PS LA 2019/1 (Withdrawn) - Remission of additional superannuation guarantee charge

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Law Administration Practice Statement PS LA 2019/1 was withdrawn with effect from 8 September 2020. It has been replaced by Law Administration Practice Statement PS LA 2020/4 which provides guidelines in relation to the remission of additional super guarantee charge imposed under Part 7 of the *Superannuation Guarantee (Administration) Act 1992*.

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PS LA 2019/1
Remission of additional superannuation guarantee charge

Law Administration Practice Statement PS LA 2019/1 was withdrawn with effect from 8 September 2020. It has been replaced by Law Administration Practice Statement PS LA 2020/4 which provides guidelines in relation to the remission of additional super guarantee charge imposed under Part 7 of the *Superannuation Guarantee (Administration) Act 1992*.

This Law Administration Practice Statement provides guidelines in relation to the remission of additional super guarantee charge imposed under Part 7 of the *Superannuation Guarantee (Administration) Act 1992.*

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

1. What this Practice Statement is about

This Practice Statement sets out what you need to consider in making a decision on the remission, in whole or part, of the additional super guarantee charge (SGC) imposed under subsection 59(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA). It also sets out when penalty relief is appropriate to be applied.

2. What principles of the super guarantee regime should you consider when making decisions?

If you are making a decision concerning super guarantee (SG) matters, you should have regard to the overarching principles of the SG regime. These are summarised below.

The SG regime is designed to encourage employers to provide their employees with a minimum level of super. This compulsory super is a fundamental pillar in Australia's retirement income system.

Where an employer does not provide this minimum level of super, the employer is liable to pay a tax, the SGC.

The SGC is collected from employers and is distributed primarily to the super interests of employees. For that reason, the SGC is unlike other taxes.

The SG regime provides for penalties to encourage willing employer behaviour and to deter employers from failing to report their SGC liability by set due dates. This is by ensuring there are consequences for employers who do not comply with the law.

We take non-compliance with employer obligations seriously. We have pay-event reporting of SG accruals, and event-based reporting of contribution payments from funds regulated by the Australian Prudential Regulation Authority (APRA). Where an employer does not come forward voluntarily for late or non-payment of SG by the due date, we will engage with employers to get their obligations up to date.

Non-payment of SG has severe impacts on several groups. Employees are deprived of super support, impairing their ability to save for retirement. Employers who meet their SG obligations may be disadvantaged in competing with others who do not comply.

3. What is the additional SGC?

An additional SGC (referred to as the Part 7 penalty) is imposed under Part 7 of the SGAA when an employer fails to provide, when required:

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

The Part 7 penalty arises in two situations:

- where an employer lodges an SG statement for a quarter after the due date[2], or
- where we make a default assessment[3] of the employer's liability for the SGC because
  - an employer has not lodged an SG statement for a quarter, and
  - we are of the opinion the employer is liable to pay SGC for the quarter.

The Part 7 penalty is automatically imposed on an employer by law.[4] The Part 7 penalty imposed is equal

[1] Subsection 59(1) of the SGAA. The SG statement or information may relate to an SGC arising from a failure to provide super support for an employer or a failure to fulfil the choice of fund obligations for an employee in Part 3A of the SGAA.
[2] See subsection 33(1) of the SGAA for lodgment due dates.
[3] Section 36 of the SGAA; PS LA 2007/10 *Making default assessments: section 36 of the Superannuation Guarantee (Administration) Act 1992.*

to double the SGC payable by the employer for the quarter (that is, 200% of the SGC).

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

If you amend[6] an employer's SGC assessment for a quarter and the law imposed a Part 7 penalty on the original SGC assessment, you must also amend the Part 7 penalty assessment for the quarter.

On the other hand, if the law did not impose a Part 7 penalty on the original SGC assessment for a quarter (for example, because the SG statement was lodged before the legislated due date), the Part 7 penalty is not imposed for any subsequent amendments.

However, in either of these cases, an administrative penalty for making a false or misleading statement may be imposed.[7]

4. When can you remit the Part 7 penalty?

You have the discretion to remit the Part 7 penalty, in full or in part.[8] This can be done as part of the assessment of the penalty (the original assessment stage) or after the penalty is assessed (through an objection decision).

