PS LA 2011/28 - Superannuation guarantee - remission of additional superannuation guarantee charge imposed under subsection 59(1) of the Superannuation Guarantee (Administration) Act 1992

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Practice Statement Law Administration

PS LA 2011/28

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SUBJECT: **Superannuation guarantee – remission of additional superannuation guarantee charge imposed under subsection 59(1) of the *Superannuation Guarantee (Administration) Act 1992***

PURPOSE: **To provide guidelines to tax officers for the remission, in whole or part, of the additional superannuation guarantee charge imposed under subsection 59(1) of the *Superannuation Guarantee (Administration) Act 1992***

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BACKGROUND

1. Part 7 of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) imposes, by way of penalty, an additional superannuation guarantee charge (referred to as the 'Part 7 penalty') where the employer fails to provide when and as required:

   - a superannuation guarantee statement (SG statement) for a quarter, or
   - information relevant to assessing the employer's liability to pay the superannuation guarantee charge (SGC) for a quarter.[1]

2. This penalty commonly applies in two situations:

   - An employer lodges an SG statement for a quarter after the due date.[2]
   - The Commissioner makes a default assessment of the employer's liability for the SGC[3] as:
     - an employer has not lodged an SG statement for a quarter,

[1] The SG statement or information may relate to an SGC arising from a failure to provide superannuation support for an employee or a failure to fulfil the choice of fund obligations for an employee in Part 3A of the SGAA.
[2] See subsection 33(1) of the SGAA.
[3] See section 36 of the SGAA and Law Administration Practice Statement PS LA 2007/10 *Making default assessments: section 36 of the Superannuation Guarantee (Administration) Act 1992* for ATO policy regarding default assessments.

- and the Commissioner is of the opinion that the employer is liable to pay SGC for the quarter.

3. The Part 7 penalty is equal to double the SGC payable for the quarter[4] (subject to remission as discussed in this practice statement).

4. The minimum amount of Part 7 penalty for a quarter is $20.[5]

5. Subsection 284-75 (3) of Schedule 1 to the *Taxation Administration Act 1953* (TAA) imposes an administrative penalty where the Commissioner determines a tax-related liability[6] without the assistance of a return, notice or other document that is required by a specified time and necessary to determine the tax-related liability (referred to in this practice statement as the 'TAA default assessment administrative penalty').

6. The base penalty amount of the TAA default assessment administrative penalty is 75% of the tax-related liability.[7]

7. Therefore, where the Commissioner makes a default assessment of an employer's liability for the SGC, two different penalties apply.

8. The Commissioner may remit, in full or in part, the Part 7 penalty[8] and may do so as part of the assessment of the penalty (an audit decision) or after the penalty is assessed (an objection decision).

9. The Commissioner may remit, in full or in part, the TAA default assessment administrative penalty,[9] and may do so as part of the assessment of the penalty (an audit decision), or after the penalty is assessed (an objection decision). A tax officer need not give the employer written notice of a decision to fully remit the penalty, and the reasons for the decision.[10] If the TAA default assessment administrative penalty is not fully remitted, the Commissioner must:

   - assess the penalty and notify the employer of the liability for the penalty;[11] and
   - give the employer written notice of the decision to not fully remit the penalty, and the reasons for the decision.[12]

10. Employers have the right to object to an assessment of a Part 7 penalty in the manner set out in Part IVC of the TAA.[13] Although there is no separate right of objection against a decision on the remission of the Part 7 penalty, an objection against a penalty assessment includes a review of the penalty remission decision.

11. Employers have a right to object to an assessment of a TAA default assessment administrative penalty in the manner set out in Part IVC of the TAA.[14] Where the penalty remission decision has been made as part of the penalty assessment, an objection against the penalty assessment will include a review of the penalty remission decision. If the penalty remission decision has been made separately from the penalty assessment, the employer has a right to object against the penalty remission decision if:

   - the Commissioner has refused to remit to any extent the amount of the penalty, and

[4] See subsection 59(1) of the SGAA.
[5] See subsection 59(3) of the SGAA.
[6] The SGC is a tax-related liability as per item 60 of the table in subsection 250-10(2) of Schedule 1 to the TAA.
[7] See item 7 of the table in subsection 284-90(1) of Schedule 1 to the TAA.
[8] See subsection 62(3) of the SGAA.
[9] See subsection 298-20(1) of Schedule 1 to the TAA.
[10] See subsection 298-20(2) of Schedule 1 to the TAA.
[11] See sections 298-10 and 298-30 of Schedule 1 to the TAA.
[12] See subsection 298-20(2) of Schedule 1 to the TAA.
[13] See section 42 of the SGAA.
[14] See subsection 298-30(2) of Schedule 1 to the TAA.

- the amount of penalty payable after the refusal to remit exceeds two penalty units.[15]

12. If the Commissioner amends an SGC assessment[16] to reflect an increased liability for the SGC, no Part 7 penalty is imposed on the additional amount of SGC if the original assessment was based on information provided by an employer. In such circumstances the penalty imposed is the TAA administrative penalty for making a false or misleading statement to the Commissioner.[17] If however, the Commissioner amends a default assessment to reflect an increased liability for SGC and the original assessment was not based on information provided by the employer, the relevant penalty imposed on the additional amount of SGC is the Part 7 penalty.[18]

13. If an SGC assessment is amended to reflect a reduced liability for the SGC, any assessment of the Part 7 penalty relating to that assessment must also be amended in proportion to the reduction in the SGC. For example, such amendments occur as a result of:

    - an objection decision, or
    - a decision by a Court or the Administrative Appeals Tribunal.

