PS LA 2012/4 - Administration of penalties for making false or misleading statements that do not result in shortfall amounts

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Practice Statement Law Administration

PS LA 2012/4

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This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs, tax officers must follow their business line's escalation process.

Taxpayers can rely on this 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 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: **Administration of penalties for making false or misleading statements that do not result in shortfall amounts**

PURPOSE: **This practice statement explains:**

- **the circumstances in which an entity becomes liable to a penalty for making a false or misleading statement which does not result in a shortfall amount, and**
- **how the penalty is assessed, including determining remission.**

TABLE OF CONTENTS **Paragraph**

1. All legislative references in this practice statement are to Schedule 1 to the *Taxation Administration Act 1953* (TAA) unless otherwise stated.
2. All references to 'penalty' or 'penalties' in this practice statement are to penalties for making statements that are false or misleading in a material particular and do not result in shortfall amounts, unless explicitly noted otherwise.

BACKGROUND

3. Part 4-25 contains the uniform penalties regime that applies to entities for failing to satisfy their obligations under taxation laws. Uniform penalties will apply where an entity fails to satisfy the same type of obligation under different taxation laws.[1] This penalty regime consists of four distinct components:
   - penalties relating to statements and schemes
   - penalties for failing to lodge returns and other documents on time
   - penalties for failing to meet other tax obligations, and
   - civil penalties for promotion and implementation of schemes.
4. In relation to statements, Division 284 imposes a penalty where an entity makes a statement which is false or misleading in a material particular (subsection 284-75(1) and subsection 284-75(4)), whether because of things in it or things omitted from it.
5. These provisions apply to statements made by an entity's agent as if those statements had been made by the entity. Throughout the practice statement the phrase 'the entity' should be read as 'the entity or their agent', unless explicitly noted otherwise.

[1] References to 'taxation law' in Subdivision 284-B of Schedule 1 to the TAA specifically exclude Excise Acts (as defined in subsection 995-1(1) of the ITAA 1997)

SCOPE

6. This practice statement explains how the Commissioner administers the penalty for making a false or misleading statement on or after 4 June 2010, where the statement does not result in a shortfall amount. It discusses:

   - when such a statement will give rise to the administrative penalty, and
   - how penalty amounts are assessed, including a determination of any remission of the penalty under section 298-20.

7. This practice statement does not deal with the penalty for making a false or misleading statement on or after 4 June 2010, where the statement **does** result in a shortfall amount. Guidelines on administering that penalty are found in Law Administration Practice Statement PS LA 2012/5 *Administration of the penalty for making a false or misleading statement which results in a shortfall amount*.

8. This practice statement provides guidelines on how the Commissioner's discretion in subsection 298-20(1) to remit the penalty may be exercised. There is no intention to lay down conditions that may restrict the exercise of the discretion. Nor does the practice statement represent a general exercise of the Commissioner's discretion. Rather, the guidelines are provided to help:

   - tax officers in the exercise of the discretion, and
   - ensure that entities in like situations receive like treatment.

STATEMENT

9. The following principles are to be taken into account throughout the process of administering the penalty, including any process of review under Part IVC or other review:

   - the purpose of the penalty regime, which is to encourage entities to take reasonable care in complying with their tax obligations. As a general rule, entities should not be penalised where they have made an honest and genuine attempt to comply.
   - the principles underpinning the compliance model, including being fair to those entities wanting to do the right thing, and being firm but fair with those choosing to disengage from the system and avoid their taxation obligations.
   - the statements and principles in the *Taxpayers' Charter*. This means an entity should be presumed to have been honest, unless there is information which suggests otherwise.
   - the individual circumstances of each case, giving appropriate consideration to the background and experience of the entity in a self-assessment environment.
   - penalty decisions must be supported by the available facts and evidence. Conclusions about the entity's behaviour should only be made where they are supported by facts, or where reasonable inferences can be drawn from those facts.
   - usually the entity should be contacted and given the opportunity to explain their actions before a decision to assess the penalty is made. Exceptions to this position are the automated case actioning environment (that is, data matching) or where the facts clearly show that the entity is deliberately disengaged from the tax system.

10. The examples in this practice statement should be used as a general guide only.

11. The administration of Subdivision 284-B penalties involves three main steps:

- Step 1 — Determine if a penalty is imposed by law
- Step 2 — Assess the amount of the penalty
  - work out the base penalty amount (BPA)
  - increase and/or reduce the BPA
  - determine if remission is appropriate
- Step 3 — Notify the entity of the liability to pay the penalty.

12. This practice statement provides guidance on each of these three steps in the order they occur in the administrative process. The steps must be completed in the order they appear above. This means that a decision about remission of penalty will normally be made in the course of assessing the amount of any penalty. However, a decision about remission of penalty can also be made after an entity has been notified of its liability to pay the penalty.[2]

13. The Commissioner has adopted a practical approach to administering the penalty. This means a penalty will not be assessed for every statement encountered which may be false or misleading in a material particular.

Commissioner's approach to administering the penalty

14. The penalty provisions have broad application to written and oral statements made for a purpose connected with a taxation law, and could apply to compliance, objection, advice, debt, lodgment and registration activities.

15. However, it is not administratively appropriate nor is it necessary to examine or to consider the application of the penalty to every potentially false or misleading statement. Section 44 of the *Financial Management and Accountability Act 1997* requires efficient, effective and ethical use of resources.

16. The Commissioner's practical approach to administering these penalties is in observance of risk management principles, which means that not every statement which is potentially false or misleading in a material particular will be examined.

17. Statements which do not result in a shortfall amount will normally be examined (including for the purposes of considering penalty) where ATO action is taken to investigate or mitigate a risk. This includes, but is not limited to:

- audits of regulatory statements made by trustees of self managed superannuation funds
- audits of Australian Prudential Regulation Authority (APRA) regulated funds for the accuracy and completeness of their reporting
- tax audits on carry forward losses which result in reduced carry forward losses for a year of income
- reviews of registration applications and/or registration records, or
- ATO project based work where tax or superannuation-related statements are being checked.

[2] Subsection 298-20(1)

These examinations will result in the making of a penalty decision, which may involve assessment of a penalty.

18. Tax officers should not usually seek to examine statements which do not result in a shortfall amount where the statements made are of little importance or relevance to their current activities. If the statement is not the focus of the examination or activity, the Commissioner will only consider examination of the statement if there is a risk to the integrity of the taxation system or a need to be firm with non compliant entities. This will usually occur where it appears that the statement was made recklessly or with intentional disregard of the law.

19. Additionally, the Commissioner will only consider assessing a penalty for the following types of statements in exceptional situations:

- an incorrect application of the law to correct facts (statements of mixed fact and law will be considered)
- a statement made regarding future intentions, unless subsequent actions cast doubt as to whether the statement was genuine, or
- the omission of information in response to a questionnaire or in another document which is not an approved form[3] where the purpose of the questionnaire or document was simply to gather generic information from the entity.

Step 1 – Determine whether the entity is liable to a penalty

20. An entity is liable to an administrative penalty under subsection 284-75(1) if:

- the entity or their agent[4] makes a statement to the Commissioner[5] or another entity exercising powers or performing functions under a taxation law; and
- the statement is false or misleading in a material particular, whether because of things in it or omitted from it.

21. An entity is liable to an administrative penalty under subsection 284-75(4) if:

- the entity or their agent makes a statement to an entity other than
  - the Commissioner; and
  - an entity exercising powers or performing functions under a taxation law;
- the statement is, or purports to be, one required or permitted under taxation law; and
- the statement is false or misleading in a material particular, whether because of things in it or omitted from it.

What is a statement?

22. A statement is anything disclosed and may be made or given orally or in any other way, including electronically.

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3 PS LA 2005/19 explains when a document is in the approved form
4 Section 284-25
5 Subsection 28(2) of *A New Tax System (Australian Business Number) Act 1999* specifies that The Commissioner of Taxation is the Registrar of the Australian Business Register.

23. Statements may be made in correspondence, requests for information, a notice of objection, a request for an amendment of an assessment, in answer to a questionnaire, in a registration form, in connection with an examination or investigation, or in any other communication for a purpose connected with a taxation law. A statement will include entering information on an application, approved form, activity statement, certificate, declaration, notice, notification, return or other document prepared or given under a taxation law.

