PS LA 2012/4 - Administration of the false or misleading statement penalty - where there is no shortfall amount

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PS LA 2012/4
Administration of the false or misleading statement penalty – where there is no shortfall amount

This Law Administration Practice Statement provides guidelines in relation to the penalty for making a false or misleading statement, where no shortfall amount results.

This Practice Statement is an internal ATO document and is an instruction to ATO staff.

1. What is this Practice Statement about?

1A. This Practice Statement provides guidance on how the Commissioner administers the penalty[1] for making a false or misleading statement that does not result in a shortfall amount, including:

- when an entity is liable to a penalty in the situation where the statement does not result in a shortfall amount, and
- how the penalty is assessed, including factors to consider when making a remission decision.

1AA. All legislative references in this Practice Statement are to Schedule 1 to the *Taxation Administration Act 1953*, unless otherwise indicated.

1B. This Practice Statement applies to statements made on or after 4 June 2010.

1C. Where the statement results in a shortfall amount, guidance is provided in Law Administration Practice Statement PS LA 2012/5 *Administration of the false or misleading statement penalty – where there is a shortfall amount*.

1D. Remission guidelines in this Practice Statement are provided to assist you to exercise the discretion and ensure that entities in like situations receive like treatment. The guidelines do not lay down conditions that may restrict the exercise of the discretion.

2. Administering the penalty

2A. There are 3 steps in administering the false or misleading statement penalty:

- Step 1 – determine if a penalty is imposed by law
- Step 2 – assess the amount of the penalty[2]
- Step 3 – notify the entity of the liability to pay the penalty.

3. General principles

3A. The following general principles should be considered when making decisions:

- A primary purpose of this penalty regime is to encourage entities to take reasonable care to comply with their tax obligations. Generally, an entity will not be penalised
  - where they have made a reasonable and genuine attempt to comply
  - because of the reasonable care or safe harbour exceptions
  - because the law was applied in an accepted way, or
  - because we have remitted any remaining penalty.[3]
- The penalty regime aims to achieve a level playing field, ensuring fairness and equity for all entities and for there to be consequences for failing to take reasonable care.
- The compliance model requires us to be fair to entities wanting to do the right thing, but firm with those who are choosing to avoid their tax obligations.
- The Taxpayers' Charter requires us to treat an entity to have been honest, unless we have reason to think otherwise.
- We must consider the individual circumstances of each case, including the background and experience of the entity.
- Decisions must be supported by the available facts and evidence. Conclusions about an entity's behaviour should only be made where they are supported by, or can be reasonably inferred from, the facts.
- The entity should be contacted and given the opportunity to explain their actions before a

[1] Subsections 284-75(1) and (4) of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

[2] This will usually involve a decision about remission of the penalty. This decision can also be made after the entity has been notified of the liability.

[3] Subsections 284-75(5) and (6), or section 284-224.

penalty decision is made. Exceptions to this general principle might include fully automated data matching cases or where the facts of the case clearly show deliberate disengagement from the taxation system.

4. Our approach to administering the penalty

4A. We take a risk-based approach to administering the penalty provisions.

4B. The provisions have broad application and could apply to a wide variety of activities, including compliance, audit, advice, debt, lodgment and registration activities. However, it is not administratively appropriate, nor is it necessary, to consider applying the penalty to every potentially false or misleading statement.

4C. Statements that do not result in a shortfall amount will normally only be examined where we take action 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 (SMSFs)
- audits of Australian Prudential Regulation Authority (APRA)-regulated funds for the accuracy and completeness of their reporting
- audits which result in reduced carry-forward losses for an income year (including losses carried forward to future income years)[4]
- reviews of registration applications and/or registration records, or
- project-based work where tax or super-related statements are being reviewed.

4D. These examinations will result in the making of a penalty decision, which may involve assessment of a penalty.

4E. You should not usually seek to examine statements that do not result in a shortfall amount where the statements made are of little importance or relevance to the ATO's activities.

4F. If the statement is not the focus of the examination or activity, we will only consider the statement if there is a risk to the integrity of the tax system or a need to be firm with non-compliant entities (for example, where it appears that the statement was made recklessly or with intentional disregard of the law).[5]

4G. In addition, there should be exceptional situations in order to consider assessing a penalty for the following types of statements:

- an incorrect application of the law to correct facts (although statements of mixed fact and law will be considered)
- a statement made regarding future intentions, unless subsequent actions make it doubtful the statement was genuine at the time, or
- where information is omitted on a questionnaire or document that was simply to gather generic information from an entity.

4H. We would not normally consider imposing penalties where amended assessments result in increased credits or an increase in losses carried forward.

4I. Additionally, for examinations that are ongoing from 1 July 2018, we will not apply false or misleading statement penalty where an entity or their agent failed to take reasonable care in certain circumstances. This is called 'penalty relief' and will apply in limited situations to individuals, small businesses, superannuation funds and trusts. Certain entities are excluded from penalty relief and the actions of other entities can also mean that penalty relief is not applied. Full details of the grounds for inclusion and exclusion for penalty relief are in Attachment B – Penalty Relief of PS LA 2012/5.

STEP 1 – DETERMINE IF A PENALTY IS IMPOSED BY LAW

5. What is the false or misleading statement penalty?

5A. Subsection 284-75(1) imposes a penalty where an entity (or their agent)[6] makes a statement to the Commissioner, or to another entity who is exercising powers or performing functions under a taxation law, and the statement:

- is about a tax-related matter
- is false or misleading in a material particular, and
- does not result in a shortfall amount.

5B. Subsection 284-75(4) imposes a penalty where an entity (or their agent):

- makes a statement to another entity (other than the Commissioner, or to another entity who is exercising powers or performing functions under a taxation law) and the statement

[4] Refer to Examples 1 and 9 of this Practice Statement for guidance on practical application to cases involving losses.
[5] Example 10 of this Practice Statement also provides an illustration of this approach.

[6] Any reference to entity in this Practice Statement should be read as 'the entity or their agent'.

- is, or purports to be one, that is required or permitted under a taxation law or
- might reasonably be expected to be used in determining, for the purposes of goods and services tax (GST) law, whether the entity is an Australian consumer, and[7]
- the statement is false or misleading in a material particular.

6. What is a statement?

6A. A statement is anything that is **disclosed** for a purpose connected with a taxation law orally or in writing (and includes those made electronically).

6B. Statements may be made in correspondence, a registration form, an activity statement, an amendment request or any other communication.

6C. Where an entity lodges a form, the form itself is not the statement that is made. The statement is the information at the individual labels or questions. This means more than one statement can be made on a form.

6D. Statements may also be made by omission, if an entity fails to include material information in a document that requires that information to be supplied.

