PS LA 2011/30 - Remission of administrative penalties relating to schemes imposed by subsection 284-145(1) of Schedule 1 to the Taxation Administration Act 1953

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Practice Statement Law Administration

PS LA 2011/30

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.

Taxpayers can rely on this law administration practice statement to provide them with protection from interest and penalties in the way explained below. 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 law administration 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.

SUBJECT:	**Remission of administrative penalties relating to schemes imposed by subsection 284-145(1) of Schedule 1 to the *Taxation Administration Act 1953***
PURPOSE:	**To provide guidance on remission of administrative penalty relating to scheme shortfall amounts**

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BACKGROUND

1. Part 4-25 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)[1] sets out the uniform administrative penalties regime that applies to entities[2] for failing to satisfy their obligations under the taxation laws.[3] Uniform penalties will apply where an entity fails to satisfy the same type of obligation under different taxation laws.

2. An entity is liable to an administrative penalty where they get a scheme benefit or attempt to get a scheme benefit from a scheme[4], and they entered into or carried out the scheme with the sole or dominant purpose of getting a scheme benefit. Tax avoidance schemes are, broadly, arrangements designed to avoid or defer tax obligations and to which an adjustment provision can be applied. Schemes often involve a series of complex transactions in order to avoid or minimise tax otherwise payable or to increase a credit that an entity is not otherwise entitled to.

3. A scheme benefit under section 284-150 can consist of either a reduction in a tax-related liability or an increase in payment or credit. An adjustment provision is a provision in the tax law, including Part IVA of the *Income Tax Assessment Act 1936*, which operates to eliminate a scheme benefit.

4. The scheme shortfall amount is the scheme benefit amount that an entity would have got from a scheme apart from the adjustment provision, and is, therefore, the difference between the tax-related liability of the entity under the scheme and the tax-related liability apart from the scheme: subsections 284-150(1) and 284-150(2).[5]

5. Under paragraph 284-160(a), the base penalty amount is calculated as:

   - 50% of the scheme shortfall amount, or
   - 25% of the scheme shortfall amount if it is reasonably arguable that the adjustment provision does not apply to the scheme.

6. The administration of Subdivision 284-C penalties involves three main steps:

   - Step 1 – Determine whether a penalty is imposed by law
   - Step 2 – Assess the amount of the penalty:
     - determine the shortfall amount
     - determine the base penalty amount (BPA)
     - determine whether the BPA is increased or decreased under any of the provisions of Subdivision 284-D
     - determine if remission under subsection 298-20(1) is appropriate.
   - Step 3 – Notify the entity of the liability to pay the penalty.

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[1] All legislative references in this practice statement refer to Schedule 1 of the TAA unless indicated otherwise.

[2] An entity is defined in section 960-100 of *the Income Tax Assessment Act 1997*.

[3] Subsection 2(2) of the TAA specifies Acts which are not taxation laws for the purposes of Subdivision 284-B in Schedule 1.

[4] A scheme is defined in section 995-1 of the *Income Tax Assessment Act 1997* to be any arrangement; or any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

[5] Subsection 284-150(3) provides a particular formula for working out a scheme shortfall amount to the extent that it is due to errors in working out tax cost setting amounts in a consolidated group, and the errors were made in a statement before the Commissioner became aware of the errors.

7. The Commissioner has the discretion to remit all or a part of the penalty under section 298-20. The Commissioner should consider remission as part of Step 2, after it has been determined if the base penalty amount is increased or reduced under Subdivision 284-D.[6]

SCOPE

8. This practice statement must be used when considering the remission under subsection 298-20(1) of penalties imposed under subsection 284-145(1) of Subdivision 284-C. This practice statement only applies to penalties imposed under subsection 284-145(1), and does not apply to 'transfer pricing scheme penalties' imposed under subsection 284-145(2).

9. Subdivision 284-C applies to things done in relation to :

   - for income tax, the 2000-01 income year and later years
   - for fringe benefits tax, the year commencing 1 April 2001 and later years, and
   - for other taxes, the year commencing 1 July 2000 and later years.

10. If an entity has a shortfall amount that is not a scheme shortfall amount, Subdivision 284-C will not need to be considered. In these situations, Subdivision 284-B may apply.