24. A statement is not the form that is lodged or the general statement that is made. A statement is the information at individual labels in the context of a form requesting information, or the individual statements answering questions or providing information in conversations or documents. Therefore it is possible that more than one statement in the one form or discussion can be examined for the purposes of assessing the application of this penalty, potentially resulting in multiple impositions of the penalty.

Omissions may be statements

25. A statement may also be made if an entity fails to include material information in a document or approved form and the document or approved form requires that information to be supplied. Although at first it appears that no statement was made, the entity will be taken to have made a statement by omission.

Example 1

26. *A superannuation fund lodges a member contributions statement. In the form the fund left blank the labels for personal contribution amounts, even though the entity did make personal contributions. This omission is a statement for the purposes of this penalty.*

Omissions in combined forms

27. Under subsection 388-50(2), the Commissioner has the power to combine more than one return, notice, statement, application or other document in the same approved form. If the Commissioner is satisfied sufficient information can be provided, he may approve lodgment of a single combined form to fulfil multiple reporting obligations.

28. Where a combined form exists and one discrete form within it is not completed when lodged, the omission is a failure to lodge a form. A penalty under subsection 286-75 can apply to these omissions.

Example 2

29. *A superannuation fund lodged a member contributions statement (MCS)*[6] *pertaining to 10,000 of its contributing members.*

    - *For 500 members who had made personal contributed amounts, the MCS did not report those contributions although all other information was provided for these members. The omissions of the personal contributed amounts of the 500 members are 500 statements to which this penalty may apply.*

[6] See section 390-5

- *For 800 members, none of their member or contribution information was provided in this MCS or any other MCS by the due date. The omission of 800 members from the MCS is a failure to lodge a statement for each member. Under section 286-75 a penalty for failure to lodge on time for each statement may apply.*

Omissions in approved forms and other documents

30. Where the omission is in a document which is not an approved form (or not in response to an information gathering notice),[7] the omission may be subject to this penalty. However, there are a number of considerations which may affect whether the omission is false or misleading in a material particular and generally a penalty may not be applicable.

31. A penalty may be applied provided that the purpose of the questionnaire or request for information is objectively apparent. By not completing the form in full, the entity may potentially have made statements that are false or misleading in material particulars because of information having been omitted. If the document sent to the entity appears to be a voluntary or statistical questionnaire, or does not have an identifiable purpose, it may be more difficult to establish that the responses have the quality of material particulars, as there may be no objective connection with a relevant purpose.

32. There may also be issues of fact as to whether an unanswered question amounts to an omission, a choice to not answer, or a response of 'nil', which might make it inappropriate for a penalty to be applied.

33. A false or misleading statement is not made if the entity fails to lodge or submit an approved form, does not respond to a questionnaire, or where the document, approved form or questionnaire submitted by the entity does not make allowance for the provision of material information.

'Supporting' statements

34. Where the entity provides information in support of a previously made statement, and the information they provide in the subsequent supporting statement is consistent with the information in the initial statement, the Commissioner will not consider this subsequent statement to be a separate statement for the purposes of this penalty.

Is the statement false or misleading in a material particular?

35. A statement is false if it is contrary to fact or wrong, irrespective of whether or not it was made with knowledge that it was false. It may be false because of something contained in the statement or because something is omitted from the statement.

36. A statement is misleading if it creates a false impression, even if the statement is true. It may be misleading because of something contained in the statement or because something is omitted from the statement. Even if it is literally true, it may be misleading because it is uninformative, unclear or deceptive.

37. To determine whether a statement is false or misleading in a 'material particular' regard must be had, or consideration given, to the purpose for which the statement is being made.

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[7] For example, section 264 *Income Tax Assessment Act 1936*; section 353-10 of Schedule 1 to the *Taxation Administration Act 1953*

38. This means that the type of information requested must have the necessary connection to a relevant purpose, and the specific information the entity provides must be false or misleading and material to this purpose.

39. A statement will be false or misleading in a 'material particular' for the purposes of subsections 284-75(1) and 284-75(4) if it is about a tax-related matter and it:

- is made for a purpose connected with a taxation law
- is relevant to a decision, power or function for which the statement is made
- can be taken into account in the outcome of that decision or exercise of a power or performance of a function, and
- is not immaterial, inconsequential or trivial.

40. The term 'material particular' refers to a relevant point, detail or circumstance concerning the purpose for which the statement was made. It is not necessary to establish the statement is one which must or actually will be taken into account in making a particular decision.

41. The materiality of the statement is to be determined at the time it is made. For example a statement that is not material cannot become material because of subsequent events. However, at the time that a statement is made, its materiality may not be known and may not become known until a subsequent event occurs (for example, an assessment is made) or further evidence comes to light which reveals that the statement was false or misleading in a material particular at the time it was made (for example during an examination).

Does the statement concern an issue relevant to a tax-related matter?

42. Section 284-70 provides that 'you are liable to an administrative penalty if you make a false or misleading statement about a *tax-related matter*' (emphasis added).

43. The term 'tax-related matter' is not defined. Section 284-20, an operative provision, states that Division 284 applies to statements made for a purpose connected with a taxation law. A taxation law is an Act of which the Commissioner has the general administration and any regulations under such an Act. It also includes part of an Act (and associated Regulations) to the extent that the Commissioner has the general administration of the Act. Broadly, it includes the Commonwealth taxation law and certain sections of superannuation law.[8] Therefore, certain statements will not fall for consideration under the penalty regime just because they are false or misleading in a material particular.

44. A statement is about a 'tax related matter' if a taxation law provides for the making of the statement. In this sense a 'tax-related matter' can mean something relevant to either the management or administration of the entity's tax affairs or their compliance with an obligation imposed by a Commonwealth taxation or superannuation law. The relevant connection and purpose is established through the legislative requirement to make the statement.

[8] For example, the *Superannuation Industry (Supervision) Act 1993*

45. Statements can be about a 'tax-related matter' where it is established that the nature and circumstances in which the statement is made was for a purpose connected with a taxation law; for example, the statement is relevant to a decision, the exercise of a power or performance of a function connected with a taxation law. This can be determined by considering the Commissioner's expressed explanation and instructions, or objective inference about the purpose and manner of the information and how it is collected or will be used.

46. In circumstances where a statement does not directly concern an entity's taxation or superannuation affairs and is not otherwise provided for by statute, an express explanation by the Commissioner about the purpose of the statement, available before the entity makes their statement, will provide an objective basis against which to establish whether the statement was false or misleading in a material particular.

47. In the absence of such an explanation by the Commissioner, the existence of a material particular will need to be established by an objective inference about the purpose and manner in which the information will be used.

Was the false or misleading statement made to the Commissioner or an entity exercising powers or performing functions under a taxation law?

48. To be liable to the penalty under subsection 284-75(1) the false or misleading statement must have been made to:

- the Commissioner,[9] or
- an entity that is exercising powers or performing functions under a taxation law.

49. Generally, this means the statement must be made to the Commissioner, ATO staff or other staff authorised by the Commissioner or a Deputy Commissioner to undertake functions. The term, 'performing functions under a taxation law' is interpreted narrowly and does not apply to other entities at large that may be seen to be performing some tax-related activities.[10]

50. If the false or misleading statement is made to an entity other than the Commissioner and an entity exercising powers or performing functions under a taxation law, then the entity making the statement may be liable to a penalty under subsection 284-75(4) if the statement is, or purports to be, required or permitted under a taxation law.

Was the statement one that is, or purports to be, required or permitted under a taxation law?

51. To be liable to the penalty under subsection 284-75(4) the false or misleading statement must be, or purport to be, required or permitted by a taxation law.

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9 This includes statements made to the Registrar of the ABR

10 Refer to the Delegations and authorisations manual for a detailed explanation.

52. A statement is required under a taxation law if there is an obligation to make the statement. For example, under subsection 35C(2) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), if an approved self-managed super fund (SMSF) auditor (auditor) requests, in writing, a trustee of a SMSF to give the auditor a document, each trustee of the SMSF must ensure that the document is given to the auditor within 14 days of the request being made. The statement made by the trustee to the auditor in response to the request is one required by law. However, subsection 35C of the SIS Act does not meet the definition of a taxation law in the circumstance where the request for documents or information is made by a fund's auditor to the trustee of a fund that is not an SMSF because paragraph 6(1)(e) of the SIS Act confers general administration of section 35C on the Commissioner of Taxation, only to the extent that it relates to SMSF.