Where the omission is in a combined form

6E. A combined form is one where we allow lodgment of a single form to fulfil multiple reporting obligations.[8] In these cases, where one discrete form within the combined form is not completed, the omission is a failure to give a return, notice or other document on time[9], for which a separate penalty applies. It is not a statement by omission.

6F. For example, if a super fund lodged a member contributions statement (MCS)[10] for all of its contributing members and:

- the MCS did not report personal contributions for some members, but all other information was provided for those members – these omissions would be statements for penalty purposes
- for other members, no member or contribution information was provided by the due date in this (or any other) MCS – these omissions would be failures to lodge statements for each member. A penalty for failing to give a return, notice or other document on time may apply for each statement.

Supporting statements and totals

6G. Where the entity provides information in support of a previously-made statement, and this is consistent with the information in the initial statement, generally the Commissioner will not consider this subsequent statement to be a separate statement for the purposes of this penalty. Exceptions would only apply where the statement was made intentionally disregarding the law.

6H. Additionally, where an error is made in a statement and further false or misleading statements are made relying on that error (such as sub-totals, totals or amounts being carried into new documents), only the original statement will be considered for the purposes of this penalty.

6I. However, where the second statement results in a shortfall amount (such as a later income tax return which utilises losses disallowed in a prior year), it will be more appropriate to consider shortfall penalties for the second statement, and not impose penalties for the statement which did not result in a shortfall amount.

7. Does the statement concern a tax-related matter?

7A. The penalty only applies to statements made for a purpose connected with a taxation law.[11] A taxation law is:

- an Act, or part of an Act, of which the Commissioner has the general administration, and
- any regulations under such an Act.

7B. A statement will be about a tax-related matter if a taxation law provides for the statement to be made. This includes:

- where there is a legislative requirement to make the statement, or
- where the statement is made for a purpose connected with a taxation law – for example, because it is relevant to a decision, or the exercise of a power.

7C. If the statement does not directly affect or concern an entity's tax or super affairs and is not otherwise provided for under the legislation, there needs to be a connection to:

- an express explanation about the purpose of the statement, which was available before the entity made the statement, or

[7] Subparagraph 284-75(4)(b)(ii) applies to tax periods starting on or after 1 July 2017.
[8] Subsection 388-50(2).
[9] Subsection 284-75(3). See Law Administration Practice Statement PS LA 2014/4 *Default assessment penalty* for guidance.
[10] Section 390-5.
[11] Section 284-20.

- an objective inference about the purpose and manner in which the information will be used.

8. Is the statement false or misleading in a material particular?

False

8A. A statement is false if it is contrary to fact or wrong.

8B. It may be false because of something contained in the statement or because something is omitted from the statement.

8C. If a statement was correct at the time it was made but is subsequently made incorrect because of a retrospective amendment to the law, it is not later considered false (or misleading). It is the nature of the statement at the time that it was made that is relevant.

8D. It does not matter if the person who made the statement did not know that it was false.

Misleading

8E. A statement is misleading if it creates a false impression, even if it is literally true.

8F. It may be misleading because of something contained in the statement or because of something omitted from the statement.

8G. The reason it is misleading may be because it is uninformative, unclear or deceptive.

In a material particular

8H. For a particular to be 'material' it must have a connection to the purpose for which the statement is made, but it does not have to be something that must or actually will be taken into account in making a decision.

8I. Materiality is determined at the time the statement is made – a statement cannot be made material because of subsequent events.

8J. However, materiality may be unknown until a subsequent event occurs (such as when 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 (such as during an examination).

8K. Examples 1 to 9 in Attachment A to this Practice Statement provide guidance on what would constitute a material particular.

9. Who is the statement made to?

9A. The statement must have been made in any of the following ways.

To the Commissioner or to another entity who is exercising powers or performing functions under a tax law[12]

9B. The term 'another entity who is exercising powers or performing functions under a tax law' is interpreted narrowly. This will include a statement made to the Commissioner[13], tax officers or other staff authorised to perform functions under taxation laws.[14]

To another entity, if the statement is, or purports to be, one that is required or permitted under a taxation law[15]

9C. A statement is required under a taxation law if there is an obligation to make the statement. For example, the *Superannuation Industry (Supervision) Act 1993* (SIS Act) requires a SMSF trustee to give certain information to an approved SMSF auditor if they request it. This would be a statement required by law.

9D. In certain situations, taxation laws make it clear a statement is permitted to be made. For example, under the *Income Tax Assessment Act 1936* (ITAA 1936), someone may give a tax file number (TFN) declaration to their prospective employer.

9E. In each case, if the statement is purported to be required or permitted by a taxation law, then it must state, or imply, that the statement is one that is required or permitted by taxation law.

9F. 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 does so 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.

9G. This differs from a statement held out to be required by a taxation law, when in fact no such requirement exists.

To another entity, if the statement is, or purports to be, one that might reasonably be expected to be used in determining whether the entity is an Australian consumer[16]

9H. For GST, an offshore supplier of low-value goods, digital products and other services imported by

[12] Subsection 284-75(1).
[13] This includes statements made to the Registrar of the Australian Business Register.
[14] Another person is a tax officer in the course of their duties, or a Border Force officer (customs officer) in the course of their duties under a delegation from the Commissioner of Taxation.
[15] Subsection 284-75(4).
[16] Subsection 284-75(4).

consumers is required to take reasonable steps to obtain information about whether or not the recipient is an Australian consumer of the supply, for the purposes of determining the tax treatment of the supply.[17]

9I. The law does not require that the recipient of the supply make a statement.

9J. Where a consumer supplies false information to the supplier, which might reasonably be expected to be used in determining whether the entity is an Australian consumer for GST purposes[18], a penalty may apply.

9K. For example, if an individual consumer made misrepresentations to a supplier as to their location in Australia, or falsely claimed they were registered for GST and acquiring the supply for the purpose of their enterprise they carry on in Australia, the consumer will have made a false or misleading statement for penalty purposes as outlined in paragraph 5B of this Practice Statement.

10. Who is liable for the penalty?

10A. An entity will be liable for the penalty for a statement they or their authorised representatives (including tax agents, BAS agents, authorised employees or other agents) make on their behalf.[19]

10B. Under commercial law, an agent is a person who is either expressly or impliedly authorised by a principal to act for that principal so as to create or effect legal relations between the principal and third parties.[20] An act done by the agent on behalf of the principal is considered an act of that principal.

10C. For superannuation, an authorised agent also includes an administrator or superannuation supplier.

10D. If an agent exceeds the scope of their authority when making a statement and the entity can prove that responsibility for that statement lies with the agent, the penalty may be imposed on the agent.