Employers have the right to object to an assessment of a Part 7 penalty.[9] Although there is no separate right to object to a decision on the remission of the Part 7 penalty, an objection against a penalty assessment includes a review of the penalty remission decision.

5. What process should you follow to determine whether to remit the Part 7 penalty?

The Part 7 penalty is automatically imposed at a rate of 200% and you should consider whether the penalty should be remitted in all cases. Except in rare cases, where there is an employer engaging in egregious tax avoidance behaviour, you should consider remitting the Part 7 penalty either in part or in full.

Your remission decision should take into account all the relevant facts and indicia outlined in the **Three-step penalty remission process** contained in Appendix 1 of this Practice Statement. You need to follow this three-step process when making a decision to remit the Part 7 penalty down from 200%.

The three-step process is designed to accommodate the principles of this Practice Statement and to ensure that employers in like circumstances receive like treatment as far as practicable.

It is also important for you to understand that penalties are imposed to:

- ensure employers pay super contributions for their employees correctly and on time
- change the decision-making behaviour of employers to ensure that employee SG entitlements are not put at risk of delay, compromise or loss, and
- encourage employers to lodge SG statements by their due dates.

You must have collected all relevant information and document the evidence and basis for any remission decision you make.

6. When is it appropriate to provide penalty relief?

You may provide an employer with penalty relief in limited circumstances where it is considered education is a more effective option to positively influence behaviour.

This approach recognises while we expect all employers to meet their SG obligations, an employer may have SG knowledge gaps that lead to non-compliance and can be addressed through education.

An employer is only eligible for penalty relief where they have a turnover of less than $10 million and they:

- do not have a history of lodging SG statements late
- have lodged no more than four SG statements after the lodgment due date in the present case
- have no previous SG audits where they were found to have not met their SG obligations, and
- have not previously been provided with penalty relief.

An employer cannot receive penalty relief where they:

- have been issued with an SG default assessment
- have lodged more than four SG statements after the lodgment due date in the present case, or
- have previously been issued with an SG education direction.

Penalty relief may be applied by remitting the residual penalty after applying the three-step process and

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[4] Subsection 59(1) of the SGAA.
[5] Subsection 59(3) of the SGAA.
[6] Section 37 of the SGAA.
[7] Subsection 284-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA); PS LA 2012/5 *Administration of the false misleading statement penalty – where there is a shortfall amount.* See paragraph 8 of this Practice Statement for more information.
[8] Subsection 62(3) of the SGAA.
[9] Section 42 of the SGAA.

instead providing the employer with education to help them meet their obligations in the future.

This education should be by way of a formal SG education direction and may be supplemented with informal education. It should focus on making sufficient contributions to avoid an SG shortfall, and/or lodging SG statements on time in the future, and should advise the client of the penalties for failing to lodge on time.

Penalty relief will be available to employers from the date of publication of this Practice Statement.

An employer should not be provided penalty relief at any point before the relevant SG assessments have been finalised and you are ready to finalise your remission decision.

An employer cannot 'apply' for penalty relief, and an employer cannot specifically object to a decision not to apply penalty relief. Your decision to apply penalty relief forms part of your remission decision under the power to remit prescribed by the SGAA.[10]

7. What should you do before finalising the remission decision?

In some circumstances, it may be appropriate to contact the employer to give notice of the anticipated penalty and the reasons for the remission decision before applying the Part 7 penalty. This may be appropriate if, for example, a significant residual penalty will remain after remission. You may give notice during an audit conversation or in writing.

The purpose of this contact is to encourage full disclosure of relevant facts and circumstances to ensure the penalty strikes the right balance in the first instance.

This is not an opportunity to negotiate the anticipated penalty. Rather, it is designed to draw out relevant facts or circumstances for your decision which were previously unknown.

Example – tax officer notifies employer of anticipated penalty

An employer is subject to an audit of their SG obligations for the quarters ended 31 March 2017 to 30 September 2017.

The employer has authorised another person to handle the SG audit and the tax officer has been dealing with this authorised contact. The authorised contact provides SG statements on behalf of the employer for the full period under audit.

