# *PS LA 2012/5 - Administration of penalties for making false or misleading statements that result in shortfall amounts*

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# Practice Statement Law Administration

**PS LA 2012/5**

*This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. ATO personnel, including non-ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.*

*Taxpayers can rely on this law administration practice statement to provide them with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this law administration practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.*

**SUBJECT:** **Administration of penalties for making false or misleading statements that 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 results in a shortfall amount, and**
- **how the penalty is assessed, including determining remission.**

**TABLE OF CONTENTS** **Paragraph**


| | |
|---|---|
| **BACKGROUND** | **3** |
| **SCOPE** | **6** |
| **STATEMENT** | **9** |
| Step 1 - Determine whether the entity is liable to a penalty | 14 |
| What is a statement? | 16 |
| Has a statement been made? | 18 |
| Is the statement false or misleading in a material particular? | 21 |
| Who is liable to the false or misleading statement penalty? | 25 |
| *Trusts* | 28 |
| *Partnerships (other than corporate limited partnerships)* | 35 |
| *Example 1* | 38 |
| Exceptions to shortfall penalties resulting from making a false or misleading statement | 39 |

*Has the entity exercised reasonable care?* 44
*Reasonable care and genuine attempt* 48
*Using a registered tax agent or BAS agent (registered agent)* 50
*Does the safe harbour exception apply?* 56
*All relevant taxation information* 60
*Example 2* 64
*Proving safe harbour* 68
*Example 3* 74
Step 2 - Assess the amount of the penalty 77
What is a shortfall amount? 78
How is a shortfall amount calculated? 82
*Example 4* 84
*Example 5* 85
*Example 6* 86
*Example 7* 88
*Shortfall amounts composed of more than one part* 90
*Example 8* 91
*Reduced liability apportionment* 92
*Income tax - entities in a loss situation* 95
*Other factors affecting calculations of the shortfall amount* 98
*Work out the BPA* 99
*What if more than one item in the table is applicable?* 100
*Example 9* 101
*Failure to take reasonable care* 106
*Recklessness* 107
*Intentional disregard* 109
Treating the law as applying in an accepted way 111
*Has the entity relied on advice or a statement from the Commissioner?* 112
*Does the entity's treatment agree with a general administrative practice*? 115
Increase or reduction of the BPA 118
*Increase in BPA* 119
*Prevents or obstructs the Commissioner* 121
*Becomes aware of the shortfall amount after the statement is made* 129
*BPA worked out for the same penalty type previously* 130
*Example 10* 134
*Reduction in the BPA for voluntary disclosure* 135
*What is an approved form?* 141
*Completeness of the disclosure* 143
*Example 11* 145

*Example 12* 148
*Example 13* 152
Determine any remission of the penalty 155
*Calculation or mechanical process* 159
*Example 14* 160
*Example 15* 161
*Where the entity has taken reasonable care but they are liable to a penalty* 163
*The application of the special rules in respect of trustees* 166
*Multiple penalties* 168
*Commissioner's discretion in relation to tax invoices or adjustment notes* 171
*Amount reported or claimed in incorrect period* 175
*An amount disclosed or a deduction or credit claimed in another entity's return or activity statement in the same accounting period* 179
*Voluntary disclosure* 183
*Considerations that are generally not relevant* 186
*Treating entities in the same circumstances consistently* 189
Step 3 - Notify the entity of the liability to pay the penalty 190
*Objection rights* 197
**ATTACHMENT A- CALCULATIONS 201**
**ATTACHMENT B - DEFINITIONS 230**

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 false or misleading statements in a material particular that result in shortfall amounts, unless explicitly noted otherwise.

## BACKGROUND

3. Part 4-25 contains the uniform administrative penalties regime that applies to entities for failing to satisfy their obligations under the taxation laws. Uniform penalties will apply where an entity fails to satisfy the same type of obligation under different taxation laws.[1] The penalty regime consists of four distinct components for failing to satisfy obligations under taxation laws:
   - 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.

[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)

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 the entity's agent as if they 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.

## SCOPE

6. This practice statement replaces Law Administration Practice Statement PS LA 2006/2 effective 23 August 2012 and explains how the Commissioner administers the penalty for making a false or misleading statement made on or after 1 April 2004 where the statement results 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 administrative penalties applying to false or misleading statements which do not result in a shortfall amount. Guidelines on administering the penalty for false or misleading statements, which do not result in a shortfall amount, are found in Law Administration Practice Statement PS LA 2012/4.

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 should be taken into account throughout the application of the administrative penalty process including any process of review under Part IVC or other reviews undertaken:

   - 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 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 the 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.
- the entity should normally be contacted and given the opportunity to explain their actions before a decision to assess 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
        - determine the shortfall amount
        - determine 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. A number of expressions used in the legislative provisions are referred to in this practice statement. These expressions are defined in Attachment B.

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

14. An entity is liable to an administrative penalty if:
    - the entity or their agent[3] makes a statement to the Commissioner 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.[4]

15. From 4 June 2010, an entity is also liable to an administrative penalty 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, and
    - the statement is, or purports to be, one required or permitted by a taxation law, and
    - the statement is false or misleading in a material particular, whether because of things in it or omitted from it.[5]

[2] Subsection 298-20(1).
[3] Section 284-25.
[4] Subsection 284-75(1).

### What is a statement?

16. A statement is anything disclosed for a purpose connected with a taxation law to the Commissioner or to another person exercising powers or performing functions under a taxation law, including a statement made to:

    - a tax officer in the course of their duties, or
    - a customs officer who in the course of their duties is authorised to administer an indirect tax law under a delegation from the Commissioner, for example, administering the indirect tax provisions on taxable importations.[6]

17. From 4 June 2010, a relevant statement includes a statement which has both of the characteristics below:

    - anything communicated to an entity other than the Commissioner and an entity exercising powers or performing functions under a taxation law, and
    - is, or purports to be, a statement required or permitted by a taxation law.

### Has a statement been made?

18. A statement may be made or given in writing, orally or in any other way, including electronically. Statements may be made in correspondence, responses to requests for information, a notice of objection, a request for an amendment to an assessment, in answer to a questionnaire or in connection with an examination or investigation.

19. A statement will include entering an amount or other information at a label on an application, approved form, business activity statement, instalment activity statement, certificate, declaration, notice, notification, return or other document prepared or given under a taxation law.

20. A statement may also be made if an entity fails to include information in a document or approved form when required to do so, and the document or approved form has a place for that information. Although at first it appears that no statement was in fact made, the entity will be taken to have made a statement by omission, that is, a statement there was no liability or that an event did not occur.

### Is the statement false or misleading in a material particular?

21. A statement is false if it is contrary to fact or wrong, irrespective of whether 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.

22. 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.

23. A material particular is something that is likely to affect a decision regarding the calculation of an entity's tax-related liability or entitlement to a credit or payment. An inconsequential statement which does not affect an entity's tax position will not be a material particular in relation to penalties for false or misleading statements that result in a shortfall amount. Most of the information provided in a tax return or activity statement will constitute a material particular.

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[5] Subsection 284-75(4).
[6] Section 284-20 and subsection 284-75(1).

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

### Who is liable to the false or misleading statement penalty?

25. The entity lodging the statement, or on whose behalf the statement is lodged, is usually liable to the penalty.

26. Generally, an entity will be liable to the penalty where a statement is made by their authorised representative. This includes statements made by the agent for the entity. Also, a company will be liable to penalties resulting from statements made by an authorised employee, public officer or director.

27. However, special rules apply to trusts and partnerships in determining the liability for shortfall penalties (see paragraphs 28 to 38 of this practice statement).

#### *Trusts*

28. Where a trustee of a trust makes a statement resulting in a shortfall amount for a beneficiary of the trust, section 284-30 treats the shortfall amount as that of the trustee for penalty purposes. This provision will mainly apply where a statement is made by the trustee about the net income of the trust, as this will affect the amount that a beneficiary has to include as assessable income in their income tax return.

29. A beneficiary relying on the trustee's advice as to their share of the net income of the trust will generally be taken to have exercised reasonable care, unless the beneficiary knew, or could reasonably be expected to have known, the information was wrong. Where the beneficiary has exercised reasonable care, they will not have a shortfall amount for the purpose of determining whether they are liable to an administrative penalty.

30. In most cases where incorrect, incomplete or misleading advice was provided to the beneficiary, it will be appropriate to consider a penalty for the trustee in respect of the shortfall amounts of all the beneficiaries.

31. However, there may be some situations where it is appropriate to consider the liability to penalty of both the trustee and one or more beneficiaries.

32. Section 284-30 operates with subsections 284-75(1) and (4), to impose a penalty on the trustee in addition to a penalty that may be assessed on the beneficiary in respect of the beneficiary's shortfall amount. Where neither the trustee nor the beneficiary have exercised reasonable care, the trustee and beneficiary will both be liable to a penalty, provided none of the other exceptions apply.[7] However, as a matter of policy, the Commissioner will exercise his discretion to remit all or part of the penalty of the trustee and/or the beneficiary in order to avoid duplicating the penalty.