11. Exceptions to the penalty

11A. An entity will not be liable to a penalty where:

- the entity and their agent (if relevant) took reasonable care in connection with making the statement[21], or
- a 'safe harbour' applies to the statement.[22]

11B. There is also a reduced liability to a penalty where the entity followed our advice or guidance, or general administrative practice. This is a reduction of the base penalty amount and is covered in paragraphs 15M to 15Q of this Practice Statement.

12. Reasonable care

12A. Reasonable care is explained in Miscellaneous tax MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard.*

12B. The 'reasonable care test' requires an entity to make a **reasonable and genuine attempt** to comply with obligations imposed under a taxation law. This means taking into account all actions leading up to the making of the statement.

12C. Making a genuine attempt means that the entity was actively engaged with the tax system and actively attempting to comply with their tax obligations. When considering if a genuine attempt has been made we compare the entity's attempt with that of other entities in similar circumstances.

12D. The fact that a false or misleading statement was made does not automatically mean there was a failure to take reasonable care. There must be evidence that the entity's attempt to comply has fallen short of the standard of care that would reasonably be expected in the circumstances.

12E. The effort required is one commensurate with the entity's circumstances, including their knowledge, education, experience and skill.[23] 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.[24] In borderline cases, it can be more readily accepted that an entity has exercised reasonable care where the entity has a good compliance history.

12F. The following factors are also relevant when assessing reasonable care:

- if there was an inadvertent mistake
- if reasonable enquiries were made, including whether
  - the entity conducted a level of enquiry commensurate with the risk of the decision and their resources, or
  - the entity just assumed the statement was correct

[17] Division 84 of the *A New Tax System (Goods and Service) Act 1999.*
[18] Subsection 9-25(7) of the *A New Tax System (Goods and Service) Act 1999.*
[19] Section 284-25.
[20] *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* [1958] HCA 16.
[21] Subsection 284-75(5).
[22] Subsection 284-75(6).
[23] Paragraph 28 of MT 2008/1.
[24] Paragraph 92 of MT 2008/1.

- whether the entity was aware, or should have been aware, of the correct treatment of the law or of the facts, noting
  - an entity should not rely on advice they have received where a reasonable person would be expected to know or strongly suspect the advice is not worthy of such reliance[25], and
  - an entity is not obliged or entitled to blithely accept assurance by their professional advisor especially where those statements appear flawed or questionable
- whether any factors prevented the entity from seeking advice, understanding the requirements of the tax law or reporting correctly, and
- whether the entity's level of knowledge, understanding of the tax system or personal circumstances impacted their compliance, considering
  - whether a registered tax agent or BAS agent was used
  - the entity's level of sophistication relating to tax matters
  - the level of knowledge, education, experience and skills of relevant persons involved with the entity, and
  - the personal circumstances of relevant persons involved, including age, health and background.

Using a registered tax agent or BAS agent

12G. Even if an entity uses a registered tax agent or BAS agent, they are still expected to take a prudent attitude to their tax affairs. Engaging an agent does not, by itself, mean that reasonable care has automatically been taken, and entities are still required to set up appropriate reporting and recording systems, provide all relevant taxation information to their agent and answer questions or provide information to their agent.

12H. An entity will generally be found not to be making a genuine attempt to comply with their obligations where they do not query advice that:

- is obviously incorrect or does not apply to their circumstances
- produces an odd or irregular outcome, or
- seems an extraordinary treatment of tax matters, which a comparable, ordinarily prudent person would investigate further.

12I. The more complex the area of tax law involved, the greater the monetary amount involved or the more 'sophisticated' the entity, the greater the level of enquiry that is expected.

12J. Before signing documents lodged on their behalf, an entity is also expected to confirm, to an appropriate extent, that the document reflects the information they provided to their tax agent.

12K. A registered agent will be subject to a higher standard of care that reflects the level of knowledge and experience a reasonable person in their circumstances will possess. The appropriate benchmark is the level of care that would be expected of an ordinary and competent practitioner practising in that field and having the same level of expertise.

12L. Registered agents are not required to extensively audit or review books, records or other source documents to independently verify the entity's information. It will not be possible or practical for an agent to scrutinise every item of information supplied. What is appropriate will depend on the individual circumstances of the entity and the registered agent. However, reasonable enquiries must be made if the information appears to be incorrect or incomplete.

13. The 'safe harbour' exception

13A. Safe harbour[26] provides that an entity will not be subject to a penalty as a result of certain actions (or omissions) of their registered tax or BAS agent, as long as:

- they gave all the relevant tax information necessary for the statement to be correctly prepared to the agent, and
- the agent did not act recklessly or with intentional disregard of the law.[27]

13B. This means the safe harbour exception applies only where the agent has failed to take reasonable care.

13C. Each statement has to be considered separately.

All relevant taxation information

13D. The safe harbour exception will only apply if the entity provides their registered agent with all the relevant taxation information about a particular matter.

[25] *Weyers v Commissioner of Taxation* [2006] FCA 818.
[26] Subsection 284-75(6). 'Safe harbour' is not a term found in the law but is commonly used to describe this exception, including in the Explanatory Memorandum to the law.
[27] See section 15 of this Practice Statement and MT 2008/1 for the meanings of the terms 'reckless' and 'intentional disregard'.

13E. Whether or not 'all the relevant taxation information' was provided needs to be considered objectively. It does not matter if the entity genuinely believed they provided all relevant information. The exception will not apply if the entity omitted or did not supply any part of the relevant information, or gave incorrect or conflicting information.

13F. An entity may provide some information to their registered agent in a summary and the registered agent may reasonably rely on that for preparation of the statement. However, a summary which is incorrect or incomplete in a material particular will not meet the requirement to provide all relevant taxation information, even if reasonable care for a registered agent would have involved querying the information. Registered agents are not required to view all source documents, and it is often impractical for them to do so.

13G. The entity has the burden of proof to establish that they provided all relevant taxation information. 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.

13H. You would usually need to contact the registered agent if the entity is claiming the safe harbour exception to the penalty. Without doing so, it would be difficult to assess their actions and whether they exercised reasonable care, or know what information they requested from their client.

13I. However, contact with the registered agent is not mandatory. If you have been unable to contact the registered agent, a decision should be made on the information available.

13J. Safe harbour can be considered even if the entity or agent do not explicitly request it, as it may be clear from the statement that all relevant taxation information was provided but the registered agent did not exercise reasonable care. In these cases, it is still generally appropriate to contact the registered agent to discuss safe harbour, but you are not required to do so in order to apply safe harbour.

STEP 2 – ASSESSING THE AMOUNT OF THE PENALTY

14. Working out the penalty amount

14A. To assess the penalty amount:

- determine the base penalty amount (BPA)
- increase and/or reduce the BPA, and
- consider remission of the calculated penalty amount.

