PS LA 2020/4 (Withdrawn) - Remission of additional superannuation guarantee charge

This cover sheet is provided for information only. It does not form part of *PS LA 2020/4 (Withdrawn) - Remission of additional superannuation guarantee charge*

Law Administration Practice Statement PS LA 2020/4 was withdrawn with effect from 24 November 2021. It has been replaced by Law Administration Practice Statement PS LA 2021/3 which provides guidelines in relation to the remission of additional super guarantee charge imposed under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 document has changed over time. This version was published on *25 November 2021*

Australian Government
Australian Taxation Office

PS LA 2020/4
Remission of additional superannuation guarantee charge

Law Administration Practice Statement PS LA 2020/4 was withdrawn with effect from 24 November 2021. It has been replaced by Law Administration Practice Statement PS LA 2021/3 which provides guidelines in relation to the remission of additional super guarantee charge imposed under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.

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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) where an employer fails to lodge a super guarantee (SG) statement by the lodgment due date. This additional SGC is referred to as the Part 7 penalty.

This Practice Statement 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 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.

Non-payment of SG contributions 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.

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. Where an employer does not come forward voluntarily for late or non-payment of SG contributions by the due date, we will engage with employers to get their obligations up to date.

Between 24 May 2018 and 7 September 2020, employers were offered a one-off amnesty to disclose unpaid SG without being subject to Part 7 penalties. In legislating this amnesty, the Government has set clear expectations that employers who do not come forward voluntarily and only have an SGC liability identified through ATO compliance action should be subject to significant penalties. This is reflected in the remission restrictions in the amnesty legislation itself, as well as the broader policy context.[1]

Considering:

- that an amnesty was offered for past periods
- the increased reporting requirements for current and future periods, and
- our willingness to work with employers who disclose SG shortfalls to us voluntarily,

we will take a very strict approach to penalties where an employer could have come forward voluntarily to disclose an SG shortfall and failed to do so.

We will generally expect minimum penalties of 100% of the SGC where an employer did not come forward voluntarily and it took ATO compliance action for them to disclose, including for quarters where there is no legislated restriction on remission.

The Part 7 penalty is not a penalty on the employer for failing to meet their SG obligations – it is a penalty on

[1] Jane Hume MP, Second Reading Speech, Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019, Commonwealth of Australia, Senate, Hansard, 24 February 2020, page 1111.

the employer for not promptly disclosing to the Commissioner where they have an SG shortfall. No penalty applies where the SG statement is lodged before the lodgment due date.

3. What is the Part 7 penalty?

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:

- an SG statement for a quarter, or
- information relevant to assessing the employer's liability to pay the SGC for a quarter.[2]

The Part 7 penalty arises in two situations:

- where an employer lodges an SG statement for a quarter after the due date[3], or
- where we make a default assessment[4] 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 the SGC for the quarter.

The Part 7 penalty is automatically imposed on an employer by law.[5] The Part 7 penalty imposed is equal 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.[6]

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

On the other hand, if a Part 7 penalty was not imposed 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.[8]

SGC assessments covered by the SG amnesty

The *Treasury Laws Amendment (Recovering Unpaid Superannuation) Act 2020* introduced a one-off amnesty for employers who voluntarily disclose SGC liabilities for quarters from 1 July 1992 to 31 March 2018 (known as **historical quarters**).

If an eligible employer lodged SG statements for relevant quarters within the amnesty period (from 24 May 2018 to 7 September 2020), the Part 7 penalty is not imposed on the SGC assessments.[9]

However, an employer who is notified they are disqualified from the amnesty is treated as though they were never eligible for the amnesty.[10] In these cases the Part 7 penalty will be imposed and remission will need to be considered.

4. When can you remit the Part 7 penalty?

You have the discretion to remit the Part 7 penalty, in full or in part.[11] 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).

However, your ability to remit a Part 7 penalty imposed for a historical quarter will generally be limited. For more information see section 5 of this Practice Statement.

Employers have the right to object to an assessment of a Part 7 penalty.[12] If an employer is dissatisfied with the level of remission of their Part 7 penalty, they should object to the Part 7 penalty assessment - there is no separate right to object to the remission decision itself.

5. Restriction on remitting Part 7 penalty for historical quarters

For SGC assessments made after 7 September 2020, the law generally limits your ability to remit Part 7 penalties for historical quarters.