14. The failure to lodge on time penalty under subsection 286-75(1) of Schedule 1 to the TAA does not apply to the late lodgment or non-lodgment of a return, notice, statement or other document under the SGAA.[19]

STATEMENT

Remission of the Part 7 penalty

15. Tax officers should use this practice statement as a guide in exercising the Commissioner's discretion to remit any part of the Part 7 penalty to ensure that employers are treated appropriately having regard to their circumstances, so that employers in like circumstances (so far as practicable) receive like treatment. Tax officers must obtain information relevant to the penalty remission decision and fully document the relevant evidence and the basis on which the penalty remission decision is made.

16. Any decision concerning the remission of the Part 7 penalty must have regard to the circumstances of the case including the effort made by the employer to comply with the obligation to self-assess the liability for SGC. Tax officers should bear in mind that the purpose of imposing penalties is to ensure employees' superannuation entitlements are protected, and to encourage future voluntary compliance and continuing co-operation from employers. It is appropriate to treat genuine attempts to comply differently to situations where an employer does not make an effort to comply. This approach accords with principles of the Taxpayers' Charter and with the compliance model.

17. A penalty remission decision should be made following the three step process outlined at paragraphs 19 to 28 of this practice statement.

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[15] See subsection 298-20(3) of Schedule 1 to the TAA. Refer to Section 4AA of the *Crimes Act 1914* for the value of a penalty unit..

[16] The Commissioner has the power to amend an SGC assessment under section 37 of the SGAA.

[17] See subsection 284-75(1) of Schedule 1 to the TAA. The administration of this penalty is addressed in Law Administration Practice Statement PS LA 2012/5 *Administration of penalties for making false or misleading statements that result in shortfall amounts*.

[18] The TAA default assessment administrative penalty is also applicable if the assessment was amended without the provision of information from the employer. In these circumstances the remission guidance provided in paragraph 25 of this practice statement also applies to the amended assessment.

[19] See subsection 286-75(2) of Schedule 1 to the TAA.

18. In considering an objection against an assessment of the Part 7 penalty, tax officers should also consider relevant facts and circumstances that were applicable, but not known, when the original assessment of the penalty and any remission decision were made.

Step 1

19. Step 1 of the penalty remission process involves determining a basic level of remission having regard to the employer's attempt to comply with their superannuation guarantee (SG) obligations. The following table illustrates the level to which the Part 7 penalty might be remitted based on the employer's attempt to comply.

Degree of attempt to comply	**Level of penalty remission**	**The residual penalty is equivalent to:**
Genuine attempt to comply • An employer lodges an SG statement after the lodgment due date but before Australian Taxation Office (ATO) compliance action.[20]	100% of the penalty imposed.	Nil of the SGC
Moderate attempt to comply • An employer lodges an SG statement after the lodgment due date in response to ATO compliance action. * refer to paragraphs 20-21 for late payment offset considerations.	87.5% of the penalty imposed.	25% of the SGC
Default assessment- information provided by employer • A default assessment is made based on information provided by the employer after the lodgment due date in response to ATO compliance action.	75% of the penalty imposed.	50% of the SGC
Default assessment- information not provided by employer • A default assessment is made where the employer has failed to lodge an SG statement or provide relevant information in response to ATO compliance action.	62.5% of the penalty imposed.	75% of the SGC

Treatment of late payment offset (LPO) claims

20. If an employer lodges an SG statement with an LPO claim and the LPO claim is equivalent to their total SG shortfall, this may indicate that the employer has made a genuine attempt to comply. Remit the penalty by 100%.

21. If an employer lodges an SG statement with an LPO claim and the LPO claim is less than the employer's total SG shortfall, this may indicate that the employer has made a moderate attempt to comply. Under the first step of the remission process, remit the entire penalty that applies to the LPO amount and for the residual penalty not covered by the LPO, remit the penalty by 87.5%.

[20] The term 'ATO compliance action' is explained further in paragraph 31 of this practice statement.

Step 2

22. Step 2 of the penalty remission process involves determining whether a lower or higher level of remission is appropriate having regard to the employer's compliance history in relation to both:

    - their SG obligations, and
    - their obligations under other taxation laws.[21]

23. If the employer has:

    - a good compliance history, the penalty remission may be increased, or
    - a poor compliance history, the penalty remission may be decreased.

Step 3

24. Step 3 of the penalty remission process involves considering all other relevant facts and circumstances to ensure that the resulting Part 7 penalty assessment is appropriate. If, after considering such other relevant facts and circumstances, a tax officer determines that the resulting Part 7 penalty assessment would not be appropriate, they should consider increasing the level of penalty remission.

25. Paragraph 47 of this practice statement provides a non-exhaustive list of other relevant facts and circumstances that may indicate a need for further remission and the amounts by which tax officers may consider increasing the level of penalty remission. If such other relevant facts or circumstances are not present, it may still be appropriate to consider increasing the level of penalty remission. This may be appropriate to avoid a Part 7 penalty assessment that would be considered harsh in the particular circumstances of the employer.[22] Where steps 1 and 2 are appropriately applied, a penalty assessment would not typically be considered harsh in the absence of additional mitigating facts.