15. Working out the BPA

15A. The BPA is calculated by:

- assessing the entity's behaviour in making the statement, then
- reducing the BPA to the extent that the entity applied a taxation law in an accepted way.

15B. Where a shortfall amount does not occur, subsection 284-90(1) provides the initial penalty units[28] as follows:

Table: BPA penalty units

In this situation	*The BPA is*
intentional disregard of a taxation law by the entity or their agent	60 penalty units
recklessness by the entity or their agent as to the operation of a taxation law	40 penalty units
failure by the entity or their agent to take reasonable care to comply with a taxation law	20 penalty units

15C. The entity's behaviours or attributes to consider are those exhibited at the time of and in connection with making the statement. Actions which occur after making the statement do not affect the determination of the BPA.

15D. The behaviours considered are those exhibited at the time of, or in connection to the making of the statement. The guidelines for determining the behaviour are in MT 2008/1. They are described briefly in the following sections of this Practice Statement but you must use the ATO view found in MT 2008/1.

15E. Each statement needs to be considered separately.

BPA for a significant global entity

15F. For statements made on or after 1 July 2017, if an entity is a significant global entity (SGE)[29] and a BPA in an item of the table in subsection 284-90(1) applies, the base penalty amount is taken to be doubled.[30]

15G. An entity's status as an SGE must be worked out on the day the statement was made and is based upon the most recent income year for which an income tax

[28] The value of a penalty unit is contained in section 4AA of the *Crimes Act 1914* and is indexed regularly The dollar amount of a penalty unit is available at ato.gov.au/penalty.

[29] The term 'significant global entity' is defined in section 960-555 of the *Income Tax Assessment Act 1997*. Paragraphs 6 to 10 of Law Companion Ruling LCR 2015/3 *Subdivision 815-E of the Income Tax Assessment Act 1997: Country-by-Country reporting* contains further guidance on the meaning of significant global entity.

[30] Subsection 284-90(1A).

assessment has been made for the entity[31] or a determination by the Commissioner that the entity is an SGE at the date of the statement (see Example 15 of this Practice Statement).

Failure to take reasonable care

15H. Failure to take reasonable care occurs where reasonable care has not been taken in connection with making the statement, but neither the entity nor their agent has been reckless or intentionally disregarded the law.

Recklessness

15I. 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.

15J. 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 does not need to actually realise the likelihood of the risk for it to be reckless.

Intentional disregard

15K. Intentional disregard of the law is something more than reckless disregard of, or indifference to, a taxation law.

15L. 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 their affairs and make a deliberate choice to ignore the law.

Reducing the BPA where the entity treated the law as applying in an accepted way

15M. The BPA is reduced[32] to the extent that the entity treated a taxation law in a particular way that agreed with:

- advice given to them 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.

Reliance on advice or a statement from the Commissioner

15N. Where an entity has treated a taxation law as applying in a particular way, and that way agrees with advice we provided (in writing or orally) or a statement in a document we have published, then they may be protected from application of a penalty.[33]

Alignment with a general administrative practice

15O. The BPA is also reduced to the extent that an entity's behaviour aligns with our general administrative practice.

15P. A general administrative practice under a taxation law is a practice which is applied by us generally as a matter of administration. It is the usual course of conduct that we apply, rather than any particular document, that is relevant in determining whether or not there is a general administrative practice.[34]

15Q. Publications and other documents produced by the Commissioner may also provide evidence of a general administrative practice. If we frequently provide advice to different taxpayers which consistently adopts a particular practice, that will tend to support that a general administrative practice exists.

16. Increasing and/or reducing the BPA

16A. In certain instances, the BPA is increased and/or reduced, using the following formula[35]:

BPA + [BPA × (increase % – reduction %)]

Increasing the BPA

16B. The BPA is increased by 20% where the entity[36]:

- prevents or obstructs us 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 us about it within a reasonable time, or

[31] Assessment may be based on the last return lodged or an original default assessment.
[32] A reduction under section 284-224 is applied to the BPA **before** the formula in section 284-155 is used to determine the amount of penalty. The reduction in the formula only refers to section 284-225 (voluntary disclosures).
[33] See Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the ATO*.
[34] For more information on general administrative practice, refer to Taxation Determination TD 2011/19 *Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?*
[35] Subsection 284-85(2). This formula is not used for reductions resulting from treating the law as applying in an accepted way.
[36] Section 284-220.

- had a BPA worked out for this type of penalty previously, even if the penalty was remitted.

16C. The increase is a maximum of 20%, even if more than one of the criteria in paragraph 16B of this Practice Statement applies.

Increasing the BPA – prevent or obstruct

16D. Examples of what would constitute preventing or obstructing us would include where the entity, without an acceptable reason:

- repeatedly defers or fails to keep appointments
- repeatedly fails to supply information
- repeatedly fails to respond adequately to reasonable requests for information, such as
  - by not replying to the request for information
  - giving information that is not relevant
  - not addressing all the issues in the request, or
  - supplying inadequate information
- fails to respond to formal information-gathering notices
- provides incorrect information or fraudulently prepared documents in support of statements (although these may also be further false or misleading statements), or
- destroys records.

16E. You should also note the use of the term 'repeatedly' when considering increases for prevention or obstruction. Simply not replying to a letter or not returning a call does not indicate the entity is taking steps to prevent or obstruct us.[37] It will also not be obstruction where the incorrect information or the failure to provide information was the result of the taxpayer not understanding the request.

16F. We expect that where legal professional privilege (LPP) claims are made, they are made properly.[38] Claims of LPP will not generally be considered to be obstructive. However, if you discover that claims were unjustified, you should consider if they were made to obstruct us.

Increasing the BPA – previous penalty

16G. The BPA is increased by 20% where the entity has a previous penalty of the same type as the penalty being assessed. For false or misleading statements which do not result in a shortfall amount, the previous penalty must also have been for a false or misleading statement which did not result in a shortfall amount.

16H. The increase will apply regardless of whether the previous penalty was assessed during a previous interaction, or whether it occurs on the same day. This means that, where you assess multiple penalties of the same type at the same time, the increase will apply to the second and subsequent statements.

16I. The order of the statements is determined by the date on which they were made, not the period to which they relate.

Reducing the BPA for voluntary disclosure

16J. The BPA can be reduced in certain circumstances where an entity voluntarily discloses the false or misleading statement, if they do so in 'the approved form'.[39]

16K. You must refer to Miscellaneous Taxation Ruling MT 2012/3 *Administrative penalties: voluntary disclosures* when making any decision regarding voluntary disclosure and the rates of penalty reduction applicable in certain situations.[40]

Approved form

16L. A voluntary disclosure must meet the requirements of the approved form.