The tax officer phones the authorised contact and notifies them of the anticipated penalty and the associated reasons. The tax officer also outlines the relevant facts and circumstances known to them.

The authorised contact requests time to make contact with the employer to obtain any other facts or circumstances relevant to the decision. The employer then contacts the tax officer directly to explain further relevant facts.

Considering these new facts, the tax officer decides to provide further remission of the penalty than was initially indicated.

8. How does the Part 7 penalty interact with other administrative penalties?

TAA default assessment penalty

An employer is also liable to an administrative penalty under the TAA where:

- we determine a tax-related liability[11] without the assistance of a return, notice or other document
- the document has not been provided by a specified time, and
- the document is necessary to determine the tax-related liability.[12]

This Practice Statement refers to this penalty as the 'TAA default assessment penalty'.

Where we make a default assessment of an employer's SGC liability, the Part 7 penalty and the TAA default assessment penalty may both apply.

The base penalty amount of the TAA default assessment penalty is 75% of the tax-related liability.[13]

You can remit the TAA default assessment penalty, in full or in part.[14]

You should consider remitting in full the employer's liability to the TAA default assessment penalty. This is regardless of the extent to which the Part 7 penalty is remitted. The Part 7 penalty is the penalty specifically provided for by the SGAA and is generally the appropriate penalty to apply where both penalties are imposed.

TAA false or misleading statement penalty

Likewise, an employer is liable to an administrative penalty under the TAA where:

[10] Subsection 62(3) of the SGAA.

[11] The SGC is a tax-related liability per table item 60 in subsection 250-10(2) of Schedule 1 to the TAA.
[12] Subsection 284-75(3) of Schedule 1 to the TAA.
[13] Table item 7 in subsection 284-90(1) of Schedule 1 to the TAA.
[14] Subsection 298-20(1) of Schedule 1 to the TAA.

- the employer makes a statement[15] to us under a taxation law[16], and
- the statement is false or misleading in a material particular, whether because of things in it or things omitted from it, and
- the statement results in a shortfall amount.[17]

This Practice Statement refers to this penalty as the 'TAA false or misleading statement penalty'.

This penalty may be imposed where an employer is assessed for SGC because they lodged an SG statement, and that assessment is subsequently amended because the SG statement stated an incorrect SG shortfall.

You can remit the TAA false or misleading statement penalty, in full or in part.

Consistent with the treatment of the TAA default assessment penalty, you should consider remitting in full the employer's liability to the TAA false or misleading statement penalty where the Part 7 penalty has also been imposed under the law for the same quarter.

However, you should fully consider the application of the TAA false or misleading statement penalty to the employer's shortfall amount in situations where the law did not impose a Part 7 penalty.

Administrative penalty remission decision and objections

You are not required to give the employer written notice of a decision to remit in full the TAA default assessment penalty or the TAA false or misleading statement penalty. However, if you do not remit an administrative penalty in full, you must inform the employer of the reasons for that decision.[18]

Employers can object to an assessment of the TAA default assessment penalty or the TAA false or misleading statement penalty.[19]

9. More information

For more information, see:

- Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the ATO*
- *Archibald Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v Commissioner of Taxation* [2008] FCAFC 54

[15] A statement is anything that is disclosed for a purpose connected with a taxation law orally or in writing and includes those made electronically. See section 284-20 of Schedule 1 to the TAA.
[16] Taxation law is defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* and includes an Act of which the Commissioner has the general administration. The Commissioner has the general administration of the SGAA: section 43 of the SGAA.
[17] Subsection 284-75(1) of Schedule 1 to the TAA.
[18] Subsection 298-20(2) of Schedule 1 to the TAA.
[19] Subsection 298-30(2) of Schedule 1 to the TAA.

APPENDIX 1 – THREE-STEP PENALTY REMISSION PROCESS

Step 1a – determine the basic level of remission, based on the employer's attempt to comply with their SGC obligations

The following table illustrates the basic level of remission based on an employer's attempt to comply. It recognises that there is a broad range of employer behaviours that lead to an SGC assessment, and it is appropriate to address them via a wide spread of remission relative to the full extent of the penalty available. In all cases, you must also evaluate the employer's compliance history (Step 2) and other relevant facts or circumstances (Step 3) before finalising your remission decision.