53. In certain situations, taxation laws make it clear a statement is permitted to be made. For example, under section 202C of the *Income Tax Assessment Act 1936*, a person who is a recipient of a payer (which includes an employee), or expects to become a recipient of a payer (prospective employee), may make a Tax File Number declaration in relation to the payer (employer).

54. In order for a statement to 'purport' to be one required or permitted by a taxation law, the statement that is made must state, or imply, that the statement is one that is required or permitted by taxation law.

55. For example, if the law requires that a statement be made by a trustee in an approved form and the trustee makes a statement which appears to be the one required but in a manner which fails to meet the approved form requirements, the statement is one that purports to be the statement as required by law. In these cases, a false or misleading statement could be subject to a penalty.

56. This differs from a statement where the statement maker merely holds out that the statement is required by a taxation law when in fact no such requirement exists.

Has the statement resulted in a shortfall amount?

57. A shortfall amount[11] occurs when a statement is made and a tax-related liability, worked out on the basis of that statement, is less than it would be if the statement were not false or misleading. A shortfall amount can also arise if an amount the Commissioner must pay or credit, worked out on the basis of the statement, is more than it would be if the statement were not false or misleading.

58. If a statement has resulted in a shortfall amount, refer to PS LA 2012/5.

Who is liable to the penalty?

59. The entity is liable for the penalty for a statement made by them or their authorised agent.[12] In the superannuation context an authorised agent includes an administrator or superannuation supplier.

60. For commercial law purposes, an agent is a person who is authorised either expressly or impliedly by a principal to act for that principal so as to create or effect legal relations between the principal and third parties.[13]

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[11] The table in section 284-80 lists the circumstances that give rise to a shortfall amount.
[12] Section 284-25

61. Where a principal, in this instance the entity on whose behalf the statement is made or purports to be made, has authorised the agent to act on the principal's behalf, the agent is acting within the authority conferred on it by the principal. Any act done on behalf of the principal by the agent is an act of the principal. In some cases the relationship between the principal and agent is purely contractual, rather than of agency.

62. There may be instances where the agent has made a statement for the entity and in doing so has acted outside the explicit, implied or ostensible scope of their authority. In these instances, if the entity can prove the responsibility lies with the agent, the penalty imposed on the entity should be cancelled and a penalty may be imposed on the agent.

63. If an agent is making a statement on their own behalf, for example, with regard to their lodgment program, the agent is the entity making the statement and would be liable for any relevant penalty.

Exceptions to penalties resulting from making a false or misleading statement

64. There are three exceptions to this penalty which, in effect, eliminate or reduce liability. An exception applies when:

- the entity and their agent (if relevant), took reasonable care in connection with making the statement: subsection 284-75(5)
- 'safe harbour' applies to the statement: subsection 284-75(6), or
- the entity or their agent (if relevant), applied the law in an accepted way: section 284-224.

65. If an entity and their agent (if relevant), have exercised reasonable care they are not liable to a penalty. The meaning of the phrase 'reasonable care' is explained in *Miscellaneous Taxation Ruling MT 2008/1: Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard* (MT 2008/1).

66. There is no liability to a penalty if the 'safe harbour' exception applies.

67. If the entity or their agent applied the law in an accepted way, they may be protected from the application of a false or misleading statement penalty.[14]

Has the entity taken reasonable care?

68. An entity is not liable to a penalty if the entity took reasonable care in connection with making the statement.[15]

69. The concept of 'reasonable care' is explained in MT 2008/1. The 'reasonable care test' requires an entity to make a reasonable and genuine attempt to comply with obligations imposed under a taxation law. The effort required is one commensurate with the entity's circumstances, including the entity's knowledge, education, experience and skill.[16] In practice, this means that all actions leading up to the making of the statement should be taken into account, including appropriate record keeping, reporting obligations and whether a tax agent was engaged.

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[13] *International Harvester Company of Australia Proprietary Limited v. Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR 644.
[14] Section 284-224
[15] Subsection 284-75(5)
[16] Paragraph 28 of MT 2008/1

70. There is no presumption that the false or misleading nature of a statement necessarily or automatically points to a failure to take reasonable care. The evidence must support the conclusion that the entity's attempt to comply has fallen short of the standard of care that would reasonably be expected in the circumstances. In borderline cases, it can be more readily accepted that an entity has exercised reasonable care where the entity has a good compliance history.

71. However, a higher standard of care is expected of an entity dealing with a matter that involves a substantial amount of tax or involves a large proportion of the overall tax payable.[17]

Reasonable care and genuine attempt

72. A genuine attempt means showing engagement with the tax system by actively attempting to comply with tax obligations. A key indicator of an entity making a genuine attempt to comply is displaying an investigative approach to their tax affairs (that is, the entity has a responsibility to effectively manage the risks associated with their tax position and displays this approach).

73. Assessing reasonable care requires a consideration of the personal circumstances of the entity including whether:

- there was an inadvertent mistake
- reasonable enquiries were made, which may be indicated by whether:
  - the entity just assumed the statement was correct
  - the degree of enquiry exhibited by the entity was commensurate with the risk associated with the decision and their resources
- the entity was aware, or should have been aware, of the correct treatment of the law or of the facts:
  - an entity should not rely on advice they have received where a reasonable person would be expected to know the advice is not worthy of such reliance[18]
  - an entity is not obliged or entitled to blithely accept assurance by his or her professional advisor
- any factors prevented them from reporting, reporting correctly, seeking advice or understanding the requirements of the tax law, and
- the entity's level of knowledge or understanding of the tax system impacted their compliance, with reference to:
  - whether a registered tax agent or BAS agent was used
  - the entity's level of education, expertise and sophistication relating to tax matters, or
  - the entity's age, health and background.

[17] Paragraph 92 of MT 2008/1
[18] ATC 4523 *Weyers and Anor v. FCT* 2006

Using a registered tax agent or BAS agent (registered agent)

74. Each entity is expected to take a prudent attitude to their tax affairs. This is still the case even if they are using a registered agent or they are following recommendations of their advisors.

75. It is generally indicative that the entity is not making a genuine attempt to comply with their obligations where they do not query advice that is:

- obviously incorrect or foreign to their circumstances
- produces an odd or irregular outcome, or
- an extraordinary treatment of tax matters, which a comparable, ordinarily prudent person would investigate further.

76. An entity is not expected to check opinions or legal views but is expected to take an investigative approach to any advice which an ordinarily prudent person would query. Also, the more complex the area of tax law involved, the greater the amount involved or the more 'sophisticated' the entity, the greater the level of enquiry that is expected.

77. Additionally, an entity is expected to check prior to signing documents lodged on their behalf. The entity should not treat this as a mechanical process, but should confirm, to the extent appropriate, that the document reflects the information they provide to their tax agent.

Does the safe harbour exception apply?

78. An entity is not liable to a penalty under subsection 284-75(1) or 284-75(4) if the 'safe harbour' exception contained in subsection 284-75(6) applies.

79. This safe harbour provision recognises that an entity should not be subject to a penalty as a result of certain actions or omissions of their registered tax agent or BAS agent (registered agent) where the entity provided all the relevant taxation information to the registered agent necessary for the correct preparation of the statement.

80. Safe harbour does not apply where the registered agent acted:

- recklessly, or
- with intentional disregard of the taxation law.

81. The meanings of the terms 'reckless' and 'intentional disregard' are explained in MT 2008/1.

82. Any penalty for recklessness or intentional disregard of the law is not transferred to the registered agent.

All relevant taxation information

83. The safe harbour exception only applies if the entity provides the registered agent with all the relevant taxation information about a particular matter. This is an objective test. The exception is not available even if the entity genuinely believes they provided all relevant taxation information required, but in fact omitted any part of the relevant information, did not supply all the information or gave incorrect or conflicting information.

84. Whether all relevant taxation information has been provided must be considered separately for each false or misleading statement.

85. Registered agents are not required to audit, examine or review books and records or other source documents to independently verify the accuracy of information supplied by their clients. As stated in MT 2008/1, in most situations it would not be practical for a registered agent to view all the relevant source documents. A client may provide some information in a summary.

86. Where an entity provided incorrect information in a summary and the registered agent reasonably relied on the summary in the preparation of the statement, safe harbour would not apply as the correct information was not supplied. It is irrelevant that a registered agent taking reasonable care may have queried the information.