16M. The approved form sets out a list of the information required for the entity to make that disclosure. This includes an identification of the statement and an explanation of its false or misleading nature.

16N. Generally, the actual form and structure used is irrelevant, as long as the entity provides the required information through an acceptable mechanism. You can find full details of the information required and the methods or mechanisms available to make a voluntary disclosure at How to make a voluntary disclosure on ato.gov.au.

16O. In working out if a voluntary disclosure has been made, it is important to recognise that an entity making a

[37] *Ebner and Commissioner of Taxation* [2006] AATA 525 at [19]; *Ciprian and Ors and Commissioner of Taxation* [2002] AATA 746.

[38] Guidance on our approach to dealing with claims for LPP can be found in Compliance with formal notices – claiming legal professional privilege in response to formal notices, available on ato.gov.au.

[39] Section 284-225.

[40] Unlike shortfall penalties where the reduction rates are 20%, 80% and to nil, this false or misleading statement penalty is reduced to nil for pre-notification disclosures, and either by 20% or to nil (if the discretion is exercised) after being told of an examination.

genuine attempt to inform us of a mistake may not be fully aware of all the information we require.

16P. If the disclosure fails to meet the strict requirements of the approved form, but substantially complies with the requirements, and you can accurately determine the nature of the false or misleading statement from the information provided, the disclosure should be treated as meeting the requirements of the approved form.

16Q. 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.

16R. 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 us from identifying the correct information (that is, the false or misleading nature of the statement), particularly where the degree of incompleteness is significant.[41]

16S. In more complex, low-volume reviews and audits, you should:

- tell the taxpayer as soon as practicable after they make a voluntary disclosure that we have received it, and
- advise of the rate of penalty reduction at the same time, if it is possible and appropriate to do so.

17. Considering whether to remit the penalty

17A. We have the discretion to remit all or part of the penalty.[42] This discretion is 'unfettered', meaning that there is no legal restriction on when we can and cannot remit. Remission provides the administrative flexibility to ensure the penalty imposed is aligned with the observed behaviour.

17B. This Practice Statement sets out guidance that must be used in exercising this discretion. However, remission is not limited to the reasons listed here and you should consider remission in any situation where the final penalty is not a just and reasonable outcome.

17C. You must make a remission decision whenever penalties are imposed. You may decide that there are no grounds for remission or that there are grounds to remit in full or in part.

17D. You need to consider each case on its own merits, looking at all of the relevant facts and circumstances.

17E. The final penalty you apply must be defensible, proper and have regard to the overall circumstances of the entity.

17F. Relevant matters to consider in making a remission decision include:

- the purpose of the penalty regime is to encourage entities to take reasonable care in complying with their tax obligations
- the penalty regime also aims to promote consistent treatment with specified rates of penalty; this objective would be compromised if penalties imposed at the rates specified in the law were remitted without just cause, arbitrarily or as a matter of course, and
- that the amount of the penalty rate alone, in the absence of specific reasons why it would be unjust in the taxpayer's particular circumstances, is not considered to be unjust.

17G. Matters that you should not usually consider include:

- behaviour or situations unrelated to the relevant statement, such as the entity or registered agent becoming ill at the time of examination, well after the statement was made, and
- whether there is a capacity to pay the penalty, except in exceptional circumstances.[43]

Unintended or unjust result

17H. If imposition of the penalty provides an unintended or unjust result, we may remit the penalty in whole or in part.

17I. Four examples of where an unjust result could arise are outlined below in this Practice Statement. You should also consider remission in other instances where the result is unjust, having regard to the particular circumstances.

Mechanical process of the law

17J. In some instances, the mechanical process of the law could result in an unintended or unjust result. This can include where a BPA is increased because 2 or more penalties were assessed at the same time, the entity has not been advised of a previous penalty and the behaviour is not intentional disregard of the law.

[41] *Kdouh and Commissioner of Taxation* [2005] AATA 6.
[42] Section 298-20.
[43] Capacity to pay and hardship may be dealt with through payment arrangements, compromise, release, settlement and insolvency and under other taxation or insolvency provisions, and generally not remission of penalties.

Multiple penalties

17K. Because of the nature of this penalty, multiple instances of the same penalty can apply. Because a penalty is assessed in respect of each false or misleading statement, multiple penalties may arise in relation to a single form.

17L. It may not be appropriate for multiple penalties to be maintained if the errors resulted from an administrative oversight which through repetition affected a large number of statements. However, this would depend on the assessment of the particular facts and circumstances.[44]

17M. Additionally, remission may be appropriate because the ultimate penalty amounts are not commensurate with a reasonable outcome considering the statements made or are disproportionate to the errors made.

17N. The following factors should be taken into account:

- the circumstances in which the errors which caused the false or misleading statements occurred, such as
  - whether the errors were properly distinct or arose out of the one course of conduct
  - the efforts the entity took to avoid or reduce the potential for making a false or misleading statement, considering whether there have been previous incorrect statements, or whether they were aware or should have been aware of the potential for error
  - governance processes the entity had in place, and
  - the seriousness of the issues which led to 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, the entity took before being notified of an examination by us, to avoid a recurrence
- the need for specific and general deterrence
- the entity's compliance history, particularly giving consideration to any previous false or misleading statements, especially of the same or similar nature, and
- any other factors which may be relevant.

Penalty is disproportionate to misstatement

17O. Because penalties for false or misleading statements that do not result in a shortfall amount are based on a fixed number of penalty units, situations may arise where relatively small errors receive penalties which are disproportionate to the size of the misstatement.

17P. This commonly occurs when a small adjustment is made to an entity in a loss situation and the penalty is larger than the shortfall penalty which would have applied if the entity were not in a loss situation.

17Q. Where this occurs, it is appropriate to consider remitting the penalty in part, to an amount which is proportionate to the size of the misstatement.

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

17R. An unjust result may also occur where the entity has made a genuine attempt to comply (they have 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, because the agent was reckless in their application of the law or some information was not provided to the agent).

17S. While remission is possible in this situation, it would be unusual for full remission to be given, because entities are responsible for the actions of their agent. Remission is also less likely or may be for a lesser amount where the tax agent intentionally disregarded the law.

Significant global entities

17T. An entity (which is not an SGE at the time they make a false or misleading statement) may be treated as an SGE on the basis of their last lodged return, default assessment or a determination by the Commissioner, and have a penalty multiplier (double penalty) used to assess their penalties.

17U. When the entity lodges a return for the period which includes the date of the false or misleading statement, and which shows that they were not an SGE at the time of the statement, the penalty will be recalculated on the basis that they were not an SGE.

