  - fringe benefit tax (FBT)
  - superannuation guarantee
  - goods and services tax (GST)
  - other documents required by a taxation law.
- if neither of these is possible, issuing a default assessment.

This practice statement sets out a range of other matters you will need to consider when assisting a taxpayer:

- establishing proof of their identity (see section 3)
- reconstructing documents for non-business individuals (section 4)
- reconstructing documents for businesses (section 5)
- default assessments (section 8)
- substantiation for various taxes (section 9)
- false and misleading statements (section 10)
- penalties (section 11).

What is a 'disaster'?

A 'disaster' is:

- a natural disaster causing localised or widespread destruction, such as a flood, a bushfire or any other such extreme weather event
- a personal disaster such as a house or business fire or any other such event.

2. General policy on disaster affected taxpayers

In general, when a taxpayer has a 'disaster-affected' indicator on a case, we will not impose penalties for:

- failure to maintain records
- failure to lodge documents or returns on time
- failure to withhold (for more information see section 11).

Processing disaster affected returns and refunds

If you receive documents and returns that follow this practice statement, clearly note 'disaster affected' in the description field on the associated Siebel work item.

Any lodgement or refund that has been marked 'disaster affected' will be fast tracked for immediate processing.

3. Establishing proof of identity

Before you can discuss the tax affairs of a taxpayer, you will need to confirm their identity by following the guidelines for establishing proof of identity set out in Chief Executive Instruction *Identity Management CEI*.

When in the field, you can call 1800 806 218 to confirm the taxpayer's identity.

4. Assisting taxpayers who are not in business with their income tax return

You can assist the taxpayer to lodge their current year income tax return by using:

- pre-fill information from *E-tax* and *myTax*
- information from the taxpayer's employer, or if these options are not available,
- net salary amounts on the taxpayer's bank statements, which need to be grossed-up to an annual amount, and have the withholding calculated.

If the requisite information cannot be obtained, consider whether the taxpayer can make a reasonable estimate of their taxable income.

Lodging the income tax return based on a reasonable estimate of a taxpayer's taxable income

- The taxpayer may be able to lodge the current year income tax return based on a signed statement by the taxpayer setting out a 'reasonable estimate' of their taxable income in a 'Reasonable estimate for documents destroyed by disasters' form which is available on ato.gov.au (see *Assistance for clients with lost or destroyed records*.

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Only one signed statement is necessary from a taxpayer to cover all lodgments made using that reasonable estimate.

Making a reasonable estimate of a taxpayer's taxable income

At the taxpayer's request, you may be able to assist them to make a reasonable estimate of their taxable income by:

- accessing previous year income data, and asking the taxpayer if this is a reasonable estimate of their current year income and deductions
- contacting third parties who are able to supply information and/or documents. The taxpayer should approach third parties in the first instance to obtain information and/or documents
- taking into account if the taxpayer is eligible to receive insurance payouts for destroyed assets
- taking into account if the taxpayer is eligible to receive assessable income protection insurance payouts
- taking into account whether the taxpayer is eligible for rebates and other entitlements
- ensure Pay As You Go withholding (PAYGW) tax credits claimed by the taxpayer matches their employer's records on the assumption those records are correct, unless there are reasonable grounds to believe otherwise
- you use the appropriate rates and tables available on ato.gov.au to work out the PAYGW tax credits if the employer's records have also been destroyed.

5. Assisting taxpayers who are in business to lodge an income tax return

You can assist the taxpayer to lodge their current year income tax return by:

- using data from Business Activity Statements (BASs) that have been lodged to construct the income tax return
- attempting to reconstruct the taxpayer's records to determine the net amounts owed for each period of lodgment where BASs have not been lodged.

You can manually input the information relating to BASs into the ATO systems which will then be used to complete the income tax return.

If all of the requisite information cannot be obtained to enable the current income tax return to be lodged, then you need to consider whether the taxpayer is able to make a reasonable estimate of their taxable income.