Proving safe harbour

87. Under subsection 284-75(7), the entity has the burden of proof to establish they provided all relevant taxation information. How the entity discharges the burden of proof depends upon the facts and circumstances of each case.

88. The standard of proof required is 'on the balance of probability' or 'more likely than not'. If the probability either way is equal, then the standard is not satisfied.

89. The evidential burden is satisfied once the facts and evidence support the view that all relevant taxation information was provided by the entity to their registered tax agent.

90. Where the entity has requested application of the provision, generally the registered agent will be contacted as they may be able to provide evidence on whether the entity supplied all relevant taxation information. In most situations, unless the registered agent is contacted it would be difficult to determine whether safe harbour applies as tax officers would not be in a position to assess the registered agent's actions or know what information they requested from their client.

91. However, contact with the registered agent is not mandatory. Where tax officers have attempted but have been unable to contact the registered agent, a decision will need to be made on the information available.

92. From the examination of the statement it may be apparent that although all relevant information was provided the registered agent has not exercised reasonable care. In these cases, neither the entity nor the registered agent need to be contacted and safe harbour can be granted. However, it is generally appropriate to contact the registered agent.

Step 2 – Assess the amount of the penalty

93. The penalty is assessed in three steps:

- firstly the base penalty amount (BPA) is worked out
- secondly the BPA may be increased and/or reduced
- thirdly the Commissioner considers remission of the calculated penalty amount.

Work out the base penalty amount (BPA)

94. The Commissioner's assessment of the entity's behaviour in relation to making the statement determines the relevant item to use in working out the BPA. Then, if appropriate to do so, this BPA is reduced to the extent the entity applied a taxation law in an accepted way.

95. When working out the BPA items 3A, 3B and 3C of the table in subsection 284-90(1) provide the initial penalty units. These items are:

3A	A statement described in subsection 284-75(1) or (4) was false or misleading because of intentional disregard of a taxation law by you or your agent but did not result in you having a shortfall amount	60 penalty units
3B	A statement described in subsection 284-75(1) or (4) was false or misleading because of recklessness by you or your agent as to the operation of a taxation law but did not result in you having a shortfall amount	40 penalty units
3C	A statement described in subsection 284-75(1) or (4) was false or misleading because of a failure by you or your agent to take reasonable care to comply with a taxation law but did not result in you having a shortfall amount	20 penalty units

What is the behaviour?

96. The relevant levels of care are:

- failure to take reasonable care item 3C
- recklessness item 3B
- intentional disregard item 3A.

97. The guidelines for determining the behaviour are in MT 2008/1. They are briefly summarised below but tax officers must use the ATO view found in MT 2008/1.

Failure to take reasonable care

98. Failure to take reasonable care occurs where reasonable care has not been taken in connection with making the statement, but neither the entity nor the agent has been reckless or intentionally disregarded the law.

Recklessness

99. Recklessness is behaviour which falls significantly short of the standard of care expected of a reasonable person in the same circumstances as the entity. It is gross carelessness.

100. Recklessness assumes that the behaviour in question shows a disregard of the risk or indifference to the consequences that are foreseeable by a reasonable person. However, the entity or agent does not need to actually realise the likelihood of the risk for it to be reckless.

Intentional disregard

101. Intentional disregard of the law is something more than reckless disregard of or indifference to a taxation law.

102. Intention of the entity is a critical element – there must be actual knowledge that the statement made is false. The entity must understand the effect of the relevant legislation and how it operates in respect of the entity's affairs and make a deliberate choice to ignore the law.

Treating the law as applying in an accepted way

103. Under section 284-224, the BPA is reduced to the extent that the entity or their agent treated a taxation law in a particular way that agreed with:

- advice given to them or their agent by, or on behalf of, the Commissioner
- general administrative practice under that law, or
- a statement in a publication approved in writing by the Commissioner.

Has the entity relied on advice or a statement from the Commissioner?

104. Where an entity has treated a taxation law as applying in a particular way, and that way agrees with advice given by the Commissioner or a statement in an ATO publication, then they may be protected from application of a penalty. The levels of protection for particular forms of ATO advice and guidance are discussed in Attachment A to PS LA 2008/3 *Provision of advice and guidance by the Australian Taxation Office*.

105. Where an entity has relied on advice or a statement in an ATO publication, it is highly likely that they will have exercised reasonable care and the exception in subsection 284-75(5) will apply. However, even if reasonable care has not been taken, when the entity relies on advice or a statement from the Commissioner, the BPA is reduced to the extent that it was caused by that treatment (section 284-224).

106. Advice given by the Commissioner may be given in writing, electronically or orally. Statements in approved publications would include the various return form instructions and guides published by the ATO to assist entities with their tax affairs. If, for example *TaxPack* or the various activity statement instructions contained an error, and an entity's liability was disclosed as less than it should have been because the entity followed the instruction, section 284-224 reduces the BPA to the extent that it was caused by following the instructions.

Does the entity's treatment agree with a general administrative practice?

107. Section 284-224 also applies to reduce the BPA to the extent that an entity's treatment agrees with a general administrative practice under a taxation law. An explanation of general administrative practice is found in *Taxation Determination TD 2011/19 Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?*

108. A general administrative practice under a taxation law is a practice which is applied by the Commissioner generally as a matter of administration. It is the Commissioner's course of conduct, rather than any particular document, that is relevant in determining whether or not there is a general administrative practice. Nevertheless, publications and other documents produced by the Commissioner may provide evidence of a general administrative practice. Frequent advice to different taxpayers which consistently adopts a particular practice will tend to support a conclusion of a general administrative practice.

109. Whether a general administrative practice exists is a question that must be determined on a case by case basis.

Increase and/or reduce the BPA

110. The BPA is increased and/or reduced when certain conditions are met. When this occurs, the formula in subsection 284-85(2) is used to calculate the penalty:

BPA + [BPA X (increase % - reduction %)]

Increase in the BPA

111. Under section 284-220, the BPA is increased by 20% where the entity:

- prevents or obstructs the Commissioner from finding out about the false or misleading nature of the statement
- becomes aware of the false or misleading nature of the statement after the statement is made and does not tell the Commissioner about it within a reasonable time, or
- had a BPA worked out for this type of penalty previously.

112. The increase in the BPA is not cumulative, that is, the BPA can only be increased by 20% irrespective of how many of the conditions in subsection 284-220(1) are satisfied.

113. The Commissioner expects that in the majority of cases, tax officers will receive reasonable co-operation from entities and their representatives.

114. However, under paragraph 284-220(1)(a), where the entity takes steps to prevent or obstruct the Commissioner from finding out about the false or misleading nature of a statement, the BPA will be increased by 20%. These steps can include:

- the entity repeatedly deferring or failing to keep appointments, or repeatedly failing to supply information without an acceptable reason
- repeated failure by the entity to respond adequately to reasonable requests for information. This will include excessive or repeated delays in responding; not replying to the request for information; giving information that is not relevant or does not address all the issues in the request; or supplying inadequate information
- failure to respond to a request for information pursuant to formal information gathering notices, or
- a combination of the factors above.

115. Not replying to a letter or not returning a call does not indicate the entity was taking steps to prevent or obstruct the Commissioner from identifying the false or misleading nature of a statement.[19] An action of a passive nature, such as not responding to an ATO letter, although unhelpful, is not hindrance.

116. Entities are not expected to continually review their affairs to detect possible errors. However, if an entity becomes aware of a false or misleading statement and does not tell the Commissioner[20] within a reasonable time, the BPA may be increased under subparagraph 284-220(1)(b)(ii).

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[19] *Ebner & Arnor v. FC of T* [2006] AATA 525 - paragraph 19; *Ciprian & Ors v. FC of T* [2002] AATA 746
[20] Or the other entity to which the false or misleading statement was made

117. When the BPA is worked out using item 3A, 3B or 3C of the table in subsection 284-90(1) and the entity previously had a BPA worked out under one of these items, the BPA currently being worked out is increased under paragraph 284-220(1)(ca).

Reduction in the BPA for voluntary disclosure

118. The BPA imposed for penalties can be reduced[21] in certain circumstances where an entity voluntarily discloses, in the approved form, the false or misleading nature of the statement.