17V. However, if the entity requests remission of the penalty multiplier prior to that return being lodged, and is able to provide sufficient evidence that they were no

[44] See Example 16 of this Practice Statement. For APRA-regulated funds, an officer at the SES level is required to make the penalty decision where the potential for multiple penalties exists.

longer or likely not an SGE at the time of the statement, remission of the additional penalty would be appropriate.

17W. For example, a change in SGE status may have occurred as a result of the Australian entity being sold to a new owner, or the SGE may have divided its group, sold off some parts of its business, demerged, restructured, had their turnover drop significantly or go through some other change which affects their SGE status after the period covered by their last return or default assessment.

STEP 3: NOTIFY THE ENTITY OF THEIR LIABILITY

18. Notifying the entity

18A. We must give a written notice to the entity[45] telling them of:

- their liability to pay the penalty, after any reductions and/or remissions
- why they are liable to the penalty, and
- where a penalty has not been remitted in full, why the penalty has not been remitted in full.

18B. Where there is a liability to a penalty assessed, we are required to provide reasons for the decisions made that set out the findings on material questions of fact and refer to the evidence or other material that those findings were based on.

18C. The law does not require us to give reasons for the penalty decision where the penalty has been reduced or remitted to nil. However, it is still prudent to advise the entity of a summary of our reasons or alternately advise the entity of the penalty outcome and ensure the entity is aware of why the error occurred and has been provided with sufficient information or education to potentially avoid the same error in future. [46]

18D. These reasons for decision should be provided to the entity at the same time as or before they have been given the notice of assessment. If that is not possible it should occur as soon as possible after they have been notified of the penalty.

18E. You must also record complete reasons for the penalty decisions on the relevant ATO system (but this could be the same document as the reasons for decision sent to the taxpayer).

18F. The reasons for decision and notice of liability (the notice of assessment for the penalty) are separate documents and may be sent to the taxpayer either separately or together.

19. Right of review

19A. An entity that is dissatisfied with any element of the penalty assessment may object to the penalty assessment as long as there is a liability.[47]

19B. If a remission decision is made after an assessment of the penalty, the entity may also object to the separate remission decision if the amount remaining after remission is more than 2 penalty units.

19C. Where there is no liability to a penalty because the penalty has been reduced in full or to 2 penalty units or less for a separate remission decision because of an exception, reduction, voluntary disclosure or remission, there is no objection right.

20. More information

For more information, see:

- MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*
- MT 2012/3 *Administrative penalties: voluntary disclosures*
- PS LA 2008/3 *Provision of advice and guidance by the ATO*
- PS LA 2016/5 *The disclosure of information and documents collected by the Registrar of the Australian Business Register*
- PS LA 2012/5 *Administration of the false or misleading statement penalty – where there is a shortfall amount.*
- TD 2011/19 *Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?*

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[45] Sections 298-10 and 298-20.

[46] An exception to this would be where there is some operational requirement making it impractical, such as some limited types of high-volume work where penalties have been remitted automatically.

[47] Subsection 298-30(2).

ATTACHMENT A – EXAMPLES

The examples provided in this Practice Statement should be used as a general guide of the principles only. The facts and circumstances will differ from case to case, and each case should be looked at on its own merits.

Examples of what would be considered a 'material particular'

The examples on material particular do not imply that the entities will be liable to a penalty and are only for the purposes of illustrating the material particular.

Example 1– statements contributing to loss

An entity lodges an income tax return that indicates they incurred a loss of $10 million for that income year. In the following income year, the entity carried forward the $10 million loss and disclosed a current year loss of $5 million.

A review of the entity's tax affairs for the 2 income years determines the entity failed to declare all their income and in fact had a $7 million loss in the first year and a $5 million loss in the second year.

For the first income year, the tax officer examines each false or misleading statement on the income tax return that contributed 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 are material particulars as they were required to correctly determine the relevant loss amounts.

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 – entity registers for an Australian business number

An individual entity registered for an Australian business number (ABN) and GST in order to claim input tax credits on a car they intended to purchase. When applying for the ABN, the entity indicated that they had set up a new business. When queried, the entity advised they were a subcontractor who bore commercial risks and could delegate decisions. Because of this statement, the conclusion was reached that they were carrying on an enterprise and their ABN and GST applications were processed.

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 statement is material because the ability to delegate and assume commercial risks are indicators that an entity is carrying on an enterprise as an independent contractor[48]*, and the carrying on of an enterprise is an essential element in determining whether an entity is entitled to an ABN.*

Statements that impact on decisions regarding an entity's entitlement to be registered for regimes we administer have a clear nexus (or direct link) to taxation laws and are material particulars.

Example 3 – employer requires potential employee to get an Australian business number; statements by employer and employee

An employer informed prospective employees that they must acquire an ABN before they would be hired. 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 2 of this Practice Statement.

The statement by the employer would not be subject to the penalty provisions. This is because, while the statement was about taxation law, it was not a statement required or permitted to be made under a taxation law.

Example 4 – director penalty notice

The director of a company was served with a director penalty notice (DPN) under Division 269. She later advised us that she had resigned as a director 6 months before the DPN was served and was therefore not liable to the penalty.

An Australian Securities and Investments Commission (ASIC) search confirmed the resignation but also showed the form regarding resignation was lodged 4 days after the DPN was served. ASIC did not question the timing of the alleged resignation.

Based upon activity statements lodged and signed by her as director after her 'resignation' and conversations with us where she claimed to be a director, we are satisfied that she has made a false statement.

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

[48] Under Taxation Ruling TR 2005/16 *Income tax: Pay As You Go – withholding from payments to employees*.

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

Example 5 – incorrect invoices

A large tax credit for GST was claimed by Helen. In response to a request for an invoice to show the credit claimed, Helen supplied an invoice from Glenn.

When interviewed, Glenn said Helen had asked him for a tax invoice, with a credit of $12,000. As a friend, he supplied it. He did not seek advice from the ATO or a tax professional.

Glenn has made a false or misleading statement to Helen (a person other than the Commissioner) in the form of the statements made in the tax invoice purporting that GST was included in the 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 (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 6 – incorrect Tax File Numbers provided to and by a super fund

A large APRA-regulated fund has 1,000 new members, who all provided their TFN details to the fund when they completed the application form to be a new member. The fund lodges an MCS, reporting the TFNs as provided to them by the new members.

We reviewed the information contained on the MCS and advised the fund that 21 of the reported TFNs are invalid for the following reasons:

- *8 of the TFNs reported are duplicate TFNs which belong to other existing members of the fund*
- *6 of the TFNs reported have insufficient digits for the TFN to be valid, and*
- *7 of the TFNs reported are not correct and are not the valid TFN of the member.*

The statements by these 21 members to the fund are a 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.