26. However, such further penalty remission would not usually be appropriate if the employer:

    - fully understood their SG obligations, but nevertheless failed to comply. Refer to paragraph 48 of this practice statement.
    - took steps to prevent or obstruct the ATO from determining their SGC liability. Refer to paragraphs 49-50 of this practice statement, or
    - took steps to evade payment of their SGC liability, such as through 'phoenix' activities.

27. In the more serious cases, particularly if the employer fully understood their SG obligations but took steps to obstruct the ATO or evade liability, a reduction in the level of remission may be appropriate. However, a final penalty that exceeds 90% of the SGC would only be applied in the most serious cases and should not be applied without approval of a Senior Executive Service (SES) officer.

28. In all cases, an overall assessment of whether the penalty would be harsh in the circumstances is required.

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[21] Taxation law is defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* to mean an Act or part of an Act, of which the Commissioner has the general administration, and legislative instruments made under such an Act or part of an Act.

[22] See *Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v. FC of T* [2008] FCAFC 54; 2008 ATC 20-015; (2008) 69 ATR 627.

Remission of the TAA default assessment administrative penalty

29. Tax officers should consider remitting in full an employer's liability to the TAA default assessment administrative penalty. This is regardless of the extent to which the Part 7 penalty is remitted. The Part 7 penalty, being the penalty specifically provided for by the SGAA, is usually the appropriate penalty to apply where an employer fails to comply with their SG obligations.

EXPLANATION

Application of Step 1

30. The levels of basic remission under Step 1 are to avoid harsh penalty assessments and are specified to provide clarity and consistency regarding the levels of penalties that would ordinarily be considered to be harsh. However, it is emphasized that this is the first step in the process of consideration of remission and that all of the relevant circumstances must be considered under Steps 2 and 3, before reaching a final view regarding the level of penalty remission. The particular circumstances may include factors which indicate a lesser or greater level of remission is appropriate.

ATO compliance action

31. For the purposes of this practice statement, ATO compliance action commences on the date an employer receives notification of an audit in writing or by phone, or when an employer has been given a notice of estimate of unpaid SGC.[23]

Genuine attempt to comply

32. If the employer lodges an SG statement for a quarter after the lodgment due date but before ATO compliance action, this may indicate that the employer has made a genuine attempt to comply with their SG obligations. In this situation, under the first step of the remission process, remit the penalty in full.

Moderate attempt to comply

33. If an employer lodges an SG statement after the lodgment due date in response to ATO compliance action, this may indicate that the employer has made a moderate attempt to comply with their SG obligations. In this situation, under the first step of the remission process, remit the penalty by 87.5%.

Default assessment – information provided by employer

34. If the Commissioner makes a default assessment for a quarter based on information provided by the employer in response to ATO compliance action, this may indicate that the employer has made some attempt to comply with their SG obligations. In this situation, under the first step of the remission process, remit the penalty by 75%.

[23] See section 268-15 of Schedule 1 to the TAA.

Default assessment – information not provided by employer

35. If the Commissioner makes a default assessment for a quarter due to the employer failing to lodge an SG statement or provide relevant information, this may indicate that the employer has made little or no attempt to comply with their SG obligations. In this situation, under the first step of the remission process, remit the penalty by 62.5%.

36. In those circumstances, a higher level of penalty would ordinarily apply. The basic remission of 62.5% reflects a view that a penalty in excess of 75% of the SGC would ordinarily be harsh unless there are particular circumstances that warrant a higher penalty applying.

Treatment of late payment offset (LPO) claims

37. If an employer lodges an SG statement with an LPO claim and the LPO claim is equivalent to their total SG shortfall, this may indicate that the employer has made a genuine attempt to comply. Remit the penalty by 100%.

38. If an employer lodges an SG statement with an LPO claim and the LPO claim is less than the employer's total SG shortfall, this may indicate that the employer has made a moderate attempt to comply. Under the first step of the remission process, remit the entire penalty that applies to the LPO amount and for the residual penalty not covered by the LPO, remit the penalty by 87.5%.

39. For example, if an employer's SGC that is disclosed on an SG statement is $10,000 and the employer also includes an LPO claim for $7,000, under Step 1, the Part 7 penalty amount of $20,000 is initially remitted by $14,000 (that is the portion of the penalty that applies to the LPO claim). The remaining penalty balance of $6,000 ($20,000- $14,000) is then remitted by 87.5%. Refer to example 2.

Application of Step 2

Compliance history

40. An employer's compliance history is based on their past behaviour, attitudes and actions in complying with their taxation law obligations. This is to be evaluated by objectively considering information in ATO records as well as information supplied by the employer and other parties.

41. For the purposes of this practice statement, an employer's compliance history is considered by reference to the period commencing three years before the commencement of the period subject to ATO compliance action and finishing on the date that ATO compliance action commences. For example, if the period subject to ATO compliance action is from 1 October 2008 to 31March 2011, and ATO compliance action commences on 1 October 2011, the employer's compliance history for consideration is the period between 1 October 2005 and 30 September 2011.

42. The employer's SG compliance history will be given more weight than their compliance history in respect of their obligations under other taxation laws. This is to ensure that those employers who repeatedly do not comply with their SG obligations receive a Part 7 penalty assessment that:

- is appropriate and encourages them to lodge their SG statements on time and better protect the superannuation entitlements of employees, and

- helps to maintain a level playing field amongst employers by discouraging employers from obtaining an unfair competitive advantage by using unpaid SGC as working capital or otherwise.