Where a historical quarter is assessed for SGC after 7 September 2020, you cannot remit the Part 7 penalty below 100% of the SGC unless:

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[2] 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.
[3] See subsection 33(1) of the SGAA for lodgment due dates.
[4] Section 36 of the SGAA; Law Administration Practice Statement PS LA 2007/10 *Making default assessments: section 36 of the Superannuation Guarantee (Administration) Act 1992*.
[5] Subsection 59(1) of the SGAA.
[6] Subsection 59(3) of the SGAA.
[7] Section 37 of the SGAA.
[8] Subsection 284-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA); Law Administration Practice Statement PS LA 2012/5 *Administration of the false misleading statement penalty – where there is a shortfall amount*. See section 10 of this Practice Statement for more information.
[9] Section 60 of the SGAA.
[10] Subsection 74(4) of the SGAA.
[11] Subsection 62(3) of the SGAA.
[12] Section 42 of the SGAA.

- the employer voluntarily came forward to lodge an SG statement prior to being notified of any ATO compliance action[13], or
- exceptional circumstances prevented the employer from lodging an SG statement either
  - during the amnesty period (24 May 2018 to 7 September 2020), or
  - before the employer was notified of any ATO compliance action.[14]

Has the employer come forward voluntarily prior to being notified of any ATO compliance action?

If you determine that the employer took **Voluntary action prior to notice of compliance action** at Step 1 of the four-step penalty remission process in Appendix 1 of this Practice Statement, they will satisfy this requirement and there will be no restriction on remission.

Were there exceptional circumstances that prevented the employer from lodging an SG statement?

If you identify exceptional circumstances at Step 4 of the four-step penalty remission process, this requirement will be satisfied and there will be no restriction on remission.

How to remit if the restriction applies

You should follow the four-step penalty remission process. Provided you follow this process correctly, the final penalty should not be below 100% of the SGC where the restriction applies.

Note: if there is a previous SGC assessment for the quarter, the remission restriction only applies to any additional Part 7 penalty that is being imposed. You should document which quarters were affected by the remission restriction and the relevant amounts.

6. 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.

You must follow the **four-step penalty remission process** outlined in Appendix 1 of this Practice Statement when deciding whether it is appropriate to remit the Part 7 penalty down from 200%.

Step 1: Set a base penalty based on the employer's attempt to comply with their SGC obligation

Step 2: Determine any penalty uplift based on the employer's compliance history

Step 3: Identify other mitigating facts and circumstances

Step 4: Identify any exceptional circumstances that prevented lodgment of an SG statement prior to notice of ATO compliance action

The four-step penalty remission 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:

- encourage employers to 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.

7. How do you determine remission where an amendment increases the SGC and Part 7 penalty?

You should follow the four-step remission process as normal in relation to the amendment. This is a new remission decision, unrelated to any previous decision that has been made for the quarter previously.

When you have worked out this remission percentage, you will need to apply it to the additional Part 7 penalty imposed at amendment to determine the residual penalty for that component.

This will be combined with the residual Part 7 penalty that was worked out in the original assessment to determine the overall penalty for the quarter, and the overall remission percentage. In effect, this means any

[13] Subsection 62(4) of the SGAA which takes effect from 16 September 2020 – as introduced by the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Act 2020*. See Miscellaneous Taxation Ruling MT 2012/3 *Administrative penalties: voluntary disclosures* for more information about ATO compliance action and an 'examination of [SG] affairs'.

[14] Subsection 62(5) of the SGAA which takes effect from 16 September 2020.

Part 7 penalty which has already been remitted in a previous decision will not be affected. (See Example 13 of this Practice Statement.)

8. When is it appropriate to provide penalty relief?

In some limited cases, it may be appropriate to provide additional remission to an employer in conjunction with a direction for education – this is known as a 'penalty relief' arrangement.

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

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

An employer should only be considered for a penalty relief arrangement where they have a turnover of less than $50 million and they:

- took voluntary action to comply with their obligation to lodge SG statements
- 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.

Penalty relief would not be appropriate where the employer has:

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

Penalty relief may be applied by providing further remission of a residual penalty at Step 3 of the four-step penalty remission process and 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. It should advise the client of the penalties for failing to lodge on time.

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 exercise of the remission power provided by the SGAA.[15]

9. 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 2019 to 30 September 2019.