Degree of attempt to comply	**Level of penalty remission**	**Residual penalty**	**Residual penalty is equivalent to:**
Default assessment – severe disengagement and phoenix arrangements A default assessment is made and the employer has either demonstrated repeat disengagement or we have formed an opinion that the employer has engaged in a 'phoenix' arrangement.	0%	100%	200% of the SGC
Default assessment – information not provided by employer A default assessment is made where the employer has failed to lodge an SG statement or provide relevant information in response to ATO compliance action.	25%	75%	150% of the SGC
Default assessment – information provided by employer A default assessment is made based on information provided by the employer after the lodgment due date in response to ATO compliance action.	50%	50%	100% of the SGC
Enforced self-assessment An employer lodges an SG statement after the lodgment due date in response to ATO compliance action, for example after an audit has commenced.	60%	40%	80% of the SGC
Prompted self-assessment An employer lodges an SG statement after the lodgment due date and after initial ATO contact.	80%	20%	40% of the SGC
Unprompted self-assessment An employer lodges an SG statement after the lodgment due date but before we initiate contact.	90%	10%	20% of the SGC

Note: Often an employer will make initial contact with us to disclose that they have identified SG shortfalls, but will not lodge an SG statement until after discussing matters with us. For the purpose of the above table this should be considered an unprompted self-assessment.

Step 1b – treatment of late payment offset claims

The law requires that the Part 7 penalty is imposed as double the SGC regardless of any late payment offset (LPO) claims made by the employer that reduce their liability.[20]

An LPO claim will generally reflect a positive attempt to comply, as they have already made super contributions for their employees prior to the SGC assessment. As such, where an employer has made an LPO claim, the level of remission can be increased at this step, up to 25% of the original penalty imposed.

To determine whether to increase remission at this step, and whether to increase by 25% or a lesser amount, you should consider the amount of the LPO compared to the overall SGC, and whether the employer has given any evidence that the contributions were made for their employees prior to any ATO contact.

Example – tax officer provides remission for LPO claim

An employer lodges an SG statement for a quarter in response to ATO compliance action.

The employer has an SGC liability of $10,000 for the quarter and has made an LPO claim of $7,000. The initial Part 7 penalty imposed is $20,000 (200% of the SGC).

Applying Step 1a, the initial Part 7 penalty is remitted by 60% to $8,000.

Applying Step 1b, the tax officer recognises the employers LPO claim of $7,000 and decides on balance that the employer's behaviour warrants a further remission of $4,000 (20% of the original penalty imposed).

The residual Part 7 penalty after applying Steps 1a and 1b is $4,000 ($20,000 – $12,000 – $4,000).

Step 1 is the first step in the remission process, and all circumstances must be considered under Steps 2 and 3 before reaching a final view regarding the level of penalty remission. Steps 2 and 3 may lead to a decrease or increase depending on the circumstances of the case.

Step 2 – determine a remission level based on the employer's compliance history

You need to consider the employer's compliance history for both SG obligations and other taxation laws[21] for the three-year period leading up to the earlier of:

- the day before the self-assessment occurred, or
- the day before ATO compliance action commenced (either by phone or in writing).

You should evaluate their history by reviewing their ATO records as well as information supplied by the employer[22] and any other parties.

The employer's SG compliance history will be given more weight than their compliance history for other taxation laws. When reviewing an employer's SG compliance history you should focus on:

- the number of quarters for which the employer has failed to lodge an SG statement by the due date, or for which we have made a default assessment
- the degree of the employer's attempt to comply with their SG obligations previously (not including their attempts to comply for the period being considered)
- any previous SG audits conducted on the employer including outcomes, and
- any shift in behaviour by an employer that has been subject to a previous audit. This may be demonstrated by an improvement or deterioration in their level of engagement and cooperation with us during the compliance activity.

If the employer has a good compliance history (noting that 'good' does not have to mean exceptional), the penalty remission may be increased.

If the employer has neither a good nor poor compliance history, the level of remission may remain unchanged.