11. Remission of administrative penalties where Subdivisions 284-B and 284-C may apply to the same shortfall amount/scheme shortfall amount are dealt with in *Law Administration Practice Statement PS LA 2008/18 Interaction between Subdivisions 284-B and 284-C of Schedule 1 to the Taxation Administration Act 1953*.

STATEMENT

12. Under section 298-20, the Commissioner has the discretion to remit all or part of the schemes penalty. After all the prior steps required under the penalty legislation have been applied correctly, a remission decision should be made.

13. The Commissioner must consider remission whenever an entity is liable to penalty under subsection 284-145(1). Tax officers making an assessment of penalty must determine in every case whether the base penalty amount or adjusted base penalty amount should be remitted in full or in part.

14. This practice statement provides guidelines on how the discretion to remit the penalty may be exercised. There is no intention to lay down conditions that may restrict the exercise of the Commissioner's discretion. Nor does the practice statement represent a general exercise of the Commissioner's discretion. Rather, the guidelines are provided to:

   - guide tax officers in the exercise of the discretion, and
   - assist in ensuring entities receive consistent treatment.

[6] It is also possible for remission to be considered after Step 3, once the entity has been notified of the amount of penalty assessed, but the genera practice is for the entity to lodge an objection to the assessment including remission of penalty.

15. The guiding principles are that the discretion should be exercised:

- so there is consistent treatment of penalty rates - the penalty rate is set by law and remission without just cause, arbitrarily or as a matter of course may compromise consistent treatment of penalty rates
- where it is fair and reasonable to do so; or
- to treat entities in like circumstances consistently.

16. The following general considerations also should be borne in mind when considering whether or not to exercise the discretion to remit:

- An entity entering into any tax planning arrangement is expected to be aware of the risks inherent in their position.
- Any decision to enter into an arrangement places the onus on the entity involved to familiarise themselves with the arrangement, its operation and the consequences, including tax outcomes. The entity accepts the risks once they decide to enter the arrangement.
- The entity is expected to have investigated the arrangement and its potential tax consequences. The entity is expected to adopt a reasonable and sensible approach to the investigation and to try to avoid entering into a tax avoidance scheme.
- An entity should be aware that if they enter into a tax planning arrangement which is later shown to be a tax avoidance scheme they risk having to pay a tax liability, plus penalties and interest charges.

17. Within the framework of the compliance model and the Taxpayers' Charter, remission decisions should consider whether the penalty outcome is unjust, having regard to whether:

- the entity made a genuine attempt to comply with their tax obligations considering their personal circumstances, that is, they took all reasonable and sensible steps to avoid entering into a tax avoidance scheme; and
- the entity has a good compliance history; or
- an unjust outcome results for the entity as a result of imposition of the schemes penalty or if the penalty is not remitted.

18. The following statements and principles in the Taxpayers' Charter should be taken into account:

- an entity should be presumed to have been honest unless there is information which suggests otherwise
- conclusions about an entity's behaviour should only be made where they are supported by facts or where reasonable inferences can be drawn from those facts, and
- an entity should be contacted and given the opportunity to explain their actions before the schemes penalty decision is made.[7]

[7] Law Administration Practice Statement PS LA 2006/2 *Administration of shortfall penalty for false or misleading statement*, paragraph 16.

EXPLANATION

Genuine attempt to comply with tax obligations

19. A key indicator of an entity making a genuine attempt to comply is whether they have displayed a reasonable investigative approach to the steps and risks associated with their tax position appropriate to their personal circumstances. Each entity has the responsibility to make reasonable and sensible enquiries to determine the risks associated with the tax position they may choose or have chosen in entering into an arrangement.

20. Penalty remission is more likely to occur when an entity can show a degree of investigation and analysis appropriate to their personal circumstances. Examples of investigative behaviour include:

- checking the provider's Australian Financial Services (AFS) licence details[8]
- checking if there is a product disclosure statement or prospectus
- obtaining independent advice from an adviser who has no connection with the seller, the investment scheme or promoter of the arrangement – advice obtained from the seller or promoter is not independent advice
- checking if the scheme is covered by an ATO product ruling
- checking if a Taxpayer Alert has issued on the scheme
- applying for a private ruling; or
- ensuring that implementation of the arrangement proceeds in line with the promoter's or seller's advice or as covered in a relevant ruling.