33. Where a beneficiary has knowledge of the trustee's behaviour or is in a position to control the trustee, then generally the Commissioner would exercise his discretion to remit the part of the trustee's penalty relating to that beneficiary's shortfall amount.

[7] See sections 284-224 and subsection 284-75(6) for other exceptions.

34. In cases where a superannuation fund does not have a trustee, the person who manages the fund is treated as a trustee of the fund for the purposes of Schedule 1 to the TAA.[8] Consequently, if the person managing a superannuation fund makes a false or misleading statement in relation to the fund and the fund has a subsequent shortfall amount, that person is liable to the penalty.

### *Partnerships (other than corporate limited partnerships)*

35. A partnership can have a tax-related liability in relation to a net amount of indirect tax,[9] PAYG withholding, or fringe benefits tax (FBT). A partnership cannot however have an income tax liability or PAYG instalment liability.

36. Section 444-30 applies to penalties relating to tax-related liabilities of the partnership, for example, PAYG withholding, indirect tax and FBT amounts. That provision makes each partner jointly and severally liable to the penalty assessed on the partnership shortfall amount. If one partner is not at fault for the partnership having a shortfall amount, that partner will still be liable to pay the penalty in full.

37. Under section 284-35, in relation to the stated net income of the partnership or partnership loss, each partner is liable to a penalty on the shortfall amount reflected in the partner's individual income tax return. That is, an incorrect statement made in the partnership return will result in a shortfall amount in each partner's return. Where a partnership's net income is understated, or loss is overstated, each partner's share of the misstated amount is in proportion to the partner's share of the partnership net income or loss. Each partner is liable to a penalty calculated on the shortfall amount in their income tax return.

### *Example 1*

38. *A partnership is made up of two partners who are entitled to share in profits equally. In the partnership income tax return for the last income year, the net partnership income was understated by $2,500,000. Each partner will be liable to a penalty on the shortfall amount resulting from the understated $1,250,000 in their individual income tax returns.*

### Exceptions to shortfall penalties resulting from making a false or misleading statement

39. There are three exceptions to shortfall penalty which, in effect, eliminate or reduce liability for statements made on or after 4 June 2010. They apply where:

- 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 and their agent (if relevant), applied the law in an accepted way: section 284-224.

[8] Section 444-50.
[9] A net amount includes amounts in respect of luxury car tax and wine equalisation tax.

40. If an entity and their agent (if relevant), have both exercised reasonable care the entity is 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).

41. There is no liability to a penalty if the 'safe harbour' exception applies. The 'safe harbour' exception only applies to statements made on or after 1 March 2010.

42. If the entity or their agent applied the law in an accepted way, they may be protected from application of a shortfall penalty.[10]

43. For statements made before 4 June 2010:

- former subsection 284-215(1) reduced the shortfall amount to the extent it was caused by reliance upon advice or guidance, and
- former subsection 284-215(2) eliminated the shortfall amount for penalty purposes where the entity and their agent took reasonable care.

### *Has the entity exercised reasonable care?*

44. 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 taxpayer's knowledge, education, experience and skill.[11] In practice, this means that all actions leading up to the making of the statement should be taken into account, including record keeping, governance processes and using a registered agent.

45. Where an entity has made a reasonable and genuine attempt to comply such that reasonable care has been taken, the general rule is that no penalty applies. An entity will not be liable to a penalty relating to a statement that was false or misleading where the entity, and the agent if the agent made the statement, took reasonable care in making the statement.[12]

46. There is no presumption that the false or misleading nature of a statement necessarily or automatically points to a failure to take reasonable care. In order for there to be a finding of 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.

47. 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.[13]

[10] Section 284-224.
[11] Paragraph 28 of MT 2008/1.
[12] For statements made on or before 3 June 2010, the entity will be treated as not having a shortfall amount as a result of the statement for the purposes of penalty calculation.
[13] Paragraph 92 of MT 2008/1.

***Reasonable care and genuine attempt***

48. A genuine attempt means that an entity shows they are engaged in the tax system by actively attempting to comply with their tax obligations. A key indicator of an entity making a genuine attempt to comply is whether they are making reasonable attempts to effectively manage the risks associated with their tax position and displays this approach in their reporting to the ATO.

49. Assessing reasonable care requires a consideration of the personal circumstances of the entity, including:

- whether there was an inadvertent mistake such as a transposition error or an overlooked document
- whether reasonable enquiries were made, which may be indicated by whether:
  - the entity just assumed the treatment was correct, for example, by 'mechanically' signing a statement without checking its content[14]
  - the degree of enquiry exhibited by the entity was commensurate with the risk associated with the decision and their resources, or
  - the care and investigation was commensurate with the size of the transaction
- whether the entity was aware, or should have been aware, of the correct treatment of the law or of the relevant facts:
  - an entity should not rely on advice given where a reasonable person would be expected to know that the advice is not worthy of such reliance[15]
  - an entity is not obliged or entitled to blithely accept assurance by his or her professional advisor
- whether it was a new, unusual or extraordinary transaction - such transactions should have correspondingly higher levels of care associated with them
- whether reasonable attempts were made to keep records and to set up processes and systems, including the training of staff
- whether any factors prevented the entity 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, with reference to:
  - whether a registered agent was used
  - the entity's level of education, expertise and tax sophistication, and
  - the entity's age, health and background.

[14] *Necovski v. FC of T* [2009] AATA 195.
[15] *Weyers and Anor v. FCT* [2006] FCA 818.

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

50. Each entity is expected to take a prudent attitude to their tax affairs. This is the case even if using a registered agent or following the recommendation of their adviser. Engaging a registered agent does not, of itself, discharge the entity's obligation to take reasonable care. The entity is 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 as required.

51. However, it is generally indicative that the entity is not making a genuine attempt to comply with their reporting obligations where they do not query advice from their agent that:

- is obviously incorrect
- leads to an irregular outcome, or
- represents an extraordinary treatment of tax matters, which a comparable, ordinarily prudent person would investigate further.

52. 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 larger the amount involved and/or the more 'sophisticated' the entity, the greater the level of enquiry that is expected from the entity.

53. Additionally, an entity is expected to check and sign documents lodged on their behalf. The entity should not treat this as a mechanical process, but should confirm, to the extent appropriate, that it reflects the information they provided.

54. 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.[16]

55. 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.[17]

### *Does the safe harbour exception apply?*

56. 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) or former subsection 284-75(1A) applies. The safe harbour exception in relation to the making of a false or misleading statement only applies to statements made on or after 1 March 2010.[18]

[16] MT 2008/1 paragraph 85.
[17] MT 2008/1 paragraphs 53 and 57.
[18] An exemption under former subsection 284-75(1A) applies to statements made on or before 3 June 2010. An exception under subsection 284-75(6) applies to statements made on or after 4 June 2010. The terms 'exception' and 'exemption' should be taken to have the same meaning.

57. The 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 agent or BAS agent (registered agent) where the entity provided all relevant taxation information to the registered agent necessary for the correct preparation of the statement.

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

- recklessly, or
- with intentional disregard of the taxation law.[19]

59. The penalty is not transferred to the registered agent.

### *All relevant taxation information*

60. 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, or gave incorrect or conflicting information.

61. Whether all relevant taxation information has been provided must be considered separately for each false or misleading statement leading to a shortfall amount.

62. Registered agents are not required to audit, examine or review books, 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.

63. 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 to the consideration of safe harbour that a registered agent taking reasonable care may have queried the information and the mistake could have been corrected.

### *Example 2*

64. *An examination is conducted in relation to the following items in an entity's income tax return:*

- *interest income*
- *rental deductions*

65. *The tax officer discovers that a false or misleading statement has been made in relation to the interest income and the rental deductions.*

66. *The tax officer determines that the entity and its registered agent failed to take reasonable care in relation to the two shortfall amounts, and therefore the exception in subsection 284-75(5) (and former subsection 284-215(2)) do not apply. To determine if the safe harbour exception in section 284-75(6) or former subsection 284-75(1A) applies, the tax officer considers each item separately.*

***19*** The meaning of the terms 'reckless' and 'intentional disregard' are explained in MT 2008/1.

67. *The entity provided all relevant information to the registered agent in relation to the interest income but failed to provide all information relating to the rental deductions. The entity is entitled to the safe harbour exemption in relation to the interest income but not in relation to the rental deductions.*

### *Proving safe harbour*

68. 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.

69. 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.

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

71. Where we consider that the safe harbour exception applies, or where the entity has requested application of the provision, the registered agent will normally be contacted. The registered agent may provide evidence on whether the entity supplied all relevant taxation information. Otherwise, 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.

72. Where tax officers are unable to contact the registered agent, a decision will need to be made on the information available.

73. The Commissioner may apply the safe harbour exception without the entity or their agent requesting its application. This will occur if the Commissioner has sufficient information to determine that safe harbour does apply.