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[20] Section 62A of the SGAA.

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

[22] If an employer supplies you with information about their compliance history, the evidence should include details which this Practice Statement instructs you to focus on.

If the employer has a poor compliance history, the remission may be reduced.

The following examples illustrate some of the common situations where the level of penalty remission may be reduced:

- the employer has demonstrated a history or habit of lodging SG statements late
- the employer has previously been issued with an SG education direction
- the employer has previously been issued with an SGC default assessment and has shown no improvement in behaviour
- the employer was not adequately addressing (through an active payment plan) an outstanding SGC debt, or other tax debt, prior to the current matter arising, or
- the employer has several outstanding lodgments relating to other taxes.

Step 3 – consider all other relevant facts and circumstances

You need to consider all other relevant facts and circumstances to ensure the resulting Part 7 penalty is appropriate.

Where you have already taken into account the degree of the employer's attempt to comply (in Step 1) and the employer's compliance history (in Step 2), you should not consider them again for further remission at Step 3.

For example, if an employer lodges an SG statement in response to an audit, they are given partial remission at Step 1. The fact an employer lodges an SG statement in response to an audit is therefore not an 'other' relevant fact or circumstance.

Further, an employer may be found to have a good compliance history at Step 2 due to no previous SG audits or previously lodged SG statements. The fact an employer has not had a previous SG audit or lodged an SG statement before is likewise not an 'other' relevant fact or circumstance.

Other relevant facts or circumstances include:

- the employer has provided evidence[23] that they were affected by natural disasters, such as flood, bushfire, earthquake or the like[24] – consider increasing penalty remission to 100%
- the ATO determines that individuals are engaged under a contract that is wholly or principally for their labour[25], but the employer has a reasonably held argument for not treating the individuals as employees for SG purposes – consider increasing penalty remission to 100%
- the provision of incorrect advice or guidance by the ATO[26] – consider increasing penalty remission to 100%
- the malfunction or outage of a key ATO system which the employer can demonstrate caused them to narrowly miss the SG payment or lodgment due date[27] – consider increasing penalty remission to 100%
- ill health of the employer or a key employee of the employer – consider increasing remission of the residual penalty by up to 50% (or higher, including up to 100% depending on the nature of the business and the circumstances and severity of the ill health)
- the employer has provided evidence that they have taken steps to mitigate the circumstances that contributed to their non-compliance with their SG obligations (noting that a promise or agreement to do so is not sufficient evidence) – consider increasing penalty remission based on the individual facts of the employer
- the employer's non-compliance with their SG obligations occurred in their first year of operation, and their principals had no previous business experience – consider increasing penalty remission based on the individual facts of the employer

[23] The presence of an indicator on the employer's file alone will not be sufficient evidence.
[24] Note that under subsection 33(1A) of the SGAA the Commissioner may allow an employer to lodge an SG statement on a later day.
[25] The Commissioner's view on when an individual is considered to be an employee under section 12 of the SGAA is contained in Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?*
[26] See PS LA 2008/3 *Provision of advice and guidance by the ATO*.
[27] For example, if the employer attempted to use the Small Business Super Clearing House to make an SG payment on time but due to a system outage the payment was not processed until after the cut-off date.

- the employer has made an unprompted voluntary disclosure of their SGC liability for a quarter and the facts indicate the shortfall arose due to an error or honest mistake – consider increasing penalty remission based on the individual facts of the employer, or
- the employer is given penalty relief – increase penalty remission to 100%.

Note: This list is not exhaustive.

An employer's penalty should not be remitted at Step 3 merely because the penalty may be 'relatively small'.

It may be appropriate, where there are additional mitigating factors to those considered at Steps 1 and 2, to consider increasing the level of penalty remission if the assessment would be considered harsh in the particular circumstances of the employer.[28] However, it would not be appropriate to consider further remission where the employer:

- is reasonably expected to have fully understood their SG obligations (for example, where they have been previously subject to compliance action, or previously lodged an SG statement, or is a tax or super professional who should have a higher level of knowledge)
- has a history of not meeting SG obligations on their other entities
- took steps to prevent or obstruct us from determining their SGC liability. This would be more than not responding to an ATO letter. Examples would be where they repeatedly fail to keep appointments to supply information for no acceptable reason, or deliberately supply irrelevant, inadequate or misleading information, or engage in behaviour delaying the provision of information
- have demonstrated a history of repeated disengagement, and
- took steps to deliberately evade payment of their SG liability, such as through 'phoenix' activities.