21. An entity does not have to display all of these elements to show an investigative approach. The ATO expects the degree of investigation to reflect the risk, complexity of tax affairs, and the level of sophistication and resources of the entity. Entities with greater sophistication or resources, relatively more complex affairs or riskier or larger transactions with greater financial implications for the revenue are expected to take greater steps in determining their tax position, even if a registered tax agent or other adviser has been used.

22. In addition to making reasonable and sensible enquiries, an entity should assess or evaluate the material or information gathered or that is available in respect of the investment scheme. Where an entity evaluates the information and it would have been reasonable to have concerns that they were entering a tax avoidance arrangement or scheme, it would be difficult to justify remission.

23. Any entity that does not investigate or undertakes inadequate investigation is considered by the Commissioner as likely to not have made a genuine attempt to comply. Unless there is some compelling particular or personal circumstance or unjust outcome, penalty remission would be difficult to justify.

24. As a general rule, it would be difficult to justify remission in relation to a claim that an entity merely followed professional advice, if it is advice an ordinarily prudent person of comparable experience and expertise would not accept without taking further steps to be sure of their position.

[8] An AFS licence is issued by the Australian Securities and Investment Commission. Anyone who offers financial products and advice must be:
(i) an AFS licence holder
(ii) a director or employee of an AFS licence holder, or
(iii) an Authorised Representative of an AFS licence holder.

25. Generally, it would be difficult to justify a remission in any of the following circumstances:

- an entity has taken a frivolous position or a position that lacks substance with little prospect of success in the courts, particularly if they did not query advice which is without substance
- an entity has relied on a mere speculative opinion, even if the opinion is from an expert source - in this context a speculative opinion or advice involves significant conjecture as to the facts or in its reasoning leading to conclusions which are speculative
- an entity was advised that there was 'a chance' of success with the argument with no indication whether the position was reasonably arguable; or
- an entity has undertaken a deliberate course of action to find and exploit a scheme, or build a scheme specific to their circumstances, for example a 'boutique' scheme.

26. Additionally, many arrangements have several steps in them. It is the responsibility of an entity or their agent to confirm that those steps occur before lodging a tax return or activity statement. For instance, the ATO would expect an entity to be aware that loan documents must be signed and put into effect in law before interest deductions can be claimed and seek assurances or confirm that they were.

27. The ATO publishes Taxpayer Alerts about particular schemes or arrangements. These should be taken into account when considering remission of penalties. As a general rule, remission is difficult to justify for those entities choosing to enter into schemes or arrangements which are the subject of a Taxpayer Alert or other applicable ATO publication.

28. The absence of a Taxpayer Alert or other ATO publication is not to be understood as the ATO endorsing a scheme or arrangement in any way.

29. Schemes range from the blatantly artificial or groundless to those which may involve a reasonably arguable position[9]. Remission is less likely to be granted as the schemes become more egregious through blatant, artificial or contrived arrangements.

Personal circumstances

30. Remission should be considered if an entity, at a disadvantage due to factors including their age, health and background, or through their low level of knowledge or understanding of the tax system, participated in a scheme.

31. Generally, some remission of penalties may occur in circumstances where an entity has been coerced into entering or participating in the scheme by an intermediary, such as an advisor or promoter, where the promoter has taken improper advantage, or exerted undue influence affecting the quality of consent given by the entity.[10]

[9] MT 2008/2 provides guidance on taking a position that is not reasonably arguable.
[10] *Bester v. Perpetual Trustee Co Ltd* [1970] 3 NSWR 30.

32. An entity may also be in a position of special disadvantage primarily due to the intermediary unduly using their position to influence the entity's decision. This can occur if the entity is not in a position to make an informed assessment about the scheme arrangement and defers to the intermediary's perceived expertise. As a result, the entity accepts the promoter's advice and does not have an understanding of their true tax risk due to their lack of knowledge or taxation sophistication. In these circumstances, remission of penalties should be considered if the entity can show that they only gave their permission to be involved in the scheme due to the intermediary actively taking advantage of their special disadvantage, or the other party's undue influence.