43. The evaluation of an employer's SG compliance history should focus on:

- the number of quarters for which the employer has failed to lodge an SG statement by the due date, or for which the Commissioner has made a default assessment, and
- the degree of the employer's attempt to comply with their SG obligations, and
- a shift in behaviour by an employer that has been subject to a previous audit. This may be demonstrated by an improvement or deterioration in their level of engagement and co-operation with the Commissioner during the compliance activity.

44. Whilst a good compliance history is generally one where the obligations of complying with the taxation laws have been met, an employer does not necessarily need to have a flawless compliance history to be considered to have a good compliance history for the purposes of this practice statement. An employer may have a good compliance history even though there are isolated instances of non-compliance in respect of their SG and other taxation law obligations, particularly if there are extenuating facts and circumstances.

45. An employer that does not have a good compliance history does not necessarily have a poor compliance history. The existence of some culpable behaviour may preclude a conclusion that the employer has a good compliance history, but the level of that culpable behaviour may not warrant a conclusion that the employer's compliance history is poor.

46. However, an employer with an established history of non-compliance and no improvement in their level of engagement with the Commissioner during a compliance activity cannot be considered to have a good compliance history.

Application of Step 3

Other relevant facts and circumstances

47. Other relevant facts and circumstances and the level of penalty remission that may be appropriate depending on the particular circumstances, include (but are not limited to):

- natural disasters, such as flood, bushfire, earthquake or the like[24] – consider increasing penalty remission to 100%
- individuals being determined, as a result of ATO compliance action, to be engaged under a contract that is wholly or principally for their labour,[25] but the employer has a reasonably held argument for not treating the individuals as employees for SG purposes – consider increasing penalty remission to 100%

[24] Please note that under subsection 33(1A) of the SGAA the Commissioner may allow an employer to lodge an SG statement on a later day.

[25] The Commissioner's view on when an individual is considered to be an employee under section 12 of the SGAA is contained in Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?*

- the provision of incorrect advice or guidance by the ATO[26] – consider increasing penalty remission to 100%
- ill health of the employer or a key employee of the employer – consider increasing remission of the residual penalty by up to 50% (or higher, including to 100% depending on the nature of the business and the circumstances and severity of the ill health)
- the employer has provided evidence that they have taken steps to mitigate the circumstances that contributed to their non-compliance with their SG obligations – consider increasing penalty remission based on the individual facts of the employer, or
- the employer's non-compliance with their SG obligations occurring in their first year of operation, and their principals having no previous business experience – consider increasing penalty remission.

Employer fully understanding their SG obligations

48. When considering the level of penalty remission for an employer that has made no attempt to comply with their SG obligations, there are circumstances that may indicate that the employer fully understood those obligations. Examples include where the employer:
    - has been previously subject to ATO compliance action relating to their SG obligations
    - has previously lodged an SG statement, or
    - is a tax or superannuation practitioner, such as a registered tax agent,[27] who would be expected to have a high level of knowledge of their SG obligations.

Employer taking steps to prevent or obstruct the ATO from determining their SGC liability

49. It is expected that during ATO compliance action, tax officers will receive reasonable co-operation from employers. However, a lack of co-operation alone does not indicate that an employer was actively seeking to prevent or obstruct the Commissioner from determining their SGC liability.[28] An action of a passive nature, such as not responding to an ATO letter, although unhelpful, is not active hindrance.

50. However, an employer will generally be viewed as taking steps to prevent or obstruct the Commissioner from determining their SGC liability, if there is:
    - repeated failure to keep appointments to supply information without an acceptable reason
    - the deliberate supply of information that is irrelevant, inadequate or misleading in regards to the accurate determination of their SG obligations, or
    - engagement in any culpable behaviour to delay the provision of information.

[26] Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the Australian Taxation Office* outlines the Commissioner's view on what is considered advice and guidance, and provides differing levels of protection in respect of the tax that would otherwise be payable, tax shortfall penalties and interest charges that may arise as a result of acting upon incorrect advice or guidance provided by the ATO.
[27] See subsection 2(1) of the TAA.
[28] See *Ebner & Anor v. FC of T* [2006] AATA 525, and *Ciprian & Ors v. FC of T* [2002] AATA 746.

51. Refer to Attachment A for a high level flowchart of the remission process.

EXAMPLES

Example 1 – Partial remission – Default assessment – information provided – First year employer

52. *An employer has an SG shortfall amount for the quarter ended 31 March 2011, and in response to an audit notification letter issued on 14 March 2012 they do not lodge the required SG statement, but provide sufficient information for a default assessment of $3,000 SGC to be made on 1 April 2012.*

53. *Applying Step 1, the tax officer determines that the employer made some attempt to comply with their SG obligations by providing information on which to assess the SG liability, and that the Part 7 penalty of $6,000 should be remitted by 75% ($4,500). The residual penalty before considering Step 2 is $1,500.*

54. *Applying Step 2, the tax officer notes that as this is the first time the employer has not complied with their SG obligations, and that their compliance history in respect of their other taxation law obligations is good despite the employer having paid their pay as you go withholding amount for the quarter ended 31 March 2011 ten days after the due date. The tax officer determines that the level of penalty remission should be increased by 5% ($300). After Step 2 the residual penalty is decreased to $1,200.*

55. *Applying Step 3, the tax officer notes that the employer is in their first year of operation and that it would not be appropriate for the employer to be required to pay the residual 20% ($1200) of the penalty. Therefore the tax officer determines that the level of penalty remission should be increased by a further 5% ($300).*