119. *Miscellaneous Taxation Ruling MT 2012/3* sets out the Commissioner's views on the application of section 284-225. The ruling also sets out when the Commissioner's discretion provided in subsection 284-225(5) should or should not be exercised. Tax officers must refer to MT 2012/3 when making decisions regarding voluntary disclosures.

120. If a voluntary disclosure about the false or misleading nature of the statement is made prior to notification of an examination for a relevant period, the BPA is reduced to nil.[22] A relevant period may refer to an accounting period or, where it does not relate to an accounting period, to the date (period) that a statement was made. For example, a request for registration form lodged on 5 March 2012 will have a relevant period of 5 March 2012.

121. The Commissioner has the discretion to treat a voluntary disclosure made after the entity has been informed of an examination as if it were made before this notification.[23]

122. Where the Commissioner may apply his discretion under subsection 284-225(5), he will invite a voluntary disclosure. It will generally be invited at the commencement of all examinations except where recklessness or intentional disregard of the law was displayed in making the statement, or where this is a repeated error (a penalty was previously applied or there has been a previous request to correct the same type of error).

123. If the voluntary disclosure is made after notification of an examination and the Commissioner's discretion is not exercised the penalty may be reduced by 20% if the voluntary disclosure saves the Commissioner a significant amount of time and resources.

Approved form

124. A voluntary disclosure must meet the requirement of the approved form. The approved form sets out the information required to be furnished and methods that an entity needs to follow to make a voluntary disclosure. It is a 'virtual form'. Generally, the form and structure is irrelevant as long as the required information is given by the entity through an acceptable mechanism. The Commissioner may develop forms to assist entities to meet their tax obligations. These forms must meet the requirements of the approved forms published on the ATO website.

125. The voluntary disclosure approved form contains a list of the information required for the entity to make that disclosure. It requires that the entity identify the statement and explain the false or misleading nature of the statement.

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21 Section 284-225
22 Subsection 284-225(4A)
23 Subsection 284-225(5)

126. Tax officers should exercise sound judgment in relation to the completeness of a disclosure. They should recognise that an entity making a genuine attempt to inform the Commissioner of a mistake may not be fully aware of all the information required by the Commissioner.

127. If the disclosure fails to meet the strict requirements of the approved form, but substantially complies with those requirements, and the Commissioner can accurately determine the nature of the false or misleading statement from the information provided, the disclosure should be treated as one meeting the requirements of the approved form.

128. If additional information is sought on an incomplete disclosure and it is provided within a reasonable time, the original incomplete disclosure should be treated as sufficiently complete.

129. The entity's original disclosure would not be regarded as constituting a voluntary disclosure if the facts or reasonable inferences indicate that the entity supplied incomplete information in an attempt to obstruct or hinder the Commissioner from identifying the correct information (that is, the false or misleading nature of the statement), particularly where the degree of incompleteness is significant.

Determine any remission of the penalty

130. Whilst the penalty is imposed by law, under section 298-20, the Commissioner has the discretion to remit all or part of the penalty. Section 298-20 is expressed as an unfettered discretion.

131. Tax officers must consider the question of remission in each case based on all of the relevant facts and circumstances, having regard to the purpose of the provision. Relevant matters to consider in approaching the issue of remission of penalty include:

- the purpose of the penalty regime, which is to encourage entities to take reasonable care in complying with their tax obligations. Where the entity has made a genuine attempt to make a correct statement it will generally be the case that no penalty applies because of the exercise of reasonable care, safe harbour or because the law was applied in an accepted way.[24]
- remission decisions need to consider that a major objective of the penalty regime is to promote consistent treatment by reference to specified rates of penalty. That objective would be compromised if the penalties imposed at the rates specified in the law were remitted without just cause, arbitrarily or as a matter of course.

132. The discretion to remit penalties should be approached in a fair and reasonable way, including ensuring that prescribed rates of penalty do not cause unintended or unjust results.

133. Although a remission decision must be made, this does not imply that remission will be given. A remission decision may result in no remission, partial remission or remission of the entire penalty.

24 Subsections 284-75(5), 284-75(6) or section 284-224

Unjust result

134. There will be cases where penalties imposed may not provide a just result to the entity. In such cases the Commissioner may remit the penalty imposed by the law in whole or in part.

135. Two kinds of situations in which an unjust result could arise are outlined below. The Commissioner may also consider remission in other instances of unjust result, having regard to the particular circumstances.

Multiple penalties

136. The possibility of multiple penalties arises when multiple false or misleading statements are made on a single approved form and a penalty is assessed in respect of each and every false or misleading statement. For example, it is conceivable that the same kind of false or misleading statement could be replicated in regulatory returns for a significant number of members of large superannuation funds. In these circumstances it may be unjust to maintain the collective penalty amount. For APRA regulated funds, an officer at the SES level is required to make the penalty decision where the potential for multiple penalties exists. Example 14 is an example of the process for dealing with multiple false or misleading statements made by APRA regulated super funds.

137. Generally, it would not be appropriate to assess multiple penalties if the errors resulted from an administrative oversight even if the errors affected a large number of statements. However, this would depend on the assessment of the particular facts and circumstances.

138. The final penalty applied must be defensible, proper and just having regard to the overall circumstances of the entity. Remission provides the administrative flexibility to ensure the penalty imposed is aligned with the observed behaviour. It will be relevant to take into account the following, without limiting other considerations:

- the circumstances in which the errors occurred which resulted in the false or misleading statements, such as
    - whether the errors that resulted in the false or misleading statements were properly distinct or arose out of the one course of conduct
    - the efforts of the entity to avoid or reduce the potential for making a false or misleading statements, for example had there been previous incorrect statements, were they aware or should they have been aware of the potential for error
    - governance processes
    - the seriousness or severity of the issues underpinning the false or misleading statements.
- the nature and degree of impact the false or misleading statement had on third parties
- whether the entity gained a real or perceived benefit as a result of the false or misleading statement
- what remedial action, if any, has been taken before being notified of an examination, to avoid a recurrence
- the need for specific and general deterrence, and

- the entity's compliance history, particularly giving consideration to any previous and repetitive false or misleading statement.

Where the entity has taken reasonable care but the actions of their registered agent makes them liable to a penalty

139. An unjust result may occur in certain situations where the entity has made a genuine attempt to comply (taken reasonable care), but because of the actions of their registered agent the entity is liable to a penalty and safe harbour does not apply. For example, the entity provided all relevant information to the tax agent, asked relevant questions about claims that were unusual and reviewed the document before signing. However, the tax agent was reckless in their application of the law and safe harbour did not apply.

140. Because entities are responsible for the actions of their agent it would be unusual for significant or full remission to be given.

141. Remission would generally not be warranted in situations where the tax agent intentionally disregarded the law.

Step 3: Notify the entity of their liability

142. Under section 298-10, the Commissioner must give a written notice to the entity informing them of their liability to pay the penalty, after any reductions and/or remissions, and why the entity is liable to the penalty. Under subsection 298-20(2), where a penalty applies and has not been remitted in full, the entity must be provided with a written explanation of why the penalty has not been remitted in full. The Commissioner must make an assessment of the penalty under subsection 298-30(1).

143. It is general practice to provide written reasons for the decisions made, setting out the findings on material questions of fact and referring to the evidence or other material on which those findings were based.

144. The law does not specify when the explanation must be supplied. However, tax officers should ensure the reasons are supplied prior to, at the same time as, or as soon as possible after the entity has been notified of the penalty.

145. If reasonable care or another exception exists, or if the penalty has been remitted in full, the law does not require the Commissioner to give reasons for the decision.[25] However, where these situations do occur, it is expected the entity will be advised, at a minimum, of a summary of the reasons for the decision. The only exception is where there is some operational requirement making it impractical, such as some limited high volume work.

146. Complete reasons for the penalty decisions must be recorded on ATO systems.

Objection rights

147. The Commissioner must make an assessment of the amount of an administrative penalty under Subdivision 284-B.[26] If the Commissioner decides not to remit a penalty or to partially remit a penalty, the Commissioner must give written notice of the decision and the reasons for the decision to the entity.[27]

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25 Subsection 298-10
26 Subsection 298-30(1)
27 Subsection 298-20(2)

148. An entity that is dissatisfied with an assessment of penalty may object against it in the manner set out in Part IVC of the TAA. The grounds of the objection may include any or all elements of the penalty assessment.[28]

149. In the usual situation, where a remission decision is made as 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 component of the penalty decision.