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.

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

10. 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[16] 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.[17]

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.[18]

You can remit the TAA default assessment penalty, in full or in part.[19]

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:

- the employer makes a statement[20] to us under a taxation law[21], 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.[22]

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 the 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 (generally where a SG statement was lodged on or before the due date).

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.[23]

Employers can object to an assessment of the TAA default assessment penalty or the TAA false or misleading statement penalty.[24]

11. 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

Date issued	19 November 2020
Date of effect	8 September 2020

[16] The SGC is a tax-related liability per table item 60 of subsection 250-10(2) of Schedule 1 to the TAA.
[17] Subsection 284-75(3) of Schedule 1 to the TAA.
[18] Table item 7 of subsection 284-90(1) of Schedule 1 to the TAA.
[19] Subsection 298-20(1) of Schedule 1 to the TAA.
[20] 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.
[21] '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.
[22] Subsection 284-75(1) of Schedule 1 to the TAA.
[23] Subsection 298-20(2) of Schedule 1 to the TAA.
[24] Subsection 298-30(2) of Schedule 1 to the TAA.

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APPENDIX 1 – FOUR-STEP PENALTY REMISSION PROCESS

Step 1 – set a base penalty level based on the employer's attempt to comply with their SGC obligations

Using the following table, remit to a minimum base penalty based on an employer's attempt to comply with their obligation to lodge their SG statement. Generally, it will not be appropriate to provide further remission below these base penalties except in limited circumstances.

This 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 imposed. It also recognises that base levels of penalty are appropriate where an SG shortfall is not disclosed by the due date for an SG statement.

Before finalising your remission decision, you must evaluate:

- the employer's compliance history (Step 2)
- other mitigating facts or circumstances (Step 3), and
- any exceptional circumstances (Step 4).

Degree of attempt to comply	**Base penalty**	**Base penalty is equivalent to:**
Employer actions in response to ATO compliance action		
A default assessment is made, or a Commissioner-initiated amendment is made to a prior SGC assessment, and the employer has either demonstrated repeat disengagement or we have formed an opinion that the employer has engaged in a 'phoenix' arrangement.	100%	200% of the SGC
A default assessment is made, or a Commissioner-initiated amendment is made to a prior SGC assessment, where the employer has failed to lodge an SG statement or provide relevant information in response to ATO compliance action.	75%	150% of the SGC
A default assessment is made, or a Commissioner-initiated amendment is made to a prior SGC assessment, based on information provided by the employer after the lodgment due date in response to ATO compliance action.	60%	120% of the SGC
An employer lodges an SG statement or requests an amendment to a prior SGC assessment in response to ATO compliance action, for example after an audit has commenced.	50%	100% of the SGC
Voluntary actions prior to notice of ATO compliance action		
An employer lodges an SG statement or requests an amendment to a prior SGC assessment after the lodgment due date and after initial ATO contact[25] but before any ATO compliance action.	20%	40% of the SGC
An employer lodges an SG statement or requests an amendment to a prior SGC assessment after the lodgment due date but before any ATO contact.	10%	20% of the SGC
An employer lodges an SG statement on or before the lodgment due date (including an extended due date).	0%	0% of the SGC

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 the same as a lodgment prior to any ATO contact; the fact that an employer has voluntarily engaged with us on a preliminary basis rather than immediately lodging statements does not demonstrate any lower level of engagement.

[25] This may include ATO activities, such as reminder letters, that are a preliminary ATO contact before any compliance action is considered.

Step 2 – determine any penalty uplift based on the employer's compliance history

You need to consider the employer's compliance history for both SG obligations and other taxation laws[26] for the three-year period leading up to the earlier of the day before:

- the disclosure occurred, or
- 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[27] 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.

A previous SGC assessment that arose due to ATO compliance action will reflect a poorer compliance history than an SGC assessment that came via a voluntary disclosure.

If the employer has a **good compliance history** (noting that 'good' does not have to mean exceptional), the penalty should remain at the base penalty level set in Step 1.

If the employer has neither a good nor poor compliance history, apply an uplift to the base penalty level set in Step 1. Generally, the uplift should not exceed 5%.

If the employer has a poor compliance history, apply a larger uplift to the base penalty level set in Step 1. Generally, this uplift should not exceed 10%.