These are regarded as serious cases, and a reduction in the level of remission, or no remission at all, may be appropriate.

[28] See *Archibald Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v Commissioner of Taxation* [2008] FCAFC 54.

APPENDIX 2 – EXAMPLES

Example 1 – no remission – default assessment with disengagement and phoenix arrangements

Default assessments of an employer's SGC were made on 20 March 2019 for the quarters ended 30 September 2018 to 31 December 2018. The employer has been subject to five previous audits, resulting in default SGC assessments being issued at the conclusion of each audit.

Applying Step 1, the tax officer identifies that the director of the employer company is linked to four liquidated companies which have also had compliance issues, suggesting the director has engaged in phoenix activity. The tax officer determines the Part 7 penalty should not be remitted, as the employer did not provide information for the ATO to make an assessment of the employer's SGC, and has demonstrated severe disengagement.

Applying Step 2, the tax officer notes that the employer has been subject to five previous audits and there has been no apparent shift in the employer's attitude to their SG obligations as they again did not cooperate or respond to requests for information. The tax officer determines that penalty should not be remitted under this step.

Applying Step 3, the tax officer notes that there are no other factors to consider that would warrant remission of the penalty.

After considering Steps 1, 2 and 3, the Part 7 penalty is not remitted at all. A Part 7 penalty assessment equivalent to 200% of the SGC is issued against the employer. The TAA default assessment penalty is fully remitted.

Example 2 – 15% remission – default assessment with no information provided

Default assessments of an employer's SGC were made on 20 March 2019 for the quarters ended 30 September 2018 and 31 December 2018. The employer has been subject to two previous audits, resulting in default SGC assessments being issued at the conclusion of each audit.

Applying Step 1, the tax officer determines the Part 7 penalty should be remitted by 25%, as the employer did not lodge an SG statement and did not provide information for the ATO to make an assessment of the employer's SGC.

Applying Step 2, the tax officer notes that the employer has been subject to two previous compliance activities and there has been no apparent shift in the employer's attitude to their SG obligations as they again did not cooperate or respond to requests for information. The tax officer determines that a decrease in the level of penalty remission by 5% would be appropriate.

Applying Step 3, the tax officer considers that based on the two previous audits which resulted in default assessments, the employer should have fully understood their SG obligations. The tax officer determines that a further decrease by 5% would be appropriate.

After considering Steps 1, 2 and 3, the Part 7 penalty is remitted by 15%, leaving a residual penalty of 85%. A Part 7 penalty assessment equivalent to 170% of the SGC is issued against the employer. The TAA default assessment penalty is fully remitted.

Example 3 – 30% remission – default assessment with information unable to be provided

Default assessments of an employer's SGC were made on 20 May 2019 for the quarters ended 30 September 2018 to 31 December 2018.

During the compliance activity, the employer:

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

Applying Step 1, the tax officer determines that the Part 7 penalty should be remitted by 25% as the employer did not provide information to the ATO to make an assessment of the employer's SGC.

Applying Step 2, the tax officer notes that the employer has no outstanding lodgments or debts in relation to their other taxation law obligations and that this is the first time they have been subject to a compliance activity regarding their SG obligations. Based on their good compliance history, the level of penalty remission should be increased by 10%.

Applying Step 3, the tax officer notes there are no other factors to consider.

After considering Steps 1, 2 and 3, the Part 7 penalty is remitted by 35%, leaving a residual penalty of 65%. A Part 7 penalty assessment equivalent to 130% of the SGC is issued against the employer. The TAA default assessment penalty is fully remitted.

Example 4 – 70% remission – default assessment with information provided – first year employer

An employer has an SG shortfall amount for the quarter ended 31 March 2019, and in response to an ATO audit they do not lodge the required SG statement, but provide sufficient information for a default assessment to be raised.