### *Example 3*

74. *Jock provides Ian, his registered agent, with details on, amongst other information, the purchase of a computer for his business. Ian claims a deduction for the full price of Jock's computer in Jock's income tax return.*

75. *An audit determines that the computer was used solely for business purposes but the deduction should have been only for the depreciation of the computer. The registered agent is unable to explain why the item was expensed instead of being depreciated.*

76. *The tax officer considers that Jock must have provided the relevant information to the registered agent because the agent knew that a computer was purchased for the business and the price that was paid, as evidenced by the inclusion of the amount in the income tax return. If the tax officer decides the registered agent had failed to take reasonable care then safe harbour could be applied without either the taxpayer or the registered agent requesting it. However, we would generally attempt to obtain information from the registered agent before making the decision.*

**Step 2 – Assess the amount of the penalty**

77. The penalty is assessed in four stages:

- determine the shortfall amount
- worked out the base penalty amount (BPA)
- the BPA may be increased and/or reduced
- the Commissioner considers remission of the calculated penalty amount.

**What is a shortfall amount?**

78. Section 284-80 lists the circumstances that give rise to a shortfall amount. Only the circumstances listed in Item 1 and Item 2 in the table in subsection 284-80(1) relate to false or misleading statements.

79. Under Item 1 in subsection 284-80(1), the shortfall amount is the amount by which a tax-related liability is less than it would have been if the statement was not false or misleading. A tax-related liability is a pecuniary liability to the Commonwealth arising under a taxation law. Section 250-10 contains tables summarising the various tax-related liabilities.

80. Under Item 2 in subsection 284-80(1) a shortfall amount is an amount by which a payment or credit that the Commissioner must make under a taxation law is more than it would have been if the statement were not false or misleading.

81. In some circumstances, it is possible for Item 1 and Item 2 to apply in respect of an adjustment. For example, an entity may over-claim a refundable tax offset or GST credit leading to an excessive refund and Item 2 would apply. Where the over-claimed tax offset or credit also reduced the tax-related liability by an amount, Item 1 would also apply. In such a case tax officers are to treat the shortfall amount as arising under either Item 1 or Item 2 but not both.

**How is a shortfall amount calculated?**

82. A shortfall amount is generally worked out for an accounting period. The period is the period for which the tax-related liability or credit is calculated.

83. However, in some circumstances a shortfall amount is worked out on an 'events' basis, such as taxable importations or wine equalisation tax on customs dealings.

***Example 4***

84. *Pellagreen Enterprises lodged its income tax return for the 2009-10 income year disclosing assessable income of $350,000 and deductions of $30,000. No tax offsets were claimed. During an examination, it was discovered that rental income of $200,000 and rental outgoings of $80,000 had not been disclosed. The tax rate is 30%. The shortfall amount is the amount by which the tax-related liability is understated:*

| | |
|---|---|
| *Actual tax liability* | |
| *($350,000 - $30,000) + ($200,000 - $80,000) = $440,000 × 30%* | *$132,000.00* |
| *Returned tax liability* | |
| *($350,000 - $30,000) = $320,000 × 30%* | *$96,000.00* |
| *Shortfall amount* | *$36,000.00* |

***Example 5***

85. *R-Sandow Power Ltd notified in its activity statement that the goods and services tax (GST) net amount payable for a period was $250,000. During an examination the tax officer found that GST payable on supplies by the company was understated by $50,000 and GST credits were understated by $10,000. As the tax-related liability under the GST law is the net amount payable for the tax period, the shortfall amount is $40,000. The penalty for the false or misleading statement is worked out on that net amount (the shortfall amount), not the $50,000 understatement of GST payable on supplies.*

***Example 6***

86. *Bill claims GST credits of $45,000 for GST in his activity statement which results in a $30,000 negative net amount (overall credit) for the accounting period. He has included GST credits for an acquisition which was GST-free. Upon examination by the Commissioner, the GST credits are reduced by $20,000, resulting in an adjusted credit position of $10,000. The shortfall amount is $20,000, the difference between the claimed $30,000 credit and the correct $10,000 credit. There is a shortfall amount despite the existence of a credit owed to Bill for the period both before and after the adjustment.*

87. A shortfall amount can arise for distinct liabilities reported on a form that contains multiple reporting obligations. The activity statement is designed to report more than one tax-related liability. Therefore, distinct shortfall amounts can arise from each of the disparate tax-related liabilities reported in an activity statement. A credit for one tax type does not reduce the liability for another tax type when calculating the shortfall amount.

***Example 7***

88. *Noncomp Pty Ltd notified the following amounts in its activity statement:*

| | |
|---|---|
| *GST net amount* | *$830,000 CR* |
| *PAYG tax withheld* | *$100,000 DR* |
| *PAYG income tax instalment* | *$500,000 DR* |
| *Net amount for activity statement* | *$230,000 CR* |

89. *During an examination, the tax officer found that the PAYG tax withheld for the period was actually $200,000. All the other amounts notified were correct. Although the correct net amount for the quarter is still a credit, there is a shortfall amount of $100,000 in the PAYG withholding liability. The penalty will be worked out on the PAYG withholding shortfall amount of $100,000.*

***Shortfall amounts composed of more than one part***

90. An entity may make a number of false or misleading statements in one document which result in a number of parts to a shortfall amount. In these instances, it is necessary to calculate the proportion of the shortfall amount allocated to each false or misleading statement for which where there are different BPAs, that is, different levels of care in respect of each statement, or where there is a BPA and an exception to the penalty for the one shortfall amount. This could include multiple statements made in the one label in a document. Separate calculations are not essential where the same level of care is applied to all parts of the total shortfall amount and there is no increase or decrease in the BPA.

### *Example 8*

91. *Scrooge Company Ltd notified in its activity statement that the GST net amount payable for a period was $25,000. During a field verification visit, the tax officer found that the company intentionally disregarded a taxation law and taxable supplies were understated by $55,000. This resulted in an underpayment of GST of $5,000. GST credits were overstated by $1,000 because of a failure to take reasonable care. The shortfall amount in GST for the tax period is made up of those two parts. The penalty is calculated as follows:*

| | |
|---|---|
| *$5,000 × 75% =* | *$3,750* |
| *$1,000 × 25% =* | *$ 250* |
| | *$4,000* |

### *Reduced liability apportionment*

92. In determining a shortfall amount, a number of labels in a statement may be adjusted. These can be a mixture of credit and debit adjustments. For there to be a shortfall amount, there must be an overall increase in the tax-related liability (or an overall decrease in the credit or payment).[20] Where there are a number of increasing and decreasing adjustments, the resulting shortfall amount is allocated on a pro rata basis between the adjustments that result in an increase in liability (or decrease in the amount of a credit or payment).

93. The reduction in the tax-related liability is apportioned in the same ratio as each part of the shortfall is to the total shortfall amount. That is, a pro rata portion of the reduction is subtracted from each of the various parts of the shortfall amount.

94. Further explanation and examples of this are shown in Attachment A.

### *Income tax - entities in a loss situation*

95. Adjustments may cause an entity in a loss situation to become taxable, either in the income year relating to the adjustment or in a later income year. The shortfall amount is the amount of tax properly payable. Item 1 in the table in subsection 284-80(1) applies.

96. However, a reduction in a loss that does not result in the entity being taxable is not a shortfall amount.[21] A tax loss is not an amount the Commissioner must pay or credit for the period to which the statement relates. A prior year loss utilised in the current year that is subsequently disallowed will lead to a shortfall amount in the current year.

97. The administration of a shortfall penalty where the elimination of the tax loss causes the entity to be taxable is identical to that where the entity was in a taxable situation before adjustments are made. That is, each matter that results in a shortfall amount is examined separately.

[20] To establish a shortfall amount the Commissioner needs to determine two amounts. The first being the relevant liability based on the statement and the second being the amount the relevant liability would otherwise have been had the statement not been false or misleading. It is the difference between those amounts that is the shortfall amount.

[21] The entity may be liable to an administrative penalty for making a false or misleading statement which does not result in a shortfall amount.

### *Other factors affecting calculations of the shortfall amount*

98. A number of additional factors may affect the calculation of the shortfall amount. Explanation and examples of the above are included in Attachment A.

### *Work out the BPA*

99. The following formula is used to work out the BPA.

**[Shortfall amount x relevant percentage = base penalty amount]**

| **Base penalty amount** | | |
|---|---|---|
| **Item** | **In this situation** | **The base penalty amount is:** |
| 1 | You have a shortfall amount as a result of a statement described in subsection 284-75(1) or (4) and the amount, or part of the amount, resulted from intentional disregard of a taxation law by you or your agent | 75% of your shortfall amount or part |
| 2 | You have a shortfall amount as a result of a statement described in subsection 284-75(1) or (4) and the amount, or part of the amount, resulted from recklessness by you or your agent as to the operation of a taxation law | 50% of your shortfall amount or part |
| 3 | You have a shortfall amount as a result of a statement described in subsection 284-75(1) or (4) and the amount, or part of the amount, resulted from a failure by you or your agent to take reasonable care to comply with a taxation law | 25% of your shortfall amount or part |

### *What if more than one item in the table is applicable?*

100. It is possible for more than one item to apply to a shortfall amount. If a false or misleading statement has been made recklessly or with intentional disregard, it will also have been made without taking reasonable care. In such cases, an entity is liable to only one BPA. Subsection 284-90(2) requires the item which produces the greater BPA to be used.