The following examples illustrate some of the common situations of poor compliance history where an uplift in the level of base penalty may be appropriate:

- The employer has demonstrated a history or habit of lodging SG statements late.
- The employer has previously been issued with an SG education direction, and their repeated behaviour indicates that they have not taken the lessons from that direction on-board.
- 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.
- The employer has several outstanding lodgments relating to other taxes.
- Evidence indicates that the employer has previously been disingenuous or deceptive with the information disclosed in an SG statement (for example, by deliberately disclosing only part of their known SG shortfall for the quarter).

Step 3 – identify other mitigating facts and circumstances

Where an employer took **voluntary actions prior to notice of ATO compliance action** at Step 1 you need to consider all other relevant facts and circumstances to ensure the resulting Part 7 penalty is appropriate.

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[26] 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.

[27] 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.

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 these circumstances again for further remission at Step 3.

For example, 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 not an 'other mitigating fact or circumstance'.

If an employer did not take voluntary action prior to notice of ATO compliance action at Step 1, it would generally not be considered appropriate to remit the penalty at this step any lower than the base penalty set at Step 1.

Other mitigating facts or circumstances include:

- the malfunction or outage of a key ATO system which the employer can demonstrate caused them to narrowly miss the lodgment due date[28]
- ill health of the employer or a key employee 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
- the employer has made a voluntary disclosure of their SGC liability for a quarter and the facts indicate the shortfall arose due to an error or honest mistake
- the employer has made a voluntary disclosure of their SGC liability for a quarter and you are satisfied that they have addressed the issue(s) that led to their SG shortfalls and/or failure to lodge SG statements
- the employer has made a voluntary disclosure and their SG shortfalls are due to them correctly classifying their workers as not being employees under the ordinary meaning of employee, but failing to identify that they were employees for the purposes of the SGAA due to being engaged under a contract that is wholly or principally for their labour[29]
- the employer made all required contributions, but was late in paying by a small period, or
- the employer participates in a penalty relief arrangement and is given an education direction as a more appropriate treatment for their behaviour.

***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.[30] However, it generally would not be appropriate to remit further where the employer:

- is reasonably expected to have fully understood their SG lodgment obligations (for example, where they have been previously subject to SG compliance action, have repeatedly lodged SG statements after their due date, or are 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 failed to keep appointments to supply information for no acceptable reason, or deliberately supplied irrelevant, inadequate or misleading information, or engaged in behaviour delaying the provision of information
- has 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] 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 able to be processed until after the cut-off date.
[29] Section 12(3) of the SGAA.
[30] See *Archibald Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v Commissioner of Taxation* [2008] FCAFC 54.

Step 4 – Identify any exceptional circumstances that prevented lodgment of an SG statement prior to notice of ATO compliance action

Where exceptional circumstances prevented an employer from lodging an SG statement, it may be appropriate to remit the penalty below the base penalty level set in Step 1.

It is not possible to set precise rules for what constitutes exceptional circumstances. The core idea of exceptional circumstances and similar terms are that there is something unusual to take the case out of the ordinary course.[31] In addition, in determining whether exceptional circumstances exist, you should bear in mind the purpose of the discretion that is being exercised.[32] When considering a quarter that was covered by the SG amnesty and whether the Part 7 penalty remission restriction applies, you should also bear in mind the purpose of the remission restriction.[33]

It is not enough for the employer to demonstrate exceptional circumstances that prevented them from meeting the due date to make SG contributions, or to make payment of an SGC liability after disclosing it. The exceptional circumstances must have prevented the employer from lodging their SG statement.

Finding exceptional circumstances is a very high threshold and must be determined on a case-by-case basis depending on the particular facts of the case. Some examples of factors that are unlikely to constitute exceptional circumstances on their own are:

- An employer facing financial difficulty (including financial difficulty arising from a natural disaster) – while these circumstances may impact an employer's capacity to meet their SG contribution obligations, it does not prevent them from lodging an SG statement and disclosing their shortfall to us. Employers who are unable to make contributions before the due date can lodge an SG statement with us and explore options for a payment arrangement to meet their liabilities.
- An employer did not understand the law or their obligations – this includes if the employer has relied on poor advice from a third party.
- An employer made a mistake or error in determining their SG obligations – for example if they unintentionally or inadvertently treated a payment as falling outside of 'ordinary time earnings' and therefore not forming part of their SG obligation.
- An employer claimed that they failed to come forward during the SG Amnesty due to a lack of time between the SG amnesty being legislated and the SG amnesty period ending – this is not exceptional circumstances, and the employer always had the obligation to lodge SG statements regardless of the existence of the SG amnesty.