56. *After considering Steps 1, 2 and 3, the Part 7 penalty of $6,000 is remitted by 85% that is $ 5,100. As the penalty decision is equivalent to only 30% of the SGC there is no requirement to refer the decision to an SES officer. A Part 7 penalty assessment of $900 is issued against the employer, but the total TAA default assessment administrative penalty of $2,250 is remitted in full.*

Example 2- Partial remission – SG statement lodged with LPO claim for partial amount

57. *For the quarter ended 31 March 2011 an employer makes SG payments to the respective super funds of his employees. However due to cash flow issues the SG payments were not made until the 22nd June 2011. In response to an audit notification letter issued on 14 March 2012, the employer lodged an SG statement which created an SGC assessment for the quarter of $8,000 however the SG statement included an LPO claim for $6,000.*

58. *Applying Step 1, the tax officer determines that the employer made a moderate attempt to comply with their SG obligations by providing SG statements after the commencement of the audit: and that the Part 7 penalty of $16,000 should initially be remitted in full for the portion covered by the LPO that is $12,000, leaving a penalty balance of $4,000. The penalty balance not covered by the LPO claim, is further remitted by 87.5% ($3,500). The residual penalty before considering Step 2 is $500.*

59. *Applying Step 2, the tax officer notes that the employer had lodged two other SG statements after the due date but they have not previously been subject to an audit of their SG obligations. The employer's compliance history in respect of their other taxation law obligations is neither good nor poor so the tax officer*

determines there are no grounds to either increase or decrease the remission at Step 2 therefore the residual penalty remains at $500.

60. *Applying Step 3, the tax officer notes that there are no other factors to consider upon which to increase or decrease the penalty remission.*

61. *After considering Steps 1, 2 and 3, the Part 7 penalty of $16,000 is remitted by $15,500. As the penalty decision is clearly less than 90% of the SGC there is no requirement to refer the decision to an SES officer. A Part 7 penalty assessment of $500 is issued against the employer.*

Example 3 – Partial remission – Default assessment – information not provided – Employer fully understanding their SG obligations and obstruction

62. *Default assessments of an employer's SGC, totalling $20,000 were made on 20 March 2012 for the quarters ended 30 September 2010 to 30 June 2011. The employer has been subject to two previous audits (relating to the three year period between 1 July 2007 to 30 June 2010), resulting in default SGC assessments being issued at the conclusion of each audit.*

63. *Applying Step 1, the tax officer determines the Part 7 penalty of $40,000 should be remitted by 62.5% ($25,000), as the employer did not lodge an SG statement and did not provide information for the ATO to make an assessment of the employer's SGC. The residual penalty before considering Step 2 is $15,000.*

64. *Applying Step 2, the tax officer notes that the employer has been subject to two previous compliance activities and there has been no apparent shift in the employer's attitude to their SG obligations as they again did not co-operate or respond to requests for information to be sent to the Commissioner. The tax officer determines that a decrease in the level of penalty remission by 2.5% ($1,000) would be appropriate. After Step 2 the residual penalty is increased to $16,000.*

65. *Applying Step 3, the tax officer considers that based on the two previous compliance activities, the employer should have fully understood their SG obligations. The tax officer also notes that during ATO compliance action the employer obstructed tax officers by repeatedly refusing to provide information when requested. Further the employer had committed to meet but failed to appear at the agreed meeting. On that basis, the tax officer determines that a further decrease in the level of penalty remission by 5 % ($2,000) would be appropriate.*

66. *After considering Steps 1, 2 and 3, the Part 7 penalty of $40,000 is remitted by 55% that is $22,000. As the penalty decision is equivalent to, but not exceeding 90% of the SGC, there is no requirement to refer the decision to an SES officer. A Part 7 penalty assessment of $18,000 is issued against the employer, but the total TAA default assessment administrative penalty of $15,000 is remitted in full.*

Example 4 – Partial remission – Default assessments – no information provided

67. *A default assessment of an employer's SGC totalling $20,000 was made on 20 March 2012 for the quarters ended 30 September 2010 to 30 June 2011. During the compliance activity, the employer:*

- *advised that they have been unable to find the information that has been requested, but*
- *acknowledged that they have SGC liabilities for the relevant quarters.*

68. *Applying Step 1, the tax officer determines that the Part 7 penalty of $40,000 should be remitted by 62.5% ($25,000) as the employer has not provided information to the ATO. The residual penalty before considering Step 2 is $15,000.*

69. *Applying Step 2, the tax officer notes that the employer has no outstanding lodgments or debts in relation to their other taxation law obligations and that this is the first time that they have been subject to a compliance activity regarding their SG obligations. Based on their good compliance history, the level of penalty remission should be increased by 5% ($2,000.) After Step 2 the residual penalty is reduced to $13,000.*

70. *Applying Step 3, the tax officer determines there are no other relevant facts or circumstances upon which to increase or decrease the level of remission.*

71. *After considering Steps 1, 2 and 3, the Part 7 penalty of $40,000 is remitted by 67.5% that is $27,000. As the penalty decision is equivalent to 65% of the SGC, there is no requirement to refer the decision to an SES officer. A Part 7 penalty assessment of $13,000 is issued against the employer, but the total TAA default assessment administrative penalty of $15,000 is remitted in full.*

Example 5 – Full remission – SG statement not lodged on time because of natural disaster