150. If a remission decision is made after an assessment of the penalty, the entity may object to the separate remission decision in the manner set out in Part IVC of the TAA if the amount remaining after remission is more than 2 penalty units.

151. If a penalty has been remitted in full or reduced to nil, there is no right of objection.

EXAMPLES

152. The following examples illustrate:

- what is a 'material particular'
- the administrative approach to assessing penalty
- penalty decisions, including remission, and
- the process for considering multiple penalty imposition for APRA regulated super funds.

153. The particular facts and circumstances surrounding each statement will determine the liability to the penalty and whether or not the Commissioner should exercise his discretion to remit in any case. For this reason, the examples should be used as a general guide of the principles only as the facts and circumstances will differ from case to case.

Material particular

Example 1: Statements contributing to loss

154. An entity lodges an income tax return which indicates the entity incurred a loss of $10 million for that income year.

155. In the following income year the entity carried forward the $10 million loss and disclosed a current year loss of $5 million.

156. A review of the taxpayer's taxation affairs for the two income years concluded the entity had a $7 million loss in the first year and a $5 million loss in the second year.

157. For the first income year, the tax officer examines each false or misleading statement on the income tax return which contributes to the incorrectly claimed $3 million loss, and considers the imposition of a false or misleading statement penalty for each of the statements. The statements in the income tax returns were required to correctly determine the relevant loss amounts and constitute material particulars.

[28] Subsection 298-30(2)

158. In the second income year, the tax officer does not consider assessing a false or misleading statement penalty on the statement that there is a carry forward loss of $10 million, even though it is incorrect. The statement is restating the position from the previous return and is considered to be a 'second statement' of the same facts and should not be reviewed for the purposes of this penalty.

Example 2: Incorrect loss changed to taxable position

159. An entity lodges an income tax return claiming deductions for $10 million of carried forward losses.

160. An examination revealed the entity was only entitled to $4 million of losses. The adjustment to the losses results in the entity having a shortfall amount in the income year the losses were claimed as deductions.

161. The tax officer considers imposition of the shortfall penalty for a false or misleading statement on the loss claimed as a deduction.

Example 3: Entity registers for an ABN

162. An individual entity registered for an ABN and GST in order to claim input tax credits on a car which they intended to buy. When applying for the ABN, the entity indicated that they had set up a new business. A tax officer asked questions of the entity who advised they were a subcontractor who bore commercial risks and could delegate decisions. The entity's statement resulted in the conclusion that they were carrying on an enterprise and their ABN and GST applications were processed.

163. In fact, the entity was an employee and the statement that they were able to delegate and subcontract their work was a false or misleading statement. The relevant statement is material because the ability to delegate and assume commercial risks are indicators of the carrying on of an enterprise as an independent contractor under Taxation Ruling TR 2005/16 *Income tax: Pay As You Go - withholding from payments to employees*. The carrying on of an enterprise is an essential element in determining whether an entity is entitled to an ABN.

164. Statements that impact on decisions regarding an entity's entitlement to be registered for regimes administered by the ATO have a clear nexus to taxation laws and constitute material particulars.

Example 4: Employer requires potential employee to get an ABN; statements by employer and employee

165. An employer informed prospective employees that they must acquire an ABN before they would be hired.

166. If a potential employee applied for an ABN and provided incorrect information stating that they were operating as a subcontractor, then this would be a material particular, as in example 3.

167. However, the statement by the employer was not made for the purposes of a taxation law and would not be subject to the penalty provisions.

Example 5: Director penalty notice

168. The director of a company was served with a director penalty notice (DPN) under Division 269. She subsequently advised the ATO that she was not a director and was therefore not liable to the penalty.

169. The director said that she resigned as director six months before the DPN was served. An Australian Securities and Investments Commission (ASIC) search confirmed the resignation but also showed the form regarding resignation was lodged four days after the DPN was served. ASIC did not question the timing of the alleged resignation.

170. However, based upon activity statements lodged and signed by her as director, and conversations with the ATO where she claimed to be a director, the Commissioner is satisfied that she has made a false statement.

171. The false statements are directly pertinent to determining the director's liability under the DPN provisions and are therefore material particulars.

172. The statement to ASIC is not a statement made for a purpose connected with a taxation law.

Example 6: Incorrect invoices

173. When a tax officer conducted third party verification of a tax invoice issued by a supplier to the entity under audit (Helen) it was confirmed the supplier (Glenn who operates a lawn mowing service) is not registered for GST.

174. During an interview Glenn confirmed he knew he was not registered for GST.

175. Glenn explained that Helen had asked him to provide a tax invoice for the lawn mowing service he provided to Helen. As Glenn didn't know what a tax invoice was, he asked a friend at the pub who subsequently provided Glenn with an example of a tax invoice. Glenn used that copy as a guide to draw up the tax invoice he gave to Helen. Glenn did not seek advice from the ATO or a tax professional to confirm the requirements for issuing a tax invoice.

176. Glenn has made a false or misleading statement to Helen (a person other than the Commissioner) in the form of the tax invoice purporting that GST was included in the lawn mowing supply. The statement is material as it relates to the entitlement to a GST credit, and it is a statement that purports to be required by a taxation law, that is, the provisions of the GST law requiring tax invoices to be provided for taxable supplies within 28 days of the recipient of the supply requesting a tax invoice.

Example 7: Incorrect TFNs provided to and by a superannuation fund

177. A large APRA regulated fund has 1000 new members who all provided their TFN details to the fund when they completed the application form to be a new member. The fund subsequently lodges a member contributions statement (MCS) reporting the TFNs as provided to them by the new members. Subsequently the ATO reviews the information contained on the MCS and advises the fund that 21 of the reported TFNs are invalid as for:

- eight of the new members, the TFNs reported are duplicate TFNs which belong to other existing members of the fund
- six of the new members, the reported TFNs have insufficient digits for the TFN to be valid, and
- seven of the new members, the reported TFNs are not correct, that is, they are not the valid TFN of the member.

178. The statements by the new 21 members to the fund are material particular as a valid TFN is required to determine the correct taxing of contributions and other items under the taxing acts. The taxpayers may be liable to a penalty under subsection 284-75(4) for the incorrect information provided to the fund.

179. The statements made by the fund to the Commissioner are also false or misleading in a material particular. These false or misleading statements are material particulars because this information is required in the approved form for the statement pursuant to section 390-5.[29]

Administrative approach

180. The following example illustrates the administrative approach described in paragraphs 14 to 19 of this practice statement. In essence, statements that are not the focus of an examination or activity will not normally be considered for further investigation or imposition of penalty, unless it is readily apparent that the statement was made recklessly or with intentional disregard of a taxation law.

Example 8: Core and non-core statements

181. A tax officer is allocated an audit of an employer for the 2011 financial year to determine the correct pay as you go (PAYG) withholding amounts. PAYG withholding amounts reported by employees in their income tax returns show PAYG withholding amounts totalling $523,000, whereas the total of the amounts reported at label W2 on the Business Activity Statements ('BAS') lodged by the entity was only $475,000.

182. The tax officer notifies the employer of the examination of the BAS for the 2011 year, and commences the examination. He identifies the total PAYG withholding amounts are $547,200 and shortfalls totalling $72,200 are identified. This is the core activity for the case officer and penalties for false or misleading statements that result in shortfall amounts will be considered.

183. The tax officer became aware that amounts at label W1 in the BAS for salary, wages and other payments is also understated. They totalled $1.1 million but the total ascertained from lodged employee tax returns was $1.3 million. This false or misleading statement does not result in a shortfall amount. There was no evidence found to show that the amounts were understated through recklessness or intentional disregard. The examination of this statement would be incidental to the audit and would not be further examined for the purposes of assessing a penalty.

Examples of decisions

Example 9: SMSF loan to members

184. A self managed superannuation fund (SMSF) made loans to members. When completing the *Self managed superannuation fund annual return* (fund annual return) the trustees did not indicate the loans had been made. This statement is false.

185. The statement is material because it is directly relevant to determining whether the fund is compliant with its *Superannuation Industry (Supervision) Act 1993* (SIS Act) regulatory obligations.

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[29] The Commissioner will be required to determine if reasonable care was taken by the fund. Although this will be determined by the facts of each situation, the seven cases where there was no anomaly with the TFN are likely to meet the reasonable care standard as the fund is entitled to rely on information from third parties which they have no reason to doubt. The eight duplicate TFNs and the six TFNs that have insufficient digits are both issues that they could, and should, have picked up and dealt with.