Some factors that may point towards a finding of exceptional circumstances include:

- An employer has been impacted by a natural disaster – however the natural disaster must have directly impacted an employer's ability to lodge; financial hardship or business downturn resulting from a natural disaster alone will not point to exceptional circumstances.
- An employer's ability to lodge has been impacted by the COVID-19 pandemic – as with the above point, the pandemic would need to have directly impacted their ability to lodge, for example if the employer was displaced interstate or overseas and unable to access business records. The financial impact alone will not be sufficient unless that impact significantly reduced the employer's capacity to ascertain shortfalls and lodge SGC statements.
- An employer relied on ATO guidance that advised that they did not have an SG shortfall, and as such did not believe they had any obligation to lodge an SG statement. If the ATO guidance turned out to be incorrect, the employer could not have known they were required to lodge before they were advised of the revised position.[34]
- An employer was suffering from severe illness or other affliction that rendered them incapable of lodging an SG statement.

There may be some instances where the law or its application to particular facts is uncertain or unclear, such as complex cases of worker classification. The fact that an employer classified workers as contractors, and they were

[31] *Ward v Commissioner of Taxation* [2016] FCAFC 132 at [39–41].
[32] *Re Rosemarie Beadle and Director-General of Social Security* [1984] AATA 176.
[33] Paragraphs 1.81 to 1.90 of the Explanatory memorandum to the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019.
[34] See Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the ATO*. See also *Taxpayer's Charter – helping you to get things right.*

later found to be employees, will not of itself constitute an exceptional circumstance. In determining whether exceptional circumstances are present, you will need to consider the employer's position and all evidence provided, and whether it is reasonable to conclude that the employer could not have known that they needed to lodge an SG statement.

APPENDIX 2 – EXAMPLES

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

Default assessments of an employer's SGC were made on 22 March 2021 for the quarters ended 30 September 2020 and 31 December 2020.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 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 be set at a base penalty of 100% (that is, the full imposed penalty equivalent to 200% of the SGC). This is because 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 two 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. As the penalty is already at the maximum level, the tax officer does not change remission at this step.

Applying Steps 3 and 4, the tax officer notes that there are no other factors to consider that would warrant remission of the penalty.

After considering each of the steps, 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 22 March 2021 for the quarters ended 30 September 2020 and 31 December 2020.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% to a base penalty of 75%, 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 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 an uplift in the level of penalty of 10% would be appropriate.

Applying Steps 3 and 4, the tax officer notes that there are no other factors that would warrant further remission of the penalty.

After considering each of the steps, 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 – 25% remission – default assessment with information unable to be provided

Default assessments of an employer's SGC were made on 22 March 2021 for the quarters ended 30 September 2020 and 31 December 2020.

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% to a base penalty of 75% 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 is unchanged.

Applying Steps 3 and 4, the tax officer notes there are no other factors to consider.

After considering each of the steps, the Part 7 penalty is remitted by 25%, leaving a residual penalty of 75%. A Part 7 penalty assessment equivalent to 150% of the SGC is issued against the employer. The TAA default assessment penalty is fully remitted.

Example 4 – 80% remission – voluntary disclosure prior to ATO contact with poor compliance history

An employer has SG shortfall amounts for the quarters ended 30 September 2020 and 31 December 2020 and on 20 May 2021 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 should be remitted by 90% to a base penalty of 10%.

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 is uplifted by 10%.

Applying Steps 3 and 4, the tax officer notes there are no other factors to consider.

After considering each of the steps, 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 5 – 50% remission – SG statement provided with late payment offset (LPO) claim for part of the SGC

For the quarter ended 31 March 2020, an employer fails to make SG contributions to the respective super funds of his employees by the due date of 28 April 2020. However, the employer makes these contributions late, on 20 December 2020. The employer also fails to lodge an SG statement disclosing the SG shortfalls. In response to an audit notification letter issued on 14 June 2021, the employer lodged an SG statement on 20 June 2021; which created an SGC assessment for the quarter of $8,000 which included an LPO claim for $6,000. The employer indicates that it is their first year of operation and they did not understand their lodgment obligations.