33. Remission may also be justified where, for example, an entity obtains a benefit from a scheme, but they were not the one entering into or carrying out the scheme. The entity would also have to show they had no knowledge of the scheme and could not reasonably be expected to have knowledge of the scheme.

Example

34. *A trustee of a discretionary trust decides to enter into a scheme. The scheme enables the net income of the trust estate to be significantly reduced and results in the trust income exceeding the net income. The trustee is subsequently able to distribute a significant non assessable distribution to the beneficiaries. The beneficiaries are used to receiving variable distributions due to the nature of their interest. The beneficiaries do not control the trustee.*

35. *If the effect of the scheme is overturned, the beneficiaries incur a shortfall and the penalty is worked out under Subdivision 284-C. If the beneficiaries are able to establish that they were not in a position to have any involvement in the established trust decision-making processes and they had no reason to suspect the trustee was involved in the scheme, remission is appropriate for the beneficiaries*. *The scheme shortfall penalty imposed on the trustee is subject to a separate remission decision.*

36. It would generally not be appropriate to remit scheme shortfall penalties where the entity that entered into the scheme is also an intermediary engaged in promoting, marketing, advising on, or implementing a scheme which did not involve a reasonably arguable position.[11] These entities would normally be aware of the risk inherent in the scheme, including the avenues available to them under the taxation laws to obtain a product ruling or private binding ruling from the Commissioner to mitigate the risks about the taxation consequences of the arrangement.

Compliance history and behaviour

37. Generally, in cases with similar factors, remission would be more appropriate for an entity with a good relevant compliance history and less appropriate for an entity with a poor relevant compliance history.[12]

38. A particular factor to consider is the entity's involvement with previous schemes. Remission is less likely for an entity with a history of involvement in schemes, or involvement in multiple schemes.

[11] PS LA 2008/7 and PS LA 2008/8 provide guidance on the application of the promoter penalty provisions to potential tax exploitation schemes.

[12] An entity's compliance history refers to the entity's compliance with all of the entity's taxation obligations including registration, lodgment, lodging correct returns, activity statements and other documents required to be lodged under taxation laws, as well as correct and timely payment of tax liabilities.

Unjust outcome

39. In addition to the matters discussed above, there may be other cases where the penalty imposed may provide an unjust result to the entity. In such cases, the Commissioner may remit the penalty imposed by the law in whole or in part.

40. This can occur where the mechanical process of the law may result in an unjust result. For example where two or more penalties were imposed on the same day, the second and subsequent penalties will be increased by 20% of the BPA under section 284-220, even if the entity has not been advised of a previous penalty. If there is no evidence or reasonable inference that the entity deliberately or knowingly entered into a tax avoidance scheme, the 20% uplift should be remitted.

41. It is envisaged that any other situation warranting remission for an unjust result would be infrequent. The remission decision will turn on the facts of the case and the result must be patently unjust for remission to occur.

Widely-based Settlement Panel

42. A Widely-based Settlement Panel (the panel) has been established to ensure that the terms and conditions of widely-based settlement proposals adopted by the ATO are:

- subject to the application of the Code of Settlement Practice
- consistent and appropriate and
- the reasons for the adopted proposals are transparent.

43. Widely-based tax disputes include tax avoidance schemes and arrangements the ATO considers to be ineffective either through the operation of the ordinary provisions of the law or the application of a specific or general anti-avoidance rule.[13]

44. The application of this practice statement is subject to the application of the Code of Settlement Practice by the panel.

45. The panel will consider and make recommendations on the remission of penalties, including schemes penalty in cases that are presented to them but, the panel is not the final decision maker.

46. Where it is considered appropriate to grant remission of penalty as part of the settlement, then the panel will recommend terms that would normally apply equally to the same type of entity engaged in the same widely-based scheme. This should ensure entities of similar background and knowledge participating in the same scheme are treated equitably.

Remission decisions, including partial remission

47. The remission decision is based on an objective analysis of all the relevant factors in a case. The Commissioner considers whether the entity has made a genuine attempt to comply with tax obligations, other personal circumstances and their compliance history. No one factor alone will determine if remission should be given or the quantum of any remission.