186. Statements that have an effect on ascertaining whether an entity has satisfied the regulatory requirements under a taxation law are 'tax-related matters' as the superannuation law provides for the making of such statements, and they have a direct impact on ascertaining an entity's taxation position.

187. The ATO notifies the trustees of the SMSF that an examination is to be made for a relevant period.

188. During the examination the tax officer determines the statement was false in a material particular as the SMSF had made various loans to members. The facts and evidence support an assessment of the SMSF trustees' behaviour as reckless. The records of the fund showed clearly that three loans to members were made during the relevant period. The trustees should have reported these SIS Act contraventions to the ATO.

189. The trustees of the SMSF did not make a voluntary disclosure.

190. The trustees did not hinder the Commissioner from finding out about the false or misleading nature of the statement as they were not aware of the false nature of the statement, nor was a BPA previously worked out. The trustee did not rely on advice, a publication or a general administrative practice when they made the statement.

191. A penalty amount of $4,400 is imposed on the SMSF.

192. The tax officer decides the trustees of the SMSF had made no real effort to report correctly, and in spite of a previous good compliance history, the penalty is not remitted.

Example 10: Adjusted member contribution statement

193. Stuart (aged 58) is a member of an APRA regulated fund to which he made contributions as follows:

- 2008 income year $300,000 (which triggers the bring forward non-concessional cap of $450,000)
- 2009 income year $200,000

194. These contributions were all recorded by the fund as personal contributions at the time they were made. The contributions were not treated as assessable contributions as Stuart had made them via a direct debit from his personal bank account and with the direct debit request, gave a standard form to the fund that indicated he was making them personally and would not be claiming a tax deduction for them. The fund subsequently reported Stuart's personal contributions to the ATO in a member contributions statement.

195. Stuart received an excess contributions tax (ECT) assessment for the 2009 income year for the $50,000 contributions that were in excess of his non-concessional cap.

196. After receiving the ECT assessment, Stuart contacted the fund to say he had received an ECT assessment and asked the fund to change the information they had reported to the ATO. He said that his $200,000 contribution for the 2009 income year should in fact have been $150,000 personal contributions and $50,000 employer contributions. He gave no other reasons or facts to support the requested change and the fund did not ask for more information.

197. The fund amended its member contributions statement to reduce Stuart's personal contributions as requested.

198. The fund had never previously received employer contributions for Stuart and had no record of who his employer was.

199. The ATO notifies the fund an examination of their reporting is to occur for the relevant period.

200. When audited the fund was not able to justify its decision that the $50,000 contribution was an employer contribution rather than a personal contribution and thus could not confirm the amended MCS was accurate.

201. During the examination the tax officer determines that the statement made in the amended MCS was false or misleading in a material particular. The facts and evidence support an assessment of the fund's behaviour when making the statement as recklessness.

202. There are no grounds to reduce the BPA as the fund did not make a voluntary disclosure, but as the fund previously had a BPA worked out under item 3B in the table in subsection 284-90(1), the BPA amount of $4,400 is increased by 20%.

203. The tax officer decides the fund did not make any significant effort to provide a correct statement. As illustrated the fund does not have a good compliance history because of the errors which resulted in the previous penalty, therefore the tax officer decides no remission is appropriate.

Example 11: False invoice supplied

204. A purchaser provides a tax invoice to a tax officer conducting an audit in support of input tax credits claimed in an activity statement.

205. Due to the nature of the information supplied, a purchase by a builder (James), of $100,000 in goods from a tailor (Dennis), the tax officer decides to examine the statement by Dennis and conducts an interview with him. During this interview Dennis confirms that James is his brother-in-law and Dennis did not make the supply but provided the false tax invoice as James requested him 'to help him out'. Dennis confirmed he had not received any money from James.

206. The statement made by James during the audit (the invoice provided to the tax officer) is a false or misleading statement in a material particular that did not result in a shortfall amount. However, it is considered a supporting statement made in an attempt to hinder the Commissioner from finding out about a shortfall amount.

207. Since James has also made a statement which is false or misleading in a material particular that resulted in a shortfall amount when he lodged the activity statement, the BPA for the shortfall penalty is increased by 20% for hindering the Commissioner. The supporting statement is not considered as a separate statement for the purposes of the no shortfall penalty.

208. The facts and evidence support an assessment of James behaviour as intentional disregard of a taxation law. The tax officer decides James was not making a genuine attempt to provide a correct statement. The tax officer decides not to remit any of the penalties applicable.

Second statement and examination

209. The tax invoice provided to James, by Dennis, is a false or misleading statement made to a person other than the Commissioner for a taxation purpose. It is material to ascertaining the correct taxation position and it is a statement that purports to be required by a taxation law, that is, the provisions of the GST law requiring tax invoices to be provided for taxable supplies within 28 days of the recipient of the supply requesting a tax invoice. Dennis has confirmed that he was aware that the tax invoice was false as he had not made the supply.

210. Since Dennis voluntarily disclosed the false or misleading nature of the statement which saved the Commissioner a significant amount of time, the base penalty amount of $6,600 for intentional disregard of the law is decreased by 20%.

211. The tax officer decides that Dennis was not making a genuine attempt to provide a correct statement. The tax officer decides not to remit any penalty.

212. The actions of James and Dennis could be referred for prosecution action. This is a separate decision and not dealt with in this practice statement.

Example 12: Debt and interest remission

213. A person made various statements to the ATO in connection with entering into a payment arrangement and obtaining remission of general interest charge (GIC). One particular statement was that he had been unemployed for three months. A payment arrangement was entered into and remission given for a significant amount of GIC.

214. When the person defaulted on the payment arrangement several months later a different tax officer reviewed the file. The review took into account new information, including the person's income tax returns for previous years. It was established that the person had been employed for the full income year, including the time at which the decision was made to grant the payment arrangement and remit an amount of GIC.

215. The false or misleading information was directly related to a material particular used in a decision made by the Commissioner regarding exercising a specific statutory discretion in a particular way. The statement was also directly relevant to the purpose for which it was made – namely, whether to grant a payment arrangement and remit an amount of GIC. Therefore, the statement was false in a material particular.

216. The facts and evidence support an assessment of the person's behaviour as intentional disregard of a taxation law. The tax officer decides the person did not make a genuine attempt to provide a correct statement. The tax officer decides no amount of remission is appropriate.

Example 13: TFN omitted from a member contribution statement

217. Peter is a new member of a large APRA regulated super fund. Peter provides a completed membership application form when opening his new account and makes sure he includes his TFN. He then made a non-deductible personal contribution of $5,000 to the fund which was correctly accepted in accordance with the contributions standards as the fund did hold a TFN. However, when the application form is processed by the fund an error was made and the TFN was not recorded in their information systems. After the end of the financial year the fund lodges a MCS for Peter that reports the personal contribution but, as a consequence of the processing error, does not report Peter's TFN.

218. The ATO later reviews the MCS provided by the fund as the contribution may have been accepted by the fund without a TFN, which is in contravention of the contributions standards. The omission of the TFN is an omission of a material particular because it is required to determine if the fund has dealt with the contribution correctly. It is also a material particular as Peter may be a low income earner entitled to a super co-contribution and the omission of Peter's TFN might cause the ATO to fail to identify and determine his entitlement.

219. The fund was contacted by the ATO and asked about the lack of TFN and advised if there was a TFN the fund could make a voluntary disclosure within 14 days.

220. The fund provided Peter's TFN and explained they had received the TFN from Peter when he joined the fund. However, an incorrect character entered into the system at the time of processing, resulted in the TFN not reporting correctly on the member contributions statement even though it displayed correctly within the funds internal systems.

221. The tax officer decided this was a minor, inadvertent error and that as the fund had taken reasonable care, no penalty was considered.

Example 14: Process for dealing with multiple false or misleading statements made by ARPA regulated superannuation funds (APRA fund)

222. An APRA fund lodges a combined member contributions statement (MCS) to the ATO.

223. Analysis of the reported data suggests there were a number of statements in the MCS which may not be complete or correct in relation to 350 member statements.

224. The ATO notifies the APRA fund that an examination is to be made for the relevant period. The ATO invites the APRA fund to make a voluntary disclosure to correct any false or misleading statements before a set date, in this case 21 days later.