The statements made to us by the fund 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.[49]

Example 7 – questionnaires or requests for information

The ATO ran a project investigating entities with overseas accounts. A sample of taxpayers known to be sending amounts of money offshore was selected. These taxpayers were sent a questionnaire asking for details of transactions undertaken to assist us in determining whether further action is warranted.

Some taxpayers return a partially completed form with some questions unanswered. This lack of information leaves us unable to determine if there was a need to continue examining the entity to determine if the return lodged by the entity was correct.

By not completing the form in full, the entities may potentially have made statements that are false and misleading in material particulars because of things having been omitted. The statements are of material particulars because the statements were to be made for the purposes of reporting income-related information to the ATO. The purpose of sending these taxpayers the form was for the ATO to understand the true tax position and obtain further details about their overseas accounts and their reasons for sending amounts of money offshore. Such examination is within the Commissioner's powers and functions and statements made to the Commissioner are made for a purpose connected with taxation law. Provided that the purpose of the questionnaire is objectively apparent, the penalty applies.

The matter was considered important enough for a questionnaire to be designed by the ATO and it is intended that the information gained from such a questionnaire is material to determining an essential ATO function (namely the scope of audit activities on select individuals). Furthermore, the purpose and context of the statements being provided is implicit in the form itself by its particularity to questions regarding overseas accounts. It is also likely that the information would be relevant to the actual taxation position of the taxpayer.

However, if the document sent to the taxpayers appears to be a voluntary or statistical questionnaire or does not have an identifiable purpose or, specific questions in it do not have an identifiable purpose, it may be more difficult or not possible to establish that the responses have the quality of material particulars,

[49] We 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 7 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 8 duplicate TFNs and the 6 TFNs that have insufficient digits are both issues that they could, and should, have identified and dealt with.

as there may be no objective connection with a relevant purpose.

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' in documents that are not approved forms or formal information notices.

Example 8 – incorrect information provided in return

A taxpayer states in a company income tax return that its core business is millinery (hat-making) but, in fact, the entity is a builder. A deemed assessment issues. In the circumstances of this case, the lodgment of an income tax return containing an incorrect statement about a taxpayer's core business is not likely to be a material particular. While not covered directly by the statutory purpose of the return, a statement specifically explaining the particular purpose for the information may make it a material particular in respect of that stated purpose.

The statement may have ramifications in the ATO's overall assessment of the compliance risk of the taxpayer or it may potentially affect the industry parameters for the ATO in assessing the taxpayer's industry. However, the statement is not determinative of the taxpayer's liability in any way, nor does a taxation or superannuation law provide for the making of such a statement in the income tax return.

However, this determination needs to be made on a case-by-case basis taking into account the overall circumstances of the taxpayer and the reasons why the questions are asked. If this statement was made during an audit where a case officer was seeking to understand what transactions were occurring and the nature of the business to determine the tax-related liability, it is likely that this is a material particular.

Example of the administrative approach taken in regard to the penalty

Example 9 – incorrect loss changed to taxable position

An entity lodges an income tax return for the 2016–17 income year, showing $10 million of losses carried forward to later income years.

An examination revealed the entity overstated their deductions and was only entitled to carry $4 million of losses forward to later income years. The adjustment to the losses does not result in a shortfall amount.

Prior to the audit, the entity also lodged an income tax return for the 2017–18 income year, where they reported a profit and utilised $8 million in prior year losses. This return was correct, except for the losses carried forward from 2016–17, but the consequential amendment changes the entity from being non-taxable to being taxable.

We should consider imposition of shortfall penalties for the 2017–18 income tax return, where the incorrectly reported losses were claimed as deductions.

Example 10 – core and non-core statements

A tax officer is allocated an audit of an employer for the 2016–17 income year to determine the correct pay as you go (PAYG) withholding amounts. PAYG withholding amounts reported by employees in their income tax returns total $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.

The tax officer notifies the employer of the examination of the BAS for the 2016–17 year and commences the audit. He identifies the total PAYG withholding amounts are $547,200 (identifying a shortfall amount of $72,200). Identifying this shortfall amount is the core activity for the tax officer and penalties for false or misleading statements that result in shortfall amounts will be considered.

*During the examination, the tax officer also becomes aware that amounts at label W1 in the BAS for salary, wages and other payments are understated. The reported amount was $1.1 million but the total based on employee tax return data 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 t*he purposes of assessing a penalty.

Examples of decisions

Example 11 – SMSF loan to members

An SMSF made loans to members. When completing the SMSF annual return, the trustees of the SMSF did not indicate the loans had been made. This statement was false.

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

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

We notified the trustees of the SMSF that an examination is to be made for a relevant period.

During the examination, the tax officer identifies the false statement about the loans. The facts and evidence indicate that the SMSF trustees were acting recklessly. The records of the fund showed clearly that 3 loans to members were made during the relevant period.

The trustees should have reported these SISA contraventions to us.

A penalty amount of 40 penalty units is imposed on the SMSF, as:

- *the trustees of the SMSF did not make a voluntary disclosure*
- *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*
- *the trustee did not rely on advice, a publication or a general administrative practice when they made the statement, and*
- *a BPA had not been previously worked out for a false or misleading statement that didn't result in a shortfall amount.*

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

Example 12 – adjusted member contributions statement

Stuart (aged 58) is a member of an APRA-regulated fund and made the following contributions:

- *$300,000 in the 2012–13 income year (which triggered the bring forward non-concessional cap of $450,000), and*
- *$200,000 in the 2013–14 income year.*

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 us in an MCS.

Stuart received an excess contributions tax (ECT) assessment for the 2013–14 income year for the $50,000 that was in excess of his non-concessional cap.

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 us. He advised his $200,000 contribution for the 2013–14 income year should in fact have been $150,000 personal contributions and $50,000 employer contributions. He gave no other reasons or evidence to support the requested change and the fund did not ask for more information. The fund had never previously received employer contributions for Stuart and had no record of who his employer was.

The fund amended its MCS to reduce Stuart's personal contributions as requested.

We notified the fund an examination of their reporting was to occur for the relevant period.

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 could not confirm the amended MCS was accurate. 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 reckless.

There are no grounds to reduce the BPA as the fund did not make a voluntary disclosure. As the fund previously had a BPA applied, the BPA amount of 40 penalty units is increased by 20%.

The tax officer decides the fund did not make any significant effort to provide a correct statement and the fund did not have a good compliance history because of the previous penalty applied. As a result, the tax officer decides no remission is appropriate.

Example 13 – false invoice supplied

James provides a tax invoice in support of input tax credits claimed in an activity statement to a tax officer conducting an audit. The tax invoice was issued by another business (run by Dennis) and shows a purchase by James of $100,000 in goods.