[13] PS LA 2007/6 provides guidance on the settlement of widely-based tax disputes.

48. The considerations listed in this practice statement are not exhaustive and are not intended to prescribe the only valid factors. Rather, they are designed to encourage an analytical approach to each case and the application of sound judgment in making the remission decision. Each remission decision should be based on an objective consideration of all the relevant factors in the case.

49. A remission decision may result in no remission, partial remission or full remission of the penalty.

Notification of penalty and objection rights

50. The Commissioner must make an assessment of the amount of an administrative penalty under Subdivision 284-C.[14] If the Commissioner decides not to remit a penalty, or to partially remit the penalty, the Commissioner must give written notice of the decision and the reasons for the decision to the entity.[15]

51. Generally, tax officers should notify an entity of the penalty decision, including its liability to pay the schemes penalty, reasons for the penalty and reasons for not remitting in full prior to or at the same time that the assessment of the penalty is issued.

52. An entity that is dissatisfied with an assessment of penalty may object in the manner set out in Part IVC of the TAA. [16] The grounds of the objection may include all elements of the penalty assessment.

53. In the usual situation, where a remission decision is part of an assessment of penalty, the affected entity who is dissatisfied with the assessment will include in their objection any grounds about their dissatisfaction with the remission.

54. If a remission decision is made after an assessment of penalty, the entity may object to the separate remission decision in the manner set out in Part IVC of the TAA if the amount of penalty remaining after the decision is more than two penalty units.[17]

55. If a penalty has been remitted in full, an entity cannot object to that decision, as the entity is not dissatisfied with the decision.

56. If the entity objects against the determination of a primary tax-related liability, and the determination of the objection results in a reduction of the scheme shortfall amount, then the amount of the corresponding shortfall penalty is proportionately reduced. This is not a remission decision and no separate objection rights attach to the recalculation of the penalty.

[14] Subsection 298-30(1).
[15] Subsection 298-20(2).
[16] Subsection 298-30(2).
[17] Subsection 298-20(3). The value of a penalty unit is contained in section 4AA of the *Crimes Act 1914* and is indexed regularly. A table containing penalty unit values can be found by searching for 'penalty unit' on ato.gov.au.

Amendment history

Date of amendment	Paragraph	Comment
25 June 2020	Paragraph 54 including footnote 17	Removed specific dollar value for a penalty unit; included a reference to the source of the penalty unit value and where to locate it.
23 May 2014	Paragraph 17	Omitted ‘harsh’; substituted ‘unjust’.

Subject references	Penalties Remission of penalties Tax administration
Legislative references	TAA 1953 2(2) TAA 1953 Pt IVC TAA 1953 Sch 1 Pt 4-25 TAA 1953 Sch 1 Subdiv 284-B TAA 1953 Sch 1 Subdiv 284-C TAA 1953 Sch 1 Subdiv 284-D TAA 1953 Sch 1 284-145 TAA 1953 Sch 1 284-145(1) TAA 1953 Sch 1 284-145(2) TAA 1953 Sch 1 284-150 TAA 1953 Sch 1 284-150(1) TAA 1953 Sch 1 284-150(2) TAA 1953 Sch 1 284-150(3) TAA 1953 Sch 1 284-160(a) TAA 1953 Sch 1 298-20 TAA 1953 Sch 1 298-20(1) TAA 1953 Sch 1 298-20(3) TAA 1953 Sch 1 298-30(1) TAA 1953 Sch 1 298-30(2) ITAA 1936 Pt IVA ITAA 1997 960-100 ITAA 1997 995-1 ANTS(GST)A 1999 Div 165 Fuel Tax Act 2006 Div 75
Related public rulings	MT 2008/2
Related practice statements	PS LA 2006/2 PS LA 2007/6 PS LA 2008/7 PS LA 2008/8 PS LA 2008/18
Case references	Bester v. Perpetual Trustee Co Ltd (1970) 3 NSWR 30
Other references	Widely-Based Settlement Panel ATO Product Rulings Taxpayer Alerts
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