72. *An employer has an SG shortfall amount for the quarter ended 30 June 2011. In March 2012, the employer is selected for an audit of their SG obligations. In response to the ATO compliance action, the employer lodges the required SG statement with a self-assessed SGC of $3,000 on 3 April 2012. The employer advises the tax officer that the SG statement was not lodged on time because their business premises were badly damaged by floods which occurred on 14 August 2011, 14 days before the SG statement was due to be lodged.*

73. *Applying Step 1, the tax officer determines that Part 7 penalty of $6,000 should be remitted by 87.5% ($5,250) as the employer lodged SG statements as requested after the compliance activity had commenced. The residual penalty before considering Step 2 is $750.*

74. *Applying Step 2, the tax officer notes that in addition to the late lodgment of the SG statement for the audit period, the employer lodged their SG statement for the quarter ended 31 March 2009, 21 days after the due date. Also, they lodged their business activity statements for the quarters ended 31 March 2009 to 30 September 2009 and paid the relevant amounts only after receiving lodgment reminders from the ATO. The tax officer determines that the employer neither has a good or poor compliance history, and that the level of penalty remission should remain unchanged.*

75. *Applying Step 3, the tax officer determines that the employer's inability to lodge the SG statement for the quarter was due to the damage to their business premises caused by the floods. Further, it may not have been possible in the circumstances for the employer to have made a request to lodge an SG statement on a later date. The tax officer therefore decides that it would not be appropriate for the employer to pay the penalty.*

76. *The tax officer remits the Part 7 penalty in full.*

Example 6 – Full remission – Employer's genuine belief that they do not have to pay SG contributions for a particular person

77. *On 20 March 2012, default assessments of an employer's SGC totalling $25,000 were made for the quarters ended 31 March 2009 to 30 June 2011 in*

respect of an individual determined by the Commissioner to be an employee. Throughout the audit process, the employer contended that the individual was a contractor for the relevant quarters and not an employee. They submitted evidence and a detailed argument to support that contention. The individual who registered the complaint also provided evidence relating to their employment arrangements.

78. *The tax officer analysed the evidence provided by both parties and acknowledged the employer presented a well constructed and cohesive argument. However, the tax officer disagreed with the employer's interpretations of critical common law tests relating to control and delegation relevant to whether the individual was a contractor.*

79. *A position paper was provided to the employer explaining why the Commissioner had formed his view the individual was an employee and not a contractor. The employer was advised that unless they could supply additional evidence to support their contention, they were required to lodge an SG statement. The employer did not present any new information but maintained their position they did not have an SGC, accordingly they advised the tax officer they would not be lodging SG statements. The employer also made it clear they intended to challenge the Commissioner's interpretations by lodging objections to the default SGC assessments.*

80. *Applying Step 1, the tax officer determines that the Part 7 penalty of $50,000 should be remitted by 62.5% ($31,250) as the employer did not provide information on which to assess the SGC liability. The residual penalty before considering Step 2 is $18,750.*

81. *Applying Step 2, the tax officer notes that apart from the periods covered by the default assessments, the employer has complied with their SG and other taxation obligations. On that basis, the tax officer determines that the employer has a good compliance history, and that the level of penalty should be reduced by 5% ($2,500). After Step 2 the residual penalty is reduced to $16,250.*

82. *Applying Step 3, the tax officer determines that but for the employer's reasonably held argument that the individual was not an employee, they would have complied with their SG obligations. On that basis, the tax officer determines that it would not be appropriate for the employer to be required to pay the residual penalty of $16,250.*

83. *The tax officer remits the total Part 7 penalty in full. The total TAA default assessment administrative penalty of $18,750 is also remitted in full.*

Example 7 – Partial remission – Employer's belief that they do not have to pay SG contributions for a particular person is not a reasonably held argument

84. *An employer is audited as a result of a complaint by an individual. Initially the employer contended the individual was a contractor and not an employee and the employer submitted evidence to support that contention. The individual who registered the complaint also provided evidence relating to their employment arrangements.*

85. *The tax officer analysed the evidence provided by both the employer and individual and determined there was absolutely no basis to support the employer's contention the individual had met common law tests, relating to control, integration, results, risk, delegation and terms of engagement, which would indicate they were a contractor.*[29]

[29] The Commissioner's view on when an individual is considered to be an employee under section 12 of the SGAA is contained in SGR 2005/1.

86. *A position paper was provided to the employer explaining why the Commissioner had formed his view that the individual was an employee and not a contractor. The employer was advised that unless they could supply additional evidence to support their contention, they were required to lodge an SG statement.*

87. *The employer did not provide any additional evidence and ignored further requests to lodge an SG statement. A default assessment of the employer's SGC was made totalling $25,000 for the quarters ended 31 March 2009 to 30 June 2011.*

88. *Applying Step 1, the tax officer determines the Part 7 penalty of $50,000 should be remitted by 75% ($37,500) as the employer had made some attempt to comply by providing information to the tax officer which was used to make a default assessment of the employer's SGC. The residual penalty before considering Step 2 is $12,500.*

89. *Applying Step 2, the tax officer notes that apart from the periods covered by the default assessment of the employer's SGC for the individual, the employer has complied with their SG and other taxation obligations. On that basis, the tax officer determines that the employer has a good compliance history and the level of penalty should be further remitted by 5% ($2,500). After Step 2 the residual penalty is reduced to $10,000.*