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 that he did not make the supply but provided the tax invoice in response to a request from James 'to help him out'. Dennis confirmed he had not received any money from James.

James' case

The statement made by James during the audit (the invoice he 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 (the incorrectly claimed input tax credits).

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.

The facts and evidence support a conclusion that James had been acting with intentional disregard of a taxation law for the shortfall amount and had not been making a genuine attempt to provide a correct statement. The tax officer decides not to remit any of the penalties applicable.

Dennis' case

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, where requested by the recipient. Dennis confirmed that he was aware that the tax invoice was false as he had not made the supply.

Since Dennis voluntarily disclosed the false or misleading nature of the statement and this saved the Commissioner a significant amount of time, the base penalty amount of 60 penalty units for intentional disregard of the law is decreased by 20%.

Based on the facts of the case, the tax officer decides not to remit any penalty. It was likely that in addition to preparing the false invoice, Dennis knew or should have suspected that James was using the information to keep a false record or provide false information.

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 14 – debt and interest remission

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 3 months. A payment arrangement was entered into and remission given for a significant amount of GIC.

When the person defaulted on the payment arrangement several months later, a different tax officer reviewed the file. This review took into account new information, including the person's income tax returns for previous years. These tax returns showed 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.

The false or misleading information made at the time of entering into the payment arrangement and obtaining an interest remission 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 – that is, whether to grant a payment arrangement and remit an amount of GIC. Therefore, the statement was false in a material particular.

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

Example 15 – Tax File Number omitted from a member contributions statement

Peter is a new member of a large APRA-regulated super fund. Peter provided a completed membership application form when opening his new account and made sure to include 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, an error was made when the application form was processed by the fund and the TFN was not recorded in their information systems. After the end of the income year, the fund lodged an MCS for Peter that reported the personal contribution but, as a consequence of the processing error, did not report Peter's TFN.

We later reviewed 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 was an omission of a material particular because it was required to determine if the fund had dealt with the contribution correctly. It was also a material particular as Peter may have been 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.

The fund was contacted and advised that if there was a TFN, the fund could make a voluntary disclosure within 14 days.

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 MCS, even though it displayed correctly within the funds internal systems.

The tax officer decided this was a minor, inadvertent error and that, as the fund had taken reasonable care, the fund is not liable to a penalty.

Example 16 – process for dealing with multiple false or misleading statements made by APRA-regulated super funds (APRA fund)

The facts and circumstances relating to multiple false or misleading statements made by APRA funds may vary significantly. Final penalty decisions will be dependent upon the facts and circumstances of each case.

You must follow the decision making process in this example when dealing with multiple false or misleading statements by APRA funds.

An APRA fund lodged a combined MCS to the ATO. Analysis of the reported data suggests there were 350 member statements in the MCS which may not be complete or correct.

We notified the APRA fund that an examination was to be made for the relevant period and invited them to make a voluntary disclosure to correct any false or misleading statements within 21 days. The APRA fund responded and provided corrected information for 100 member statements within the 21 day period.

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. This information is critical for the effective administration of the tax and super affairs of those members, such as determining whether an ECT liability exists.

We sought an explanation from the APRA fund on why the mistakes occurred and gathered additional information to assist us with penalty imposition and remission considerations.

We considered the evidence gathered and applied the principles in MT 2008/1 to conclude that the APRA fund failed to take reasonable care. For the 100 statements for which a voluntary disclosure was made, we considered the penalty should be reduced to nil, and for the other 250 statements we recommended that significant remission was appropriate.

As we were considering applying multiple penalties against an APRA fund, we prepared a position paper that was referred to an internal ATO Panel.

The Panel, which included SES officers, considered the facts, evidence and initial recommendation contained in the position paper. The role of the Panel is to provide support and advice to the decision-maker (for multiple penalties relating to APRA funds this is an SES officer).

The Panel considered the following aspects:

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

As the total base penalty amount for the 250 false or misleading statements (prior to considering remission) is 500 penalty units (250 × 20 penalty units), the Panel considered what final penalty amount would be just and appropriate, having regard to the facts of the case. Significant remission of the penalty was recommended by the Panel to achieve what they considered to be a just and defensible final penalty amount.

The SES decision-maker considered the Panel's recommendation and issued a penalty position paper to the APRA fund advising the proposed final penalty amount.

If the APRA fund provides any comments in relation to the position paper, they will be considered along with any other information that may have been gathered by the tax officer. The Panel will then advise the decision-maker of any new issues or considerations.

The SES decision-maker will determine each step in the penalty process to ensure the final penalty amount is appropriate for the compliance behaviour shown. Our reasons for decisions, including our final penalty decision, are then communicated to the APRA fund and a penalty notice will issue to the APRA fund for the penalty amounts.

Example 17 – significant global entities

A company lodges a 2017–18 income tax return on 20 January 2019 and self-assesses as an SGE for that income year.

A penalty for recklessly making a false or misleading statement relating to incorrect invoices is imposed for a statement made in August 2018. The 2017–18 income year return is the last return lodged and is used to determine the SGE status. As this return shows that the company is an SGE, the penalty is doubled from 40 penalty units to 80 penalty units.

The company group is being divided and certain activities and entities have been sold as they are no longer the core business, or closed as no longer being profitable and others will be. The company considers they are no longer an SGE in the 2018–19 income year.

The entity can request remission of the multiplier. If we consider the entity is not, or will not, be an SGE for the 2018–19 income year, the SGE multiplier (the additional 40 penalty units) will be remitted.

If the entity is not in a position to provide information that would prove or indicate they will not be an SGE, the entity may choose to not request remission. If, when the entity lodges its 2018–19 income tax return, they are not an SGE, the SGE penalty multiplier will never have applied at law. As a result, the penalty amount will be recalculated and reduced to remove the SGE multiplier (the additional 40 penalty units).

Date issued	23 August 2012
Date of effect	4 June 2010
Contact officer	OperationalPolicyAssuranceandLawWorkManagement@ato.gov.au

Amendment history

Date of amendment	Part	Comment
2 March 2023	Throughout	Update of style and format.
	Footnote 28	Updated reference to the source of the penalty unit value
25 June 2020	Footnote 28	Removed specific dollar value for a penalty unit; amended reference to the source of the penalty unit value and where to locate it.
23 April 2019	Footnotes 4, 5, 28 and 44	Correct minor errors
26 February 2019	Throughout	Updated for currency Addition of BPA for significant global entities Updated to new LAPS format and style New examples of material particular.
11 June 2015	Authorisation	Updated.
22 January 2013	Paragraphs 150 & 238	Revised to reflect change in penalty unit value from 28 December 2012.

References

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