### *Example 9*

101. *A review showed that when the company lodged its income tax return for the relevant period, it did not include $135,000 of sales as income. As the company was advised in the course of an earlier examination of an activity statement about including such amounts in the income tax return and there are no other circumstances, the behaviour amounts to intentional disregard of the law. Although lack of reasonable care also applies, the higher base penalty amount is used. The penalty is as follows:*

*Calculation of penalty on income tax shortfall amount:*

*Shortfall amount: $135,000 × 30%* *= $40,500.00*

*Penalty for intentional disregard: $ 40,500 × 75%* *= $30,375.00*

102. The BPAs set out in section 284-90 are formulated as percentages of the shortfall amount. The percentage will depend on the level of care taken by the entity (or agent) which resulted in the shortfall amount. That is, the actions to consider are those at the time of or in connection with making the statement. Actions which occur after making the statement do not affect the determination of the BPA.

103. As each statement made by an entity can result in a shortfall amount, the total shortfall amount may be composed of more than one part. Each matter resulting in a part of the total shortfall amount should be examined separately to determine the level of care taken. As such, different levels of care may apply for each part of the total shortfall amount. The BPA is the sum of the BPAs for each of the various parts of the total shortfall amount.

104. The relevant levels of care are:

- failure to take reasonable care (item 3 )
- recklessness (item 2)
- intentional disregard (item 1).

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

### *Failure to take reasonable care*

106. 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*

107. 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.

108. Recklessness assumes that the behaviour in question shows a disregard of the risk, or indifference to the potential consequences of taking the risk, 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*

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

110. The 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

111. Section 284-224 applies to things done or statements made on or after 4 June 2010. Under section 284-224, the entity may have their BPA reduced to the extent that they 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, or
- 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?*

112. Where a shortfall amount arises because 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, there may not be a shortfall amount or they may be protected from application of a shortfall penalty. The levels of protection provided are discussed in Attachment A to *PS LA 2008/3: Provision of advice and guidance by the ATO*.[22]

113. Where they have relied on advice or a statement it is highly likely that the entity will have exercised reasonable care and the exemption in subsection 284-215(2) or 284-75(5) will apply. However, even if reasonable care has not been taken and the entity relies on advice or a statement from the Commissioner the entity will not be liable to a penalty by application of subsection 284-215(1) resulting in a reduced shortfall amount for the purposes of a penalty calculation or section 284-224 by having the BPA reduced.

114. 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, the income tax 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, subsection 284-215(1) reduces that shortfall amount to the extent that it was caused by following the instructions.

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

115. Former subparagraph 284-215(1)(b)(ii) provides that a shortfall amount will be reduced to the extent that an entity's treatment agrees with a general administrative practice under a taxation law. For statements made on or after 4 June 2010, section 284-224 applies to reduce the BPA in these circumstances. An explanation of the meaning 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?*

[22] The same level of protection does not apply to edited versions of private ruling given to another entity. See PS LA 2008/4 paragraphs 5 and 6.

116. 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 where there is a general administrative practice. Nevertheless, publication and other documents produced by the Commissioner may provide evidence of a general administrative practice. Frequent advice to different taxpayers where the ATO consistently adopts a particular practice will tend to support a conclusion of a general administrative practice.

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

### Increase or reduction of the BPA

118. The BPA is increased and/or reduced depending on the individual circumstances of the case. The formula in subsection 284-85(2) refers to increasing the BPA for the matters in subsection 284-220(1) and reducing the BPA for the matters in subsection 284-225 (voluntary disclosures):

**BPA + [BPA × (increase % - reduction %)]**

#### *Increase in BPA*

119. Under subsection 284-220(1), the BPA is increased by 20% where the entity:

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

For statements made before 4 June 2010, the term 'for a previous accounting period' is used instead of 'previously'.

120. The increase in the BPA is not cumulative, that is, the maximum amount the BPA can be increased by is 20% regardless of the number of conditions which are satisfied.

#### *Prevents or obstructs the Commissioner*

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

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

- repeated failure or deferral by the entity to supply information without an acceptable reason,
- repeated failure by the entity to respond adequately to reasonable requests for information including:
  - excessive or repeated delays in responding,
  - 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 notices,
- providing false or misleading information or documents,
- destroying records, or
- a combination of the factors above.

123. Not replying to a letter or not returning a call does not necessarily indicate the entity was taking steps to prevent or obstruct the Commissioner from identifying a shortfall amount.[23] A single action of a passive nature, such as not responding to an ATO letter, although unhelpful, is not necessarily hindrance.

124. However, the Commissioner holds the expectation that entities cooperate with the Tax Office. Whether or not an entity's failure to reply constitutes obstruction will depend upon the facts of the particular situation.

125. Legal Professional Privilege (LPP) is not merely a rule of evidence it is a substantive common law right. The Commissioner recognises the duty that a lawyer owes to their client. A claim for LPP in itself is not obstruction or hindrance.

126. However, the Commissioner holds the expectation that a lawyer will assert a claim for privilege only on documents which are or may be properly the subject of such a claim. The fact that LPP is subjective, difficult to prove or disprove and will be subject to value judgments that often can be made only by the Court, indicate that it would make it difficult to establish hindrance.

127. However, in cases where the claim itself is false or misleading, for example where the statement claiming LPP is baseless or without foundation, it would be appropriate to consider whether the claim was made to hinder the Commissioner.

128. If the hindrance occurs for part of the shortfall amount for the period, the BPA is increased only on that part of the shortfall amount.

### *Becomes aware of the shortfall amount after the statement is made*

129. Entities are not expected to continually review their tax affairs to detect possible errors. However, if an entity becomes aware of a shortfall amount and does not tell the Commissioner within a reasonable time, the BPA may be increased under paragraph 284-220(1)(b).

### *BPA worked out for the same penalty type previously*

130. When the BPA is worked out using item 1, 2 or 3 of the table in subsection 284-90(1) and the entity previously had a BPA worked out under one of those items, the BPA is increased under paragraph 284-220(1)(c).

131. The BPA is increased on the whole shortfall amount where there is a previous penalty. This also applies where the previous penalty was remitted in full.

132. There is no requirement for the entity to be aware of the penalty for the increase to be calculated. This means that where an entity has not previously had a base penalty worked out, but has a BPA worked out for several shortfall amounts on the one day, the second and subsequent shortfall amounts will have the 20% increase applied.

[23] *Ebner & Anor v. FC of T* [2006] AATA 525 - paragraph 19; *Ciprian & Ors v. FC of T* [2002] AATA 746

133. Where a BPA under items 1, 2 or 3 of the table in subsection 284-90(1) has been worked out for a subsection 284-75(1) penalty and a subsequent subsection 284-75(1) penalty arises with a BPA that falls under items 3A, 3B or 3C of the table (no shortfall amounts), there is no increase in the BPA.

### *Example 10*

134. *An audit takes place and the entity is found to have made a false or misleading statement for the months ending 31 May 2012 and 30 June 2012. The entity has not had a previous BPA amount worked out under items 1, 2 or 3 of subsection 284-75(1) penalty. A BPA of 25% is worked out for the two periods for a failure to take reasonable care. However, for the June period, as the entity has had a penalty for a previous period, that is the May period, the BPA for the June period is increased by 20%.*

### *Reduction in the BPA for voluntary disclosure*

135. The BPA worked out for shortfall penalties for false or misleading statements can be reduced in certain circumstances where an entity makes a voluntary disclosure, in the approved form, about the shortfall amount or part of it.

136. *Miscellaneous Taxation Ruling MT 2008/3: shortfall penalties: voluntary disclosures* (withdrawn from 7 September 2011) and *MT 2012/3: administrative penalties: voluntary disclosures* set out the Commissioner's views on the meaning of voluntary disclosure and the application of section 284-225. Tax officers must refer to these rulings when making decisions regarding voluntary disclosures.

137. Under section 284-225, the penalty imposed by the legislation may be reduced if a voluntary disclosure is made. If an entity makes a voluntary disclosure, that is, tells the Commissioner in the approved form, before notification of an examination of the entity's affairs relating to a taxation law for a relevant period, the BPA on a shortfall amount will be reduced by 80%, or 100% if the shortfall amount is less than $1,000.