90. *Applying Step 3, the tax officer determined that the employer failed to make a reasonably held argument that the employee was a contractor and as there were no other unusual or extenuating circumstances, there were no grounds for further remission. On that basis, the tax officer determined it would be appropriate for the employer to be required to pay the residual penalty of $10,000.*

91. *A Part 7 penalty assessment of $10,000 is issued against the employer. As the penalty decision is equivalent to 40% of the SGC there is no requirement to refer the decision to an SES officer. The total TAA default assessment administrative penalty of $18,750 is also remitted in full.*

Example 8 – Partial remission – Repeated late lodgment of SG statements

92. *An employer has SG shortfall amounts for the quarter ended 31 December 2010 and on 24 March 2011 lodges the required SG statements for the quarter with the total self-assessed SGC of $10,000. In March 2012, the employer is selected for ATO compliance action.*

93. *Applying Step 1, the tax officer determines that the employer has made a genuine attempt to comply with their SG obligations, and that for the purposes of Step 1 the total Part 7 penalty of $20,000 should be remitted in full.*

94. *Applying Step 2, the tax officer notes that the employer also lodged the SG statements for the quarters ended 30 September 2008 to 31 March 2010 late, although without being prompted by the ATO. The employer's repeated late lodgment of SG statements for seven consecutive quarters is a clear indication they fully understand their obligation to lodge an SG statement but they have failed to lodge by the due date on each occasion. The tax officer determines the employer's habitual lodgment of SG statements after the due date, illustrates the employer's behaviour to comply with their SG obligation is not improving. Based on the employer's poor compliance history the level of penalty should be 7.5% ($1,500).*

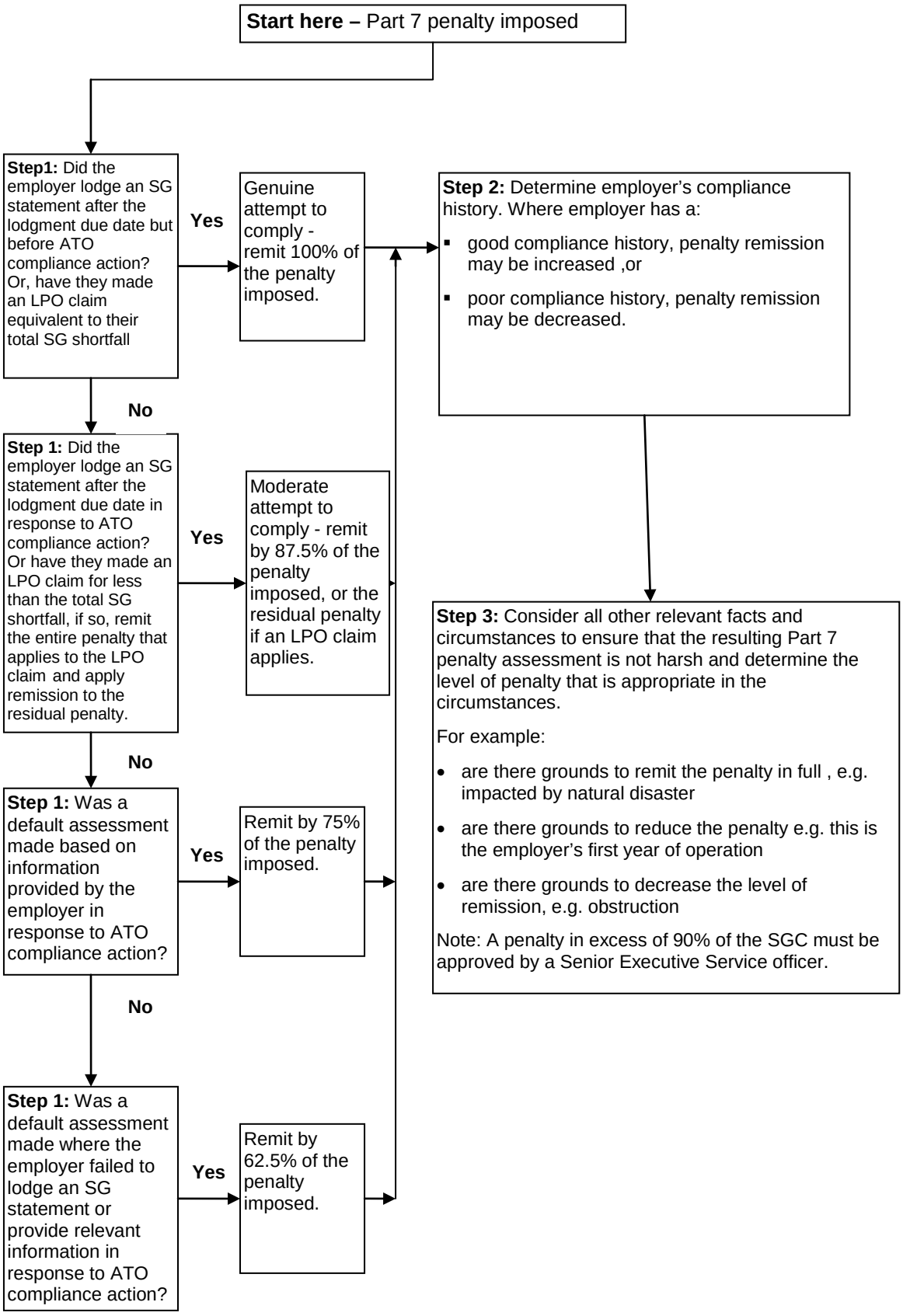
95. *Applying Step 3, the tax officer considered the employer's repeated late lodgment of SG statements for seven consecutive quarters however as this was the first time the employer had been subject to an audit, the tax officer*

determined the residual penalty of 15% of the SGC was appropriate. Therefore the level of penalty remission should be neither increased nor decreased. However the tax officer did remind the employer of their obligation to lodge all future SG statements by the due date. Further, the tax officer warned the employer if they were to be subject to further compliance action and they continued to lodge SG statements after the due date, at Step 3 the tax officer would consider decreasing the level of remission which would result in a higher level of penalty.