Assisting in making a reasonable estimate of a taxpayer's taxable income

At the taxpayer's request, you can assist in making a reasonable estimate of their taxable income by:

- using data from BASs that have been lodged to construct the income tax return
- using data available in both income tax returns and BASs from the previous three income years where there is no current BAS or only partial year BAS available
- using the data available in the above dot point make a trend-based estimate of the current income year's income and deductions, unless there are exceptional circumstances, such as:
  - our statistics as published on ato.gov.au will be applied as part of the process when averaging data
  - any estimate of this kind must take into consideration identified annual downturn in business.
- consulting with the taxpayer to determine if it is reasonable to base their income tax returns and BASs on previous years' returns and statements for the same period. In this situation, no uplift factor

should be applied. For example, if a credit was issued for the same period last year, we would generally issue a refund for the same amount.

Lodging the income tax return based on a reasonable estimate of a taxpayer's taxable income

The taxpayer may be able to lodge the current year income tax return based on a signed statement by the taxpayer setting out a 'reasonable estimate' of their taxable income in a 'Reasonable estimate for documents destroyed by disasters' form which is available on ato.gov.au.

Only one signed statement is necessary from a taxpayer to cover all lodgments made using that reasonable estimate.

If the requisite information cannot be obtained, consider whether the taxpayer can make a reasonable estimate of their taxable income.

You may also need to consider:

- Whether there are third parties who are able to supply information and/or documents. The taxpayer should approach third parties in the first instance to obtain information and/or documents.
- Whether Australian Transaction Reports and Analysis Centre (AUSTRAC) transaction reports are available to assist in reconstructing purchase and sales records for businesses. You should not pass on this information to the taxpayer.
- Is the taxpayer receiving insurance payouts for destroyed assets?
- Does the taxpayer have any Pay As You Go Instalment (PAYGI) obligations which may need to be varied?
- What rebates and other entitlements was the taxpayer eligible for previously and will continue to be eligible for?

6. Assisting taxpayers who are in business to lodge their BAS

The taxpayer may be able to lodge a BAS using a signed statement by the taxpayer setting out a 'reasonable estimate' of their GST.

If the requisite tax invoices cannot be obtained or reconstructed to enable input tax credits to be attributed to the relevant periods, consider an assessment for a net amount under section 155-5 of Schedule 1 to the TAA.

7. Assisting taxpayers who are in business with other tax obligations

PAYG withholding

You should refer to policy contained in Law Administration Practice Statement PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts* when establishing a reasonable estimate of PAYGW where business records have been destroyed. Once you have made a reasonable estimate, you will need to provide this information to the taxpayer's employees for use in their individual income tax returns.

If records have been destroyed, lodgment of PAYGW annual reports and the issuing of payment summaries will not be required.

Superannuation

You should ensure that any superannuation liability is correctly raised and reported.

If required, there can be a default assessment of superannuation guarantee shortfall and of the superannuation guarantee charge payable on the shortfall under section 36 of the *Superannuation Guarantee (Administration) Act 1992*.

Fringe benefits tax

You may also need to consider any FBT obligations.

If required, you can make a default assessment of the FBT amount and the amount of FBT payable under section 73 of the *Fringe Benefits Tax Assessment Act 1986*.

8. Default assessment

Where records have been lost or destroyed as a result of disaster and cannot be reconstructed, you can make an assessment or an estimate under various provisions of the taxation laws:

- income tax – section 167 of the ITAA 1936
- fringe benefit tax – section 73 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)
- superannuation guarantee charge – section 36 of *Superannuation Guarantee (Administration) Act 1992*
- GST or fuel tax net amount for a tax period – section 105-5 of Schedule 1 to the TAA applies for tax periods starting before 1 July 2012. For tax periods starting on or after 1 July 2012 section 155-5 of Schedule 1 to the TAA applies
- PAYGW amounts – section 268-10 of Schedule 1 to the TAA.

You may make an assessment on any basis that is reasonable in light of the information available in the particular circumstances. This includes the use of third party information, indirect audit methods, statistical information or extrapolation from previous years' returns.

You will also need to refer to Law Administration Practice Statement PS LA 2007/24 *Making default assessments: section 167 of the Income Tax Assessment Act 1936*.

9. Substantiation

Substantiation provisions in various taxation acts may prevent a taxpayer from claiming losses or outgoings unless they can provide documentary support.