138. Under subsection 284-225(2), the penalty on a shortfall amount for an accounting period will be reduced by at least 80% where an entity voluntarily tells the Commissioner about a shortfall amount before the earlier of:

- the day the Commissioner tells the entity that an examination of their affairs in relation to a taxation law, for example a risk review or an audit, for a relevant period is to be conducted, or
- the day by which the Commissioner has publicly requested voluntary disclosure from entities about a scheme or transaction that applies to the financial affairs of that entity.

139. Under subsection 284-225(5), if the Commissioner considers the circumstances are appropriate, he has the discretion to treat an entity as having made a voluntary disclosure before being told of an examination, even though the disclosure was actually made on or after that day. The ruling also sets out when the Commissioner's discretion provided in subsection 284-225(5) should or should not be exercised.[24]

[24] See MT 2008/3 paragraphs 45 to 47 or Appendix 1 of MT 2012/3.

140. Under subsection 284-225(1), the BPA will be reduced by 20% where:

- an entity voluntarily tells the Commissioner in the approved form about a shortfall amount after being told by the Commissioner that an examination of its affairs relating to a taxation law for a relevant period is to be conducted, and
- telling the Commissioner can reasonably be estimated to have saved the Commissioner significant time or resources in the examination.

The entity voluntarily tells the Commissioner about the shortfall amount, that is, makes a voluntary disclosure, when the Commissioner receives the information required in the approved form.

### *What is an approved form?*

141. The approved form sets out the information required to be furnished and the manner in which a voluntary disclosure can be made that an entity needs to follow to make a voluntary disclosure. It is a virtual 'form'. The precise form and structure is irrelevant as long as the information is given by the entity in the manner required or allowed by the approved form.[25] The Commissioner may develop specific forms to assist entities to make a voluntary disclosure about a particular issue. These forms must meet the requirements of the approved forms published on the ATO website.

142. The entity must tell the Commissioner about the shortfall amount, and provide sufficient information so that the Commissioner can accurately determine the shortfall amount based upon the information provided. There is no requirement for the entity to work out the shortfall amount.

### *Completeness of the disclosure*

143. The voluntary disclosure approved form contains a list of the information required to make that disclosure. The disclosure may be made in a number of formats, forms and, depending on the circumstances, can be made in writing, electronically or over the phone. More information on the approved form is published on the ATO website.

144. If the disclosure fails to meet the strict requirements of the approved form, but substantially complies with it, and the Commissioner can accurately determine the shortfall amount based on the information provided, the disclosure should be treated as one meeting the requirements of the approved form.[26]

### *Example 11*

145. *Mai writes a letter to the ATO advising that she has over-claimed work-related expenses for the 2007 income tax return by $8,700. She does not identify which item in the tax return the expense relates to. She signs the letter and provides information to prove her identity but does not make the required declaration.*

146. *As she had only claimed a deduction on one work related expense item in the return, the ATO can identify the item requiring adjustment and, although the declaration is preferable, in this instance, the disclosure is accepted as being in the approved form.*

[25] The voluntary disclosure approved form is published on the ATO website.
[26] A voluntary disclosure requires disclosure of information sufficient for the Commissioner to work out the shortfall amount. It does not require the entity to disclose the actual shortfall amount.

147. 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 to make an accurate assessment of the tax-related liability.

***Example 12***

148. *During an examination, an entity advised that they had made a mistake regarding the treatment and pricing of purchases of equipment from an associated entity in the previous accounting period. The entity advised the tax officer that the information could be found in the files and offered access to two folders of material.*

149. *This, in itself, does not constitute a voluntary disclosure. However, if the entity was to provide details of the specific transactions, this may be considered a voluntary disclosure.*

150. 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.

151. However, if the facts or reasonable inferences indicate the entity supplied incomplete information in an attempt to obstruct or hinder the Commissioner from identifying the full shortfall amount, particularly where the degree of incompleteness is significant, the entity's original disclosure would not be regarded as constituting a complete disclosure.[27]

***Example 13***

152. *Karen has been notified that an audit will commence. At the beginning of the audit, Karen is given a date where, if she made a voluntary disclosure on or before that date, the Commissioner would exercise his discretion under subsection 284-225(5) to reduce any shortfall penalty by 80%.*

153. *Karen supplies some information to the tax officer on the last day of the period but it is insufficient to identify the shortfall amount. The tax officer considers that Karen is making a genuine attempt to make a voluntary disclosure. He advises her that if she supplies further information sufficient for him to identify a shortfall amount within a reasonable timeframe, in this case 14 days, the tax officer will accept the voluntary disclosure as having been made on the date the earlier information was supplied. However, if the information is not provided within 14 days, the Commissioner's discretion would not be exercised but the disclosure would be considered for the 20% reduction.*

154. An entity may disclose one part of a shortfall amount, but not other parts. This may be because the entity is only aware of one part of the shortfall amount. Provided the disclosure on the part of the shortfall amount is complete and true, the entity is entitled to the benefit of the reduction in the BPA in respect of the part of the shortfall amount disclosed. The part or parts of the shortfall amount not disclosed will not receive the reduction in the BPA.

[27] *Kdouh v. FC of T* [2005] AATA 6.

**Determine any remission of the penalty**

155. The penalty for a false or misleading statement that results in a shortfall amount is imposed by law, however, 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.

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

- that the purpose of the penalty regime is to encourage entities to take reasonable care in complying with their tax obligations. Where the entity has made a genuine attempt to report correctly, it will generally be the case that no penalty applies because of the exercise of reasonable care, safe harbour[28] or because the law was applied in the accepted way.[29]
- 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.

157. 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.

158. 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.

***Calculation or mechanical process***

159. An unintended or unjust outcome justifying some remission may result from the mechanical process of the law. This can include:

- income tax cases where a credit forms part of the statement of account, that is, the shortfall amount does not include increases in credit amounts, such as PAYG withholding credits.
- where a BPA is increased because two or more penalties were assessed on the same day, and the entity has not been advised of a previous penalty and the behaviour is not intentional disregard of the law.
- where information is provided prior to lodgment or as part of lodgment of a tax return that, but for the timing, would meet or exceeded the information requirements of the voluntary disclosure in the approved form and allows the Commissioner to understand the basis of the information (or transactions).

[28] For statements made on or after 4 June 2010.
[29] Subsections 284-215(2) or 284-75(5), subsections 284-75(1A) or 284-75(6) and subsections 284-215(1) or section 284-224.

***Example 14***

160. *Heather, the director of a company with 20 employees, fails to take reasonable care on five consecutive activity statements when reporting the amounts withheld from wages. The BPA worked out for the second through fifth accounting period, inclusive, is increased by 20%. The tax officer decides to remit the 20% increase because Heather was not advised of the previous penalty and the behaviour was not intentional disregard.*

***Example 15***

161. *GHI Ltd has made a statement about a tax position in their income tax return that is false or misleading in a material particular and would result in a shortfall amount. GHI Ltd has also lodged a Reportable Tax Position Schedule (RTPS) that clearly sets out the particulars of this statement. The information in the RTPS is not a voluntary disclosure, and remission is not given simply for filling in the RTPS in accordance with the RTPS instructions. This is considered to simply be compliance with the taxation laws.*

162. *If GHI Ltd provided information to the ATO, either in the RTPS or as a supplement to the RTPS, that is sufficient for the Commissioner to identify the basis of this statement and calculate the shortfall amount, remission of the shortfall penalty may be given to the extent of the shortfall amount identified by the information. However, remission is not given where there is evidence or reasonable inference to suggest there was intentional disregard of the law in filling in the return for those items. GHI Ltd may also make a voluntary disclosure after lodgment of the return and the appropriate reduction and remission will apply. (See paragraph 183 of this practice statement and MT 2012/3.)*

***Where the entity has taken reasonable care but they are liable to a penalty***

163. An unjust result justifying some remission 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 registered agent, asked relevant questions about claims that were not usual and reviewed the document before signing. However, the registered agent was reckless in application of the law and safe harbour did not apply.

164. Because entities are responsible for the actions of their agent, except where safe harbour applies, it would be unusual for significant or full remission to be given.

165. For situations where the registered agent is reckless or intentionally disregarded the law and the taxpayer does not ask relevant questions or does not review the statement, remission would generally not be warranted.

***The application of the special rules in respect of trustees***

166. If both the trustee and beneficiary are liable under the legislation, it may be appropriate to remit an amount of penalty for the trustee only, or the beneficiary only or both parties, depending upon the facts and circumstances of each particular case.

167. When deciding whether, and how much penalty should be remitted for each entity, the following factors should be considered:

- the extent to which the respective actions of either the trustee and/or the beneficiary have caused the shortfall amount, and
- there should be no 'double penalty' assessed, that is, if the trustee and a beneficiary are the same entity, the entity should be only liable to pay one penalty.

### *Multiple penalties*

168. There may be some circumstances where the entity's behaviour results in more than one type of penalty applying under the law. The remission treatment of the penalties will differ according to the penalties that apply and the action or actions that lead to each penalty.