96. *After considering Steps 1, 2, and 3, the Part 7 penalty of $20,000 is remitted by 92.5%, i.e. $18,500. As the penalty decision is equivalent to 15% of the SGC, there is no requirement to refer the decision to an SES officer. A Part 7 penalty assessment of $1,500 is issued against the employer.*

Attachment A

Overview of the three step Part 7 penalty remission process.



Amendment history

Date of amendment	Part	Comment
9 April 2014	Contact details	Updated.
12 December 2012	Footnote 15	Updated.
16 November 2012	Generally	Updated to current corporate publication style.
	Paragraph 14	Deleted.
	Footnote 17	PS LA 2012/5 has replaced withdrawn PS LA 2006/2.
	Paragraph 31	Updated to reflect that the commencement of ATO compliance action includes when an employer has been given a notice of estimate of unpaid SGC.
26 July 2012	Attachment A	Table replaced.
	Contact details	Contact officer and telephone number updated.
12 July 2012	Generally	Updated to current ATO publishing style to aid in readability and conformity in document.
	Table of Contents	Amended to reflect changes in the document
	Paragraph 20 and footnote 21	Table updated to clarify application of step 1 and updated paragraph reference in footnote 21.
	Paragraph 22 and 46	Removed percentages
	Paragraph 28	New paragraph to include SES authorization as a process step for staff.
	Paragraph 31	New paragraph to emphasize the 3 step process.
	Paragraphs 30-33	Minor editing to provide clarification of remission levels.
	Paragraph 35-37	Changed from no attempt to comply to default assessments with and without information. New paragraph to provide clarity for application of step 1 in particular to avoid harsh outcomes.
	New paragraph 41 (old paragraph 34)	Deleted reference to specify level of compliance with other taxation laws and lodgement.
	New paragraph 44 (old paragraph 36)	New bullet point to include consideration of improvement or deterioration on compliance.
	New paragraph 48 (old paragraph 43)	Amendment to dot points.
	Paragraph 49	Added to refer to flow chart
	Paragraphs 53-97	Examples 1-6 rewritten to provide greater clarity of the 3 step process.
	Attachment A	Moved from end of document to directly follow text and before amendment history.

Date of amendment	Part	Comment
30 March 2012	Contact details	Updated contact officer and telephone number.
20 February 2012	Paragraph 12	Updated to reflect when an amount of Part 7 penalty may be increased upon an increase in an assessment of the SGC.
	Paragraphs 2 and 14	Minor changes made for readability.
	Footnotes	Editing changes to some footnotes.
	Example 4	Editing changes for readability.
19 October 2011	Numerous paragraphs	Some dates used for illustrative purposes have been amended to ensure that they correctly align with the practice statement's date of effect of 15 September 2011.

Subject references	Part 7 penalty penalty remission superannuation guarantee charge superannuation guarantee charge assessment superannuation guarantee statement TAA default assessment administrative penalty
Legislative references	SGAA 1992 SGAA 1992 12 SGAA 1992 Pt 3A SGAA 1992 33(1) SGAA 1992 33(1A) SGAA 1992 35 SGAA 1992 36 SGAA 1992 37 SGAA 1992 42 SGAA 1992 Pt 7 SGAA 1992 59(1) SGAA 1992 59(3) SGAA 1992 62(3) TAA 1953 2(1) TAA 1953 8ZE TAA 1953 Pt IVC TAA 1953 Sch 1 250-10(2) TAA 1953 Sch 1 284-75(1) TAA 1953 Sch 1 284-75(3) TAA 1953 Sch 1 284-90(1) TAA 1953 Sch 1 286-75(1) TAA 1953 Sch 1 286-75(2) TAA 1953 Sch 1 298-10 TAA 1953 Sch 1 298-20(1) TAA 1953 Sch 1 298-20(2) TAA 1953 Sch 1 298-20(3) TAA 1953 Sch 1 298-30 TAA 1953 Sch 1 298-30(2) TAA 1953 Sch 1 388-55(1) ITAA 1997 995-1(1) Crimes Act 1914 4AA
Related public rulings	SGR 2005/1 Superannuation guarantee: who is an employee?
Related practice statements	PS LA 2007/10 Making default assessments: section 36 of the Superannuation Guarantee (Administration) Act 1992 PS LA 2008/3 Provision of advice and guidance by the Australian Taxation Office PS LA 2012/5 Administration of penalties for making false or misleading statements that result in shortfall amounts
Case references	Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v. FC of T [2008] FCAFC 54; 2008 ATC 20-015; (2008) 69 ATR 627 Ebner & Anor v. FC of T [2006] AATA 525; 2006 ATC 2263; (2006) 63 ATR 1073 Ciprian & Ors v. FC of T [2002] AATA 746; 2002 ATC 2099; (2002) 50 ATR 1257
File references	1-2ACKESG

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