Where records have been lost as a result of disaster, the provisions discussed in the following paragraphs may relieve the taxpayer of having to substantiate reconstructed records.

Income tax – Division 900-205 of the ITAA 1997

Division 900 of the ITAA 1997 sets out particular substantiation requirements for:

- work expenses
- car expenses
- business travel expenses,

and requires that individuals be able to show how they reasonably arrived at a claim for any other expense.

Under section 900-205, a taxpayer may be relieved of these obligations if:

- they have a complete copy of the original document
- a substitute document that sets out all the required information,

as these may be treated as the original document.

Alternatively, if the taxpayer does not have a complete copy or suitable substitute document, they may still be relieved of the necessity to substantiate if:

- you are satisfied that they took reasonable precautions to prevent the loss or destruction
- it was not reasonably possible for the taxpayer to get a substitute document.

For more information, see:

- Law Administration Practice Statement PS LA 2005/7 *Substantiation of deductions claimed by individual taxpayers for work and car expenses incurred in the course of earning non-business and non-investment income*, which sets out the substantiation requirements in more detail, and
- Taxation Ruling TR 97/24 *Income tax: relief from the effects from failing to substantiate*.

GST – subsection 29-70(1B) of the GST Act

If you can reasonably conclude from a document that there is a creditable acquisition, you may apply the discretion.

For detailed information, see:

- Goods and Services Tax Ruling GSTR 2013/1 *Goods and services tax: tax invoices*
- Law Administration Practice Statement PS LA 2004/11 *The Commissioner's discretion to treat a particular document as a tax invoice or adjustment note*.

If there is no document to establish the creditable acquisition, consider whether you can make an assessment under section 105-5 of Schedule 1 to the TAA or, for a tax period starting on or after 1 July 2012, under section 155-5 of Schedule 1 to the TAA.

FBT – subsection 123(5) and 123(6) of the FBTAA

If FBT documents have been lost, refer to subsections 123(5) and 123(6) and section 123B of the FBTAA for exceptions to the substantiation requirements.

10. False or misleading information

If information received suggests a taxpayer had made false or misleading information in a lodgment, or lodgment was made with the intent to:

- obtain a financial benefit the taxpayer is not entitled
- to commit fraud,

the lodgment will be subject to normal compliance activities.

Ensure that the taxpayer is fully aware that the tax law imposes heavy penalties for providing false or misleading information.

11. Penalties and interest

Penalties

A penalty is not payable until the taxpayer is informed by written notice and provided with the reason the penalty was imposed.

Refer to these practice statements for details:

- Law Administration Practice Statement PS LA 2011/19 *Administration of penalties for failing to lodge documents*

- Law Administration Practice Statement PS LA 2005/2 *Penalty for failure to keep or retain records*
- Law Administration Practice Statement PS LA 2007/22 *Remission of penalty for failure to withhold as required by Division 12 of Schedule 1 to the Taxation Administration Act 1953*
- Law Administration Practice Statement PS LA 2011/28 *Superannuation guarantee – remission of additional superannuation guarantee charge imposed under subsection 59(1) of the Superannuation Guarantee (Administration) Act 1992*

Do not impose penalty for failure to lodge taxations documents or returns on time, maintain records or failure to withhold where a 'disaster affected' indicator is present on a case.

If penalties have been automatically imposed, refer to the above practice statements and consider whether the penalty should be remitted.

Interest charges

All or part of the general interest charge (GIC) imposed for late payment may be remitted under section 8AAG of the TAA.

For guidance on when GIC may be remitted, you should refer to Law Administrative Practice Statement PS LA 2011/12 *Administration of general interest charge (GIC) imposed for late payment or under estimation of liability*. In most cases, GIC will be remitted for taxpayers who are affected by a disaster.

However, administration and nominal interest components of GIC applied to superannuation guarantee charges will not be remitted.

12. More information

For more information regarding policy on substantiation of records, you may refer to:

- Law Administration Practice Statement PS LA 2005/7 *Substantiation of deductions claimed by individual taxpayers for work and car expenses incurred in the course of earning non-business and non-investment income*
- Taxation Ruling TR 97/24 *Income tax: relief from the effects from failing to substantiate*
- *Assistance for clients with lost or destroyed records*

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