169. For example, an entity may have failed to keep or retain records and be liable to a penalty under section 288-25. The lack of records and the entity's failure to otherwise try to report the correct amounts may also result in a Subdivision 284-B penalty. However, although there is a clear link between failing to keep records and not reporting a correct amount, they are not the same obligations. The failure to keep records reflects day to day business management practices. The underreporting of income or over claiming of credits is a separate action. Generally, in those circumstances, both penalties would apply and there would not be an automatic remission of the lesser penalty. The relevant remission principles should be considered for each penalty. However, consideration should be given to whether maintaining both penalties would produce an unjust result.

170. Law Administration Practice Statement PS LA 2008/18: *Interaction between Subdivisions 284-B and 284-C of Schedule 1 to the Taxation Administration Act 1953* provides details of the policy in relation to imposition and the Commissioner's discretion to remit where Subdivision 284-B and 284-C penalties apply to the same statement.

### *Commissioner's discretion in relation to tax invoices or adjustment notes*

171. The Commissioner has the discretion to treat a document not meeting the tax invoice requirements to be a tax invoice. A similar discretion exists in relation to adjustment notes. These discretions allow for flexibility to the otherwise strict information requirements for tax invoices and adjustment notes. Law Administration Practice Statement PS LA 2004/11: *The Commissioner's discretions to treat a particular document as a tax invoice or adjustment note* provides guidance to ATO staff as to how they may exercise these discretions.

172. The ATO may accept a creditable acquisition or decreasing adjustment may have been made but not exercise the discretion to treat a particular document as a tax invoice or adjustment note. If the Commissioner does not exercise the discretion, the net amount for that tax period will be assessed without allowance for the GST credit or decreasing adjustment. This may result in a shortfall amount.

173. Any shortfall penalty relating to the GST credit or decreasing adjustment will usually be remitted in full where a creditable acquisition or decreasing adjustment has been made unless it is clear the recipient:

- was aware of the requirements in relation to holding a valid tax invoice or adjustment note before it could attribute its claim, and
- deliberately sought to gain an advantage by making the claim without holding a tax invoice or adjustment note.

174. Any decision not to remit the shortfall penalty relating to the GST credit or decreasing adjustment must be approved by an EL 2 officer. See PS LA 2004/11 paragraph 36 to 39 for details of the policy.

### *Amount reported or claimed in incorrect period*

175. In some cases, a shortfall amount may represent an amount of tax deferred rather than an amount of tax permanently avoided. This generally occurs where an amount is reported in a period later than it should be or credit claimed in a period earlier than it should be. In such cases, there may be scope to remit the penalty for a false or misleading statement in whole or in part.

176. Full or partial remission of the penalty assessed may be warranted in these cases depending on the circumstances. That is, where reasonable assumptions can be drawn to conclude the amount was not reported in the correct period to defer or avoid payment of the amount, remission should not occur. The case for remission is strongest where there is only a short period of deferral of tax and the amount is reported in the next period.

177. However, in income tax cases, if there has been an amount of tax avoided due to a reduction in the rates of the tax between the two years in question, remission of the prescribed penalty for the part of a shortfall amount representing the amounts of tax permanently avoided due to the change of rates would generally not be warranted.

178. If the shortfall amount for the period is determined prior to lodgment of the second statement (which could have reported the amount), remission would not be given on this basis, and general remission principles may apply.

### *An amount disclosed or a deduction or credit claimed in another entity's return or activity statement in the same accounting period*

179. If an amount omitted by an entity is mistakenly included by another entity in their return or activity statement for the same accounting period, an administrative penalty for false or misleading statement may be fully remitted if, after the relevant amendments, there was no tax avoided in overall terms, and neither party has any losses or other tax deductions or offsets.

180. This principle applies equally for deductions or credits claimed in the wrong entity's return or activity statement. If a credit is associated with an amount mistakenly included in another return or activity statement, full remission will generally be available for the amount of tax offset by the credit when the amount is correctly declared.

181. In similar circumstances, if an amount of tax was avoided in overall terms, due to differing tax rates between the two entities, then any shortfall penalty attracted by the entity should be remitted so it is effectively only liable to a penalty on the net amount of tax avoided in overall terms.

182. However, if it is evident that the entities have not made a genuine attempt to make a correct statement when completing the relevant return or activity statement, remission will not generally be warranted.

### *Voluntary disclosure*

183. The BPA imposed by the legislation is reduced if a voluntary disclosure is made. As discussed in MT 2012/3, if an entity makes a voluntary disclosure before notification of an examination, the penalty on a shortfall amount will be reduced by at least 80% unless the disclosure relates to a shortfall amount that is less than $1,000, in which case it is reduced to nil.

184. Any penalty remaining after such statutory reduction will be remitted in full, unless there is information to indicate the entity did not make an honest and inadvertent mistake, or it can be reasonably inferred it was not an honest and inadvertent mistake.

185. If, after notification of an examination, the entity makes a voluntary disclosure for periods outside the examination period, the above paragraphs apply. For a voluntary disclosure made for a period notified, the Commissioner's discretion to treat the voluntary disclosure as though it was made prior to notification will apply. General remission principles will apply to the remaining penalty.

### *Considerations that are generally not relevant*

186. The discretion to remit penalties should not be influenced by:

- certain behaviour or situations unrelated to the relevant statement, for example the current illness of an entity or registered agent, well after the statement was made, would not be relevant to remission
- the perceived lack of effect on the revenue – that is, the availability of other credits or that there is 'no harm to the revenue' is irrelevant.[30]

187. Where an entity is unable or unwilling to collect GST where GST was 'not included' in working out the selling price for the transaction, remission is not to be granted merely because the entity could not or would not collect the GST on that supply from the purchaser. The general remission considerations above are applicable.

188. The capacity to pay, or whether payment of the penalty may cause financial hardship for the entity, is generally not relevant to shortfall penalty remission. Such considerations are limited to exceptional situations.[31]

### *Treating entities in the same circumstances consistently*

189. Entities in the same circumstances should be treated consistently for remission purposes. This is relevant for entities involved in examinations undertaken by the ATO for the same arrangement. However, this should not be used as a justification for replicating an incorrect penalty decision made in relation to another entity.

## Step 3 – Notify the entity of the liability to pay the penalty

190. Under section 298-10, the Commissioner must issue a written notice to the entity of the entity's liability to pay the penalty. This notice will advise the amount of the liability that remains after any remission of the penalty.

[30] *FC of T v. Dixon (As Trustee for the Dixon Holdsworth Superannuation Fund)* 2007 ATC 4748.
[31] Capacity to pay and hardship may be dealt with through payment arrangements, compromise, release and insolvency and under other taxation or insolvency provisions, and not remission of penalties.

191. The written explanation must set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

192. The law does not specify when the explanation must be supplied. However, tax officers usually should ensure the reasons for a liability to a penalty are supplied prior to, or at the same time as the entity is notified of the penalty. In those instances where this is not possible they should be provided as soon as possible after issuing a notice of assessment of penalty.

193. 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.[32]

194. 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 decisions. The only exception is where there is some operational requirement making it impractical, such as some limited high volume work.

195. In order to positively influence compliance behaviour, the basis of a penalty decision should be clearly and promptly explained to an entity.

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

### *Objection rights*

197. The Commissioner must make an assessment of the amount of an administrative penalty under Subdivision 284-B.[33] If the Commissioner decides not to remit a penalty or to partially remit the penalty, the Commissioner must give written notice of the decision and the reasons for the decision to the entity.[34]

198. An entity that is dissatisfied with an assessment of penalty may object against it in the manner set out in Part IVC. The grounds of the objection may include all elements of the penalty assessment. 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 need to include in their objection any grounds about their dissatisfaction with the remission. 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 if the amount of penalty remaining after the decision is more than 2 penalty units.

199. If a penalty has been remitted in full or reduced to nil during the process of assessing the penalty there is no right of objection as the entity cannot then be dissatisfied with the decision.

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

[32] Section 298-10.
[33] Subsection 298-30(1).
[34] Subsection 298-20(2).

## ATTACHMENT A– CALCULATIONS

### Income tax

#### *Credits which do not form part of an assessment*

201. Certain credits relating to an accounting period do not form part of the shortfall amount calculation: they are particulars of the statement of account between the taxpayer and the Commissioner and not components of the tax related liability under the assessment.[35] This includes credits such as PAYG withholding and Tax File Number (TFN) withholding amounts. Where there is an increase in the credits from the amount originally reported, the shortfall amount is not reduced to reflect the increased credits.

#### *Example 16*

202. *Kieran had a number of part-time jobs and changed jobs often. When lodging his tax return, he failed to include three payment summaries. The understated salary is $16,000 which led to a shortfall amount of $5,200. The shortfall penalty was assessed on the shortfall amount of $5,200.*

203. *One of the payment summaries also included PAYG withholding amounts totalling $4,000. These credits are applied to reduce the amount of tax payable (or other debts) after the (amended) assessment is made. That is, although the amount payable is $1,200, the shortfall amount is $5,200.*

#### *Head company of consolidated group*

204. Subsection 284-80(2) sets out a formula where a shortfall amount may be modified in cases where the head company of a consolidated group makes errors in working out a tax cost setting amount for an asset, as mentioned in section 705-315 of the *Income Tax Assessment Act 1997* (ITAA 1997).