Applying Step 1, the tax officer determines that the employer made some attempt to comply with their SG obligations by providing information on which to assess the SG liability, and that the Part 7 penalty should be remitted by 50%.

Applying Step 2, the tax officer notes that this is the first time the employer has not complied with their SG obligations, and that their compliance history in respect of their other taxation law obligations is good. The tax officer notes that, while the employer has a debt relating to another tax, the employer is complying with an approved payment plan. The tax officer determines that the level of penalty remission should be increased by 10%.

Applying Step 3, the tax officer notes the employer is in their first year of operation. Therefore the tax officer determines the level of penalty remission should be increased by a further 10%.

After considering Steps 1, 2 and 3, the Part 7 penalty is remitted by 70%, leaving a residual penalty of 30%. A Part 7 penalty assessment equivalent to 60% of the SGC is issued against the employer. The TAA default assessment penalty is fully remitted.

Example 5 – 80% remission – unprompted self-assessment with poor compliance history

An employer has SG shortfall amounts for the quarters ended 30 September 2018 and 31 December 2018 and on 20 May 2019 lodges the required SG statements for these quarters.

Applying Step 1, the tax officer determines the employer lodged SG statements after the due date but prior to ATO contact. The Part 7 penalty should be remitted by 90%.

Applying Step 2, the tax officer determines the employer's habitual lodgment of SG statements after the due date, illustrates the employer's behaviour to comply with their SG obligation is not improving. Based on the employer's poor compliance history the level of penalty remission should be reduced by 10%.

Applying Step 3, the tax officer notes there are no other factors to consider.

After considering Steps 1, 2, and 3, the Part 7 penalty is remitted by 80%, leaving a residual penalty of 20%. A Part 7 penalty assessment equivalent to 40% of the SGC is issued against the employer.

Example 6 – 85% remission – SG statement provided with LPO claim for part of the SGC

For the quarter ended 31 March 2019 an employer makes SG payments to the respective super funds of his employees. However the SG payments were not paid by the due date of 28 April 2019. In response to an audit notification letter issued on 14 June 2019, the employer lodged an SG statement on 20 June 2019; which created an SGC assessment for the quarter of $8,000 which included an LPO claim for $6,000.

Applying Step 1a, the tax officer determines that the employer has provided an SG statement after the commencement of the audit. The Part 7 penalty should initially by remitted by 60%.

Applying Step 1b, the tax officer identifies that the employer has claimed a partial LPO. The tax officer considers the amount of the LPO claim, and evidence that the late payments were made prior to ATO contact, and decides to increase the level of remission by 25%.

Applying Step 2, the tax officer notes the employer's compliance history in respect of their other taxation law obligations is neither good nor poor and determines there are no grounds to adjust the remission at this step.

Applying Step 3, the tax officer notes there are no other factors to consider.

After considering Steps 1, 2 and 3, the Part 7 penalty is remitted by 85%, leaving a residual penalty of 15%. A Part 7 penalty assessment equivalent to 30% of the SGC is issued against the employer.

Example 7 – penalty relief applied and SG education direction imposed – prompted self-assessment

An employer has SG shortfall amounts for the quarter ended 30 September 2019. In response to a pre-audit letter issued on 14 February 2020, the employer lodged an SG statement.

Applying Step 1, the tax officer determines that the employer lodged SG statements after the due date but in response to the pre-audit letter. The Part 7 penalty should be remitted by 80%.

Applying Step 2, the tax officer notes the employer's compliance history in respect of their other taxation law obligations is good so the tax officer determines the level of penalty remission should be increased by 10%.

Applying Step 3, the tax officer notes the employer is eligible for penalty relief, as this is the first time the employer has failed to meet their SG obligations and has lodged less than four SG statements in the present case. The tax officer decides to apply penalty relief.

After considering Steps 1, 2, and 3, and applying penalty relief, the Part 7 penalty is fully remitted. In accordance with the penalty relief process the employer is issued with an SG education direction.