225. The APRA fund responds to the offer by providing corrected information for 100 member statements within the 21 day period.

226. The examination of the remaining 250 member statements revealed they all contained inaccurate reporting of contributions. These false or misleading statements are material particulars because this information is required in the approved form for each statement pursuant to section 390-5. This information is critical for the effective administration of the taxation and superannuation affairs of those members, such as determining whether an excessive contributions tax liability exists. The tax officer conducting the audit seeks an explanation from the APRA fund on why the mistakes occurred and gathers additional information to assist them with penalty imposition and remission considerations.

227. The tax officer considers the evidence gathered and applies the principles in MT 2008/1 to make reasonable assumptions based on that evidence. They consider that the APRA fund failed to take reasonable care, however, for the 100 statements for which a voluntary disclosure is made, they consider the penalty should be reduced to nil; for the other 250 statements they recommend that significant remission is appropriate.

228. As the tax officer is considering applying multiple penalties against an APRA fund, they prepare a position paper which their manager refers to an internal ATO Panel.

229. The Panel, which includes Senior Executive Service (SES) officers, considers the facts, evidence and initial recommendation by the tax officer. The role of the Panel is to provide support and advice to the decision-maker, which for multiple penalties relating to APRA funds, will be an SES officer.

230. The Panel considers the following aspects:

- base penalty amount
- whether safe harbour provisions apply, and
- whether there are grounds to uplift and/or decrease the base penalty due to voluntary disclosure and the remissions principles set out above.

231. As the total base penalty amount for the 250 false or misleading statements (prior to considering remission) is $550,000 (250 x $2,200), they consider what final penalty amount would be just and appropriate having regard to the facts of the case. Significant remission of the penalty is recommended by the Panel to achieve what they consider to be a just and defensible final penalty amount.

232. The SES officer considers the Panel's recommendation and issues a penalty position paper to the APRA Fund advising the proposed final penalty amount. The APRA fund is invited to comment.

233. If comments are made, they will be considered along with any other information that may have been gathered by the tax officer. The Panel subsequently advises the decision-maker of any new issues or considerations, the SES officer determines each step in the penalty process to ensure the final penalty amount is appropriate for the compliance behaviour shown within the penalties framework. The final penalty decision including reasons for decision is communicated to the APRA fund. A penalty notice will issue for the amounts communicated to the APRA fund.

234. The decision making process illustrated above must be followed when dealing with multiple false or misleading statements by ARPA funds. The facts and circumstances relating to multiple false or misleading statements made by APRA funds may vary significantly. As such, final penalty decisions will be dependent upon the facts and circumstances of each case.

GLOSSARY

Base penalty amount

235. In the context of Division 284, subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) states that the base penalty amount for calculating the amount of an administrative penalty is worked out under:

- section 284-90, where the penalty is for a false or misleading statement, or a position that is not reasonably arguable; and
- section 284-160, where the penalty relates to a scheme.

236. The base penalty amount is the starting point for the calculation of an administrative penalty.

Entity

237. Entity has the meaning given by section 960-100 of the ITAA 1997 as:

(a) an individual

(b) a body corporate

(c) a body politic

(d) a partnership

(e) any other unincorporated association or body of persons

(f) a trust

(g) a superannuation fund

(h) an approved deposit fund

Penalty Unit

238. Subsection 4AA(1) of the *Crimes Act 1914* provides that the value of one penalty unit is $110 for contraventions occurring prior to 28 December 2012, and $170 for contraventions on or after this date.

Safe harbour

239. Safe harbour means a reference to the no liability provision of subsection 284-75(6).

Shortfall amount

240. A shortfall amount has the meaning given by subsection 284-80(1). For the purposes of this practice statement a shortfall amount is explained in item 1 and item 2 in the table in subsection 284-80(1). It is an amount by which the relevant tax-related liability is less than or the payment or credit is more than it would have been had the statement not been false or misleading.

Statement penalty

241. Statement penalty refers to any of the penalties in Subdivision 284-B. These include:

- subsection 284-75(1) - false or misleading statement made to the Commissioner or to an entity exercising powers or performing functions under a taxation law
- subsection 284-75(2) – no reasonably arguable position
- subsection 284-75(3) – failure to provide a document required by the Commissioner
- subsection 284-75(4) - false or misleading statement made to an entity other than the Commissioner and an entity exercising powers or performing functions under a taxation law

Taxation law

242. 'Taxation law' is defined in subsection 2(1) as having the meaning given by the ITAA 1997. Subsection 995-1(1) of the ITAA 1997 defines 'taxation law' as an Act of which the Commissioner has the general administration and any regulations under such an Act. It also includes part of an Act (and associated regulations) to the extent that the Commissioner has the general administration of the Act.

243. However, references to 'taxation law' in Subdivision 284-B specifically exclude Excise Acts (as defined in subsection 995-1(1) of the ITAA 1997).

Tax-related liability

244. ‘Tax-related liability’ is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 255-1.

245. Section 255-1 provides that a tax-related liability is a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable).

Amendment history

Date of amendment	Part	Comment
22 January 2013	Paragraphs 150 & 238	Revised to reflect change in penalty unit value from 28 December 2012.

Subject references	false or misleading statements penalties remission of penalties safe harbours taxpayer disclosures
Legislative references	ITAA 1936 202C ITAA 1936 264 ITAA 1997 960-100 ITAA 1997 995-1(1) TAA 1953 2(1) TAA 1953 Part IVC TAA 1953 Sch 1 Part 4-25 TAA 1953 Sch 1 255-1 TAA 1953 Sch 1 Div 269 TAA 1953 Sch 1 Div 284 TAA 1953 Sch 1 Subdiv 284-B TAA 1953 Sch 1 284-20 TAA 1953 Sch 1 284-25 TAA 1953 Sch 1 284-70 TAA 1953 Sch 1 284-75(1) TAA 1953 Sch 1 284-75(4) TAA 1953 Sch 1 284-75(5) TAA 1953 Sch 1 284-75(6) TAA 1953 Sch 1 284-75(7) TAA 1953 Sch 1 284-80 TAA 1953 Sch 1 284-80(1) TAA 1953 Sch 1 284-85(2) TAA 1953 Sch 1 284-90 TAA 1953 Sch 1 284-90(1) TAA 1953 Sch 1 284-160 TAA 1953 Sch 1 284-220 TAA 1953 Sch 1 284-220(1) TAA 1953 Sch 1 284-220(1)(a) TAA 1953 Sch 1 284-220(1)(b)(ii) TAA 1953 Sch 1 284-220(1)(ca) TAA 1953 Sch 1 284-224 TAA 1953 Sch 1 284-225 TAA 1953 Sch 1 284-225(4A) TAA 1953 Sch 1 284-225(5) TAA 1953 Sch 1 286-75 TAA 1953 Sch 1 298-10 TAA 1953 Sch 1 298-20 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(1) TAA 1953 Sch 1 298-30(2) TAA 1953 Sch 1 353-10 TAA 1953 Sch 1 388-50(2) TAA 1953 Sch 1 390-5 *A New Tax System (Australian Business Number) Act 1999* 28(2) *Crimes Act 1914* 4AA(1) *Excise Act 1901* *Financial Management and Accountability Act 1997* 44 *Superannuation Industry (Supervision) Act 1993* 6(1)(e) *Superannuation Industry (Supervision) Act 1993* 35C

	Superannuation Industry (Supervision) Act 1993 35C(2)
Related public rulings	MT 2008/1 MT 2012/3 TD 2011/19 TR 2005/16
Related practice statements	PS LA 2005/19 PS LA 2008/3 PS LA 2012/5
Case references	*Ebner & Arnor v. FC of T* [2006] AATA 525; (2006) 63 ATR 1073; 2006 ATC 2263 *Ciprian & Ors v. FC of T* [2002] AATA 746; 2002 ATC 2099; (2002) 50 ATR 1257 *International Harvester Company of Australia Proprietary Limited v. Carrigan's Hazeldene Pastoral Company (1958)* 100 CLR 644 *Weyers and Anor v. FC of T* [2006] FCA 818; 2006 ATC 4523; (2006) 63 ATR 268
Other references	Compliance Model *Excess contributions tax – applying to have your contributions disregarded or reallocated* Taxpayers' Charter
File references	1-2QLGZ6G
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Section	Operational Policy, Assurance and Law