#### *Matters relating to income tax assessments*

205. In working out the tax-related liability for the purpose of ascertaining the shortfall amount, the Commissioner has regard to the true tax-related liability of the entity, which would normally be reflected in an income tax assessment. The Commissioner may take into account information additional to the entity's income tax return prior to issuing the assessment. The law also requires the Commissioner to determine the amount of tax-related liability on the basis of the entity's statement. In these situations, the shortfall amount is the difference between the amount of tax-related liability, based upon statements in the income tax return and the tax-related liability in the notice of assessment.

206. For non full self-assessment taxpayers, for example, individuals or trusts, an assessment cannot be deemed on the basis of a statement and must be physically made by the Commissioner. The Commissioner may issue an original assessment with adjustments to the items as stated in the tax return.

[35] *Commissioner of Taxation v Ryan* (1998) 82 FCR 345.

### *Example 17*

207. *Mavis lodges her 2009-10 income tax return. Prior to making an assessment the Commissioner reviews the return and identifies an amount of deductions claimed in error. An assessment of the tax-related liability is made for an amount of $60,000.*

208. *For the shortfall amount, the Commissioner compares the tax-related liability worked out using Mavis's original statements in her return. A refund of $20,000 would have resulted. However, the correct liability after disallowing the deductions is a tax related liability of $60,000. The shortfall amount is therefore $80,000, comprising $20,000 which arises under Item 2 and $60,000 which arises under Item 1.*

209. Full self-assessment taxpayers such as companies are deemed to have been assessed[36] by the Commissioner upon lodgment of a tax return in the approved form. Where an adjustment is subsequently made, the shortfall amount is generally the difference in the relevant liability between the deemed assessment and the amended assessment.

## All taxes

### *Amendment not required in certain situations*

210. If an entity makes a request for an amendment to its tax position, the Commissioner is not required to amend if he believes the entity is not entitled to the amounts claimed or the stated reduction in tax payable. Therefore, it is possible for a shortfall penalty to be assessed where the Commissioner does not make an adjustment.

### *Example 18*

211. *To enable him to claim further fuel tax credits, Rohan lodges a request with the ATO to amend his activity statement. This would give him a refund of $37,200. Prior to making an adjustment, the Commissioner reviews the material and determines the credit is not substantiated. No adjustment to the period is made.*

212. *In calculating the shortfall amount, the Commissioner compares the tax-related liability worked out on the basis of the adjusted statement incorrectly claiming $37,200 with the correct liability which had already been established. A shortfall amount of $37,200 exists.*

### *Apportionment of credit amounts within a shortfall amount*

213. In determining a shortfall amount, a number of labels in a statement may be adjusted. These can be a mixture of credit and debit adjustments. In order for there to be a shortfall amount, there must be an overall increase in the tax-related liability (or an overall decrease in the credit or payment). Where there are a number of increasing and decreasing adjustments, the resulting shortfall amount is allocated on a pro rata basis between the adjustments that result in an increase in liability (or decrease in the amount of a credit or payment).

[36] Examples are section 166A of the *Income Tax Assessment Act 1936* and section 72 of the *Fringe Benefits Tax Assessment Act 1986.*

214. The reduction in the tax-related liability is apportioned in the same ratio as each part of the shortfall is to the total shortfall amount. That is, a pro rata portion of the reduction is subtracted from each of the various parts of the shortfall amount.

215. In this context, the 'notional shortfall' is what the total shortfall amount would be if the adjustment which decreases the tax-related liability was not present.

### *Example 19*

216. *A GST examination results in two adjustments which increase the tax-related liability by $10,000 and $5,000 and an adjustment that reduces the liability by $6,000.*

*The adjustments that increase the liability are the result of two different behaviours. These are:*

- Label 1A - $10,000 - reckless, and
- Label 1B - $5,000 - reasonable care.

*The notional shortfall amount is $15,000 ($10,000 + $5,000).*

*The shortfall amount, after all the adjustments are made, is $9,000.*

*The individual parts of the shortfall are calculated by multiplying the fraction of each part by the total shortfall amount as follows:*

*$9,000 X ($10,000/ $15,000) = $6,000*

*and*

*$9,000 X ($5,000/$15,000) = $3,000*

217. The calculation process may be easier to understand if a fraction is calculated for each part of the shortfall using the following formula:

$$\frac{\text{Shortfall part}}{\text{Notional shortfall}} = \text{Fraction}$$

218. The fraction of each part of the shortfall is then multiplied by the total shortfall amount to calculate the amount of that part of the shortfall to which the prescribed penalty rate for that part is applied. Example 18 uses this process.

219. For some tax types, all adjustments are directly proportional to the tax-related liability. Adjustments to either the GST payable or GST credits have a direct dollar-to-dollar effect on the GST net amount.

220. However, with taxes, such as income tax, some of the adjustments must be multiplied by the appropriate tax rate to determine the effect on the tax-related liability.

### *Reduced liability for income tax*

221. Income tax adjustments which decrease the liability are first applied to any increasing adjustments within the same broad category. Where necessary, any decrease in the tax-related liability which remains is apportioned between shortfall parts arising from adjustments in other broad categories on a pro rata basis. For these purposes, the broad categories of calculating income tax payable are divided into:

- basic income tax liability
- tax offsets, and
- levies and charges.

222. The basic income tax liability is the taxable income multiplied by the appropriate rate. Adjustments to assessable income or allowable deductions, that is, adjustments to the taxable income are considered in one broad category.

223. Tax offsets are the second broad category as they are not the same as deductions. Tax offsets directly reduce the net income tax liability, whereas deductions are subtracted from assessable income and therefore reduce taxable income.

224. The third broad category is various levies and charges, such as the Medicare levy surcharge, the superannuation surcharge and the termination payments surcharge.

***Example 20***

225. *Compli Pty Ltd lodges their income tax return. An audit identified two separate tax offsets claimed by Compli that they were not entitled to claim. The auditor also identified an additional amount of an unrelated tax offset that Compli was entitled to claim. There were no adjustments to the basic income tax liability.*

*The total shortfall amount is $900,000.*

*The two tax offsets erroneously claimed (increasing adjustments) are:*

- $500,000 resulting from intentional disregard
- $1M resulting from failure to take reasonable care

*The additional tax offset (decreasing adjustment) is $600,000.*

*The penalty is calculated as follows:*

*1. Determine each debit and the sum of the debit adjustments:*

*The sum of the debit adjustments is $500,000 + $1M = $1.5M*

*$500,000 ÷ $1.5M*

*$1M ÷ $1.5M*

*2. Determine the notional shortfall amount for each part:*

| | | |
|---|---|---|
| *$900,000 x ($500,000 ÷ $1.5M)* | *=* | *$300,000* |
| *$900,000 x ($1.0M ÷ $1.5M)* | *=* | *$600,000* |

*3. Calculate the BPA for each part:*

| | | |
|---|---|---|
| *$300,000 x 75%* | *=* | *$225,000* |
| *$600,000 x 25%* | *=* | *$150,000* |

*4. Calculate the penalty amount:*

*(Assuming there is no reason to increase or reduce either BPA)*

| | | |
|---|---|---|
| *$225,000 + $150,000* | *=* | *$375,000* |

***Example 21***

226. *Leonardo lodges his income tax return. An audit of this statement revealed that he understated income by $3,000 and claimed $500 of deductions that were disallowed. The auditor also identified $300 of deductions to which Leonardo was entitled.*

*Leonardo had also claimed two tax offsets to which he was not entitled, but had failed to claim a tax offset to which he was entitled.*

*The amounts of the adjustments and the relevant behaviour are:*

- *understated income of $1,000 – reckless*
- *understated income of $2,000 – failure to take reasonable care*
- *over claimed deduction of $500 – reasonable care*
- *unclaimed deduction – $350*
- *tax offset of $1,000 disallowed – failure to take reasonable care*
- *tax offset of $500 disallowed – reckless*
- *tax offset not claimed - $420.*

*The adjustments to the basic income tax liability result in an increase in the liability of $1,435. When the adjustments to the tax offsets of $1,080 are included the total shortfall amount is $2,515.*

*The penalty is calculated as follows:*

*Since there are adjustments in different stages of the income tax assessment process each stage is first considered separately.*

*For the basic income tax liability stage:*

*Determine the ratio each debit adjustment has to the sum of the debit adjustments for this stage:*

*The sum of the debit adjustments is $1,000 + $2,000 + $500 = $3,500*

*$1,000 = 2/7*
*$3,500*

*$2,000 = 4/7*
*$3,500*

*$500 = 1/7*
*$3,500*

*Determine the notional shortfall amount for each part:*

*$1,435 x 2/7 = $410*
*$1,435 x 4/7 = $820*
*$1,435 x 1/7 = $205*

*The BPAs for each part is then calculated:*

*$410 x 50% = $205*
*$820 x 25% = $205*

*Over claimed deduction – no BPA since reasonable care was taken.*

*For the net income tax liability stage:*

1. *Determine the ratio each debit adjustment has to the sum of the debit adjustments for this stage:*

   *The sum of the debit adjustments is $1,000 + $500 = $1,500*

   *$1,000 = 2/3*

   *$1,500*

   *$ 500 = 1/3*

   *$1,500*

2. *Determine the notional shortfall amount for each part:*

   *$1,080 x 2/3 = $720*

   *$1,080 x 1/3 = $360*

   *The BPAs for each part are then calculated:*

   *$720 x 25% = $180*

   *$360 x 50% = $180*

   *The total penalty is the sum of the BPAs.*

3. *Calculate the penalty amount:*

   *(Assuming there is no reason to increase or reduce either BPA)*

   *$205 + $205 + $180 + $180 = $770*

### *GST situations*

227. When working out the net amount for a single accounting period, if an entity understates an amount payable or overstates the entitlement to a payment or credit and at the same time overstates another liability or understates another entitlement to a payment or credit, the shortfall may need to be adjusted to apportion the credit.