Example 8 – full remission – employer affected by natural disaster

An employer has an SG shortfall amount for the quarter ended 31 March 2019. A notification of audit letter was issued on 14 July 2019. In response to the ATO compliance action, the employer advises the tax officer that their SG obligations were not met because their business premises were badly damaged by floods which occurred on 15 April 2019.

Applying Step 1, the tax officer determines that the Part 7 penalty should be remitted by 60% as the employer lodged an SG statement as requested after the compliance activity had commenced.

Applying Step 2, the tax officer notes the employer neither has a good or poor compliance history, and that the level of penalty remission should remain unchanged.

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

After considering Steps 1, 2 and 3, the Part 7 penalty is fully remitted.

Example 9 – full remission – unprompted self-assessment and good compliance history

An employer has SG shortfall amounts for the quarters ended 30 September 2018 to 31 March 2019. On 20 July 2019 the employer voluntarily discloses to the ATO that they have these shortfalls and lodges the required SG statements for these quarters.

Applying Step 1, the tax officer determines the employer lodged SG statements after the due date but prior to any ATO contact. The Part 7 penalty is remitted by 90%.

Applying Step 2, the tax officer identifies the employer has not previously lodged an SG statement and has otherwise met their SG obligations. The employer's compliance with other taxation laws is generally good, even though the employer lodged two income tax returns late for the compliance history period under consideration. The tax officer decides that based on the employer's overall good compliance history the level of penalty remission should be increased by 10%.

Applying Step 3, the tax officer notes there are no other factors to consider.

After considering Steps 1, 2, and 3, the Part 7 penalty is fully remitted.

Example 10 – full remission – unprompted voluntary disclosure where an error or honest mistake was made

An employer has SG shortfall amounts for the quarters ended 30 September 2017 to 30 June 2019. The employer identified during an internal review that the shortfalls had originated from within their payroll system, where a particular allowance was incorrectly classified as not attracting SG. The employer's SG shortfalls did not arise for any other reason. On 20 September 2019, the employer lodged SG statements for these quarters.

Applying Step 1, the tax officer determines the employer lodged SG statements after the due date but prior to any ATO contact. The Part 7 penalty is remitted by 90%.

Applying Step 2, the tax officer notes the employer neither has a good or poor compliance history, and that the level of penalty remission should remain unchanged.

Applying Step 3, the tax officer identifies the employer made the unprompted voluntary disclosure of their SG shortfalls which originated from an unintentional error in their payroll system and was an honest mistake. The tax officer decides, based on the particular facts of the employer, to remit the remaining penalty.

After considering Steps 1, 2, and 3, the Part 7 penalty is fully remitted.

However, had the SG shortfalls arisen for any other reason, the tax officer would not have fully remitted the penalty.

Example 11 – full or partial remission – employer contended worker was a contractor

On 20 June 2019, default assessments of an employer's SGC were made for the quarters ended 30 September 2018 and 31 December 2018 in respect of an individual determined by the Commissioner to be an employee. Throughout the audit process, the employer contended that the individual was a contractor for the relevant quarters and not an employee. They submitted evidence and a detailed argument to support that contention. The individual who registered the complaint also provided evidence relating to their employment arrangements.

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

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

Applying Step 1, the tax officer determines the Part 7 penalty should be remitted by 25%, as the employer did not provide information on which to assess the SGC liability.

Applying Step 2, the tax officer notes that apart from the periods covered by the default assessments, the employer has complied with their SG and other tax obligations. On that basis, the tax officer determines the employer has a good compliance history, and that the level of penalty should be further remitted by 5%.

Applying Step 3, the tax officer determines the employer had a reasonably held argument that the individual was not an employee, and they would otherwise have complied with their SG obligations.

After considering Steps 1, 2 and 3, the Part 7 penalty is fully remitted. The TAA default assessment penalty is also fully remitted.

However, if the tax officer had determined that the employer had no reasonable argument that the employee was a contractor and there were no other unusual or extenuating circumstances, they would not have provided further remission at Step 3.

In that case, after considering Steps 1, 2 and 3, the Part 7 penalty would be remitted by 30%, leaving a residual penalty of 70%. A Part 7 penalty assessment equivalent to 140% of the SGC would be issued against the employer. The TAA default assessment penalty would be fully remitted.