### *Example 22*

228. *Carborundum Company recklessly understated taxable supplies by $55,000 and this has resulted in an underreporting of GST of $5,000. The understatement of sales was also not included in the company's PAYG instalment income that was subject to a 2% instalment rate. There was also a misclassification of $22,000 worth of goods sold as GST-free due to a lack of reasonable care. This resulted in a further underreporting of $2,000.*

229. *The company also made an arithmetic error that has resulted in an under-claim of GST credits by $2,500. In this case, the total of the two GST underreportings is $7,000 ($5,000 understating of GST plus $2,000 misclassification). However, this is not the amount on which the penalty will be calculated because a reduction is required for the under-claimed GST credits. The penalty will be calculated as follows:*

| | | |
|---|---|---|
| *Shortfall amount for understated sales (as adjusted for proportion of under-claimed GST credits):* | | |
| *$5,000 - ($2,500 × 5000/7000) =* | *$3,214.00* | |
| *Penalty for recklessness:* | | |
| *$3,214 × 50% =* | | *$1,607.00* |
| *Shortfall amount for misclassification (as adjusted for proportion of under-claimed GST credits):* | | |
| *$2,000 - ($2,500 × 2000/7000) =* | *$1,286.00* | |
| *Penalty for lack of reasonable care:* | | |
| *$1,286 × 25% =* | | *$321.50* |
| *Total GST penalty* | | *$1,928.50* |
| *Calculation of penalty on PAYG instalment shortfall amount:* | | |
| *Understated income (recklessness):* | | |
| *($55,000 × 2%) × 50% =* | | *$550.00* |
| *Total penalty for activity statement* | | *$2,478.50* |

## ATTACHMENT B - DEFINITIONS

### Accounting period

230. Accounting period is the period for which the tax-related liability or credit is calculated. The period is not necessarily a financial year and may differ according to the type of tax involved.

### Base penalty amount

231. In the context of Division 284, subsection 995-1(1) of the 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.

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

233. The table in subsection 284-90(1) for false or misleading statements which result in shortfall amounts says:

| Item | In this situation | The base penalty amount is |
|---|---|---|
| 1 | Your shortfall amount or part of it resulted from intentional disregard of a taxation law by you or your agent | 75% of your shortfall amount or part |
| 2 | Your shortfall amount or part of it resulted from recklessness by you or your agent as to the operation of a taxation law | 50% of your shortfall amount or part |
| 3 | Your shortfall amount or part of it resulted from a failure by you or your agent to take reasonable care to comply with a taxation law | 25% of your shortfall amount or part |

### Entity

234. 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*

235. 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

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

### Shortfall amount

237. Shortfall amount is defined in subsection 995-1(1) of the ITAA 1997 as having the meaning given by section 284-80.

### Taxation law

238. Taxation law is defined in subsection 2(1) of the TAA 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.

239. References to 'taxation law' in Subdivision 284-B exclude Excise Acts (as defined in subsection 995-1(1) of the ITAA 1997)

### Tax-related liability

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

241. 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 |
|---|---|---|
| 11 June 2015 | Authorisation | Updated. |
| 7 April 2014 | Paragraph 159 & Example 15 | Included dot point and new example relating to disclosure or prior lodgment. |
| 22 January 2013 | Paragraphs 196 & 233 | Revised to reflect change in penalty unit value from 28 December 2012. |

| | |
|---|---|
| Subject references | administrative penalty<br>assessment of penalty<br>calculation of shortfall amount<br>compliance history<br>false or misleading statement<br>increase in penalty<br>remission of penalty<br>safe harbour<br>voluntary disclosure |
| Legislative references | ITAA 1936 166A<br>ITAA 1997 705-315<br>ITAA 1997 960-100<br>ITAA 1997 995-1(1)<br>TAA 1953 2(1)<br>TAA 1953 Sch 1 Part 4-25<br>TAA 1953 Sch 1 Part IVC<br>TAA 1953 Sch 1 Div 284<br>TAA 1953 Sch 1 Subdiv 284-B<br>TAA 1953 Sch 1 Subdiv 284-C<br>TAA 1953 Sch 1 250-10<br>TAA 1953 Sch 1 255-1<br>TAA 1953 Sch 1 284-20<br>TAA 1953 Sch 1 284-25<br>TAA 1953 Sch 1 284-30<br>TAA 1953 Sch 1 284-35<br>TAA 1953 Sch 1 284-75(1)<br>TAA 1953 Sch 1 284-75(1A)<br>TAA 1953 Sch 1 284-75(4)<br>TAA 1953 Sch 1 284-75(5)<br>TAA 1953 Sch 1 284-75(6)<br>TAA 1953 Sch 1 284-75(7)<br>TAA 1953 Sch 1 284-80<br>TAA 1953 Sch 1 284-80(1)<br>TAA 1953 Sch 1 284-80(2)<br>TAA 1953 Sch 1 284-85(2)<br>TAA 1953 Sch 1 284-90<br>TAA 1953 Sch 1 284-90(1)<br>TAA 1953 Sch 1 284-90(2)<br>TAA 1953 Sch 1 284-160<br>TAA 1953 Sch 1 284-215(1)(b)(ii)<br>TAA 1953 Sch 1 284-215(1)<br>TAA 1953 Sch 1 284-215(2)<br>TAA 1953 Sch 1 284-220(1)<br>TAA 1953 Sch 1 284-220(1)(a)<br>TAA 1953 Sch 1 284-220(1)(b)<br>TAA 1953 Sch 1 284-220(1)(c)<br>TAA 1953 Sch 1 284-224<br>TAA 1953 Sch 1 284-225<br>TAA 1953 Sch 1 284-225(1)<br>TAA 1953 Sch 1 284-225(2)<br>TAA 1953 Sch 1 284-225(5)<br>TAA 1953 Sch 1 288-25<br>TAA 1953 Sch 1 298-10<br>TAA 1953 Sch 1 298-20<br>TAA 1953 Sch 1 298-20(1)<br>TAA 1953 Sch 1 298-20(2) |

| | |
|---|---|
| | TAA 1953 Sch 1 298-20(3)<br>TAA 1953 Sch 1 298-30(1)<br>TAA 1953 Sch 1 444-30<br>TAA 1953 sch 1 444-50<br>Excise Act 1901<br>FBTAA 1986 72 |
| Related public rulings | MT 2008/1<br>MT 2008/3<br>MT 2012/3<br>TD 2011/19 |
| Related practice statements | PS LA 2004/11<br>PS LA 2006/2<br>PS LA 2008/3<br>PS LA 2008/4<br>PS LA 2008/18<br>PS LA 2012/4 |
| Case references | *Ciprian & Ors v. FC of T* [2002] AATA 746; 2002 ATC 2099; (2002) 50 ATR 1257<br>*Commissioner of Taxation v. Ryan (1998)* 82 FCR 345; (1998) 38 ATR 464; 98 ATC 4323<br>*Ebner & Anor v. FC of T* [2006] AATA 525; (2006) 63 ATR 1073; 2006 ATC 2263<br>*FC of T v. Dixon (As Trustee for the Dixon Holdsworth Superannuation Fund)* 2007 ATC 4748; [2007] FCA 1079; 67 ATR 87<br>*Kdouh v. FC of T* [2005] AATA 6; (2005) 58 ATR 1198; 2005 ATC 2001<br>*Necovski v. FC of T* [2009] AATA 195; 2009 ATC 10-084; 75 ATR 152<br>*Weyers and Anor v. FCT* [2006] FCA 818; 2006 ATC 4523; (2006) 63 ATR 268 |
| Other references | *Taxpayers' Charter* |
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| Contact email | **OperationalPolicyAssuranceandLawWorkManagement@ato.gov.au** |
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