Applying Step 1, the tax officer determines that the employer has provided an SG statement after the commencement of the audit. The Part 7 penalty should initially be remitted by 50%, to a base penalty of 50%.

Applying Step 2, the tax officer notes the employer's compliance history in respect of their other taxation law obligations is good, with no indication of any other failed lodgments or payments. The tax officer leaves the penalty unchanged at this step.

Considering Step 3, the tax officer does not remit the penalty further as the employer did not take voluntary action prior to being notified of ATO compliance action.

Considering Step 4, the tax officer identifies that payments were eventually made late with an LPO claimed, and that the employer was in its first year of operation when the SG shortfall arose. However, these two circumstances on their own do not demonstrate that exceptional circumstances prevented the employer from disclosing the SG shortfalls. The level of penalty remission is unchanged.

After considering each of the steps, the Part 7 penalty is remitted by 50%, leaving a residual penalty of 50%. A Part 7 penalty assessment equivalent to 100% of the SGC is issued against the employer.

Example 6 – penalty relief applied and SG education direction imposed – voluntary disclosure after initial ATO contact

An employer has SG shortfall amounts for the quarter ended 30 September 2019. In response to an initial early engagement contact by the ATO on 15 February 2021, the employer lodged an SG statement.

Applying Step 1, the tax officer determines that the employer lodged SG statements after the due date and after initial ATO contact, but before any ATO compliance action. The Part 7 penalty should be remitted by 80% to a base penalty of 20%.

Applying Step 2, the tax officer notes the employer's compliance history in respect of their other taxation law obligations is good, so the level of penalty remission remains unchanged.

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 and fully remits the remaining penalty.

After considering each of the steps, 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 7 – full remission – voluntary disclosure prior to ATO contact and good compliance history

An employer has SG shortfall amounts for the quarters ended 30 September 2020 to 31 March 2021. On 20 July 2021 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% to a base penalty of 10%.

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 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 remain unchanged.

Applying Step 3, the tax officer notes that the employer has explained the processes that they have put in place to mitigate the circumstances which led to the SG non-compliance. This includes upgrading the employer's payroll software to set up alerts for when SG payments are due. The tax officer determines that this is a mitigating circumstance and increases remission by 10%.

After considering each of the steps, the Part 7 penalty is fully remitted.

Example 8 – 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 2018 to 30 June 2020.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 2020, 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% to a base penalty of 10%.

Applying Step 2, the tax officer notes the employer has a good 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 each of the steps, the Part 7 penalty is fully remitted.

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

Example 9 – full remission with exceptional circumstances – ability to lodge impacted by natural disaster

An employer has SG shortfall amounts for the quarters ended 31 December 2019 and 31 March 2020. A notification of audit letter was issued on 14 July 2021. In response to ATO compliance action, the employer advises the tax officer that they had been unable to determine any SG shortfalls for the periods as their business premises were badly damaged by bushfires that occurred in early 2020. The employer provides estimates of their liability which the tax officer uses to raise default assessments.

Applying Step 1, the tax officer determines that the Part 7 penalty should be remitted by 40% to a base penalty of 60%, as a default assessment was raised based on information provided by the employer after ATO compliance action commenced.

Applying Step 2, the tax officer notes the employer's compliance history is good and leaves the penalty remission unchanged.

Considering Step 3, the tax officer does not remit any further amount of the penalty at this step as the employer did not take voluntary action to comply.

Applying Step 4, the tax officer determines that the employer was prevented from lodging SG statements due to the damage their business premises suffered. Further, given the difficult circumstances it may not have been reasonable to expect the employer to have made a request for deferral for lodging any potential SG statements. The tax officer determines that there are exceptional circumstances that prevented the employer from disclosing SG shortfalls, and fully remits the remaining penalty.

After considering each of the steps, the Part 7 penalty is fully remitted.

Example 10 – 50% remission with no exceptional circumstances – ability to lodge impacted by COVID-19

An employer has SG shortfall amounts for the quarters ended 30 September 2016 to 31 March 2017. A notification of audit letter was issued on 20 November 2020. In response to the ATO compliance action, the employer explains that they were unaware that they had SG shortfalls requiring them to lodge an SG statement. They explain that since March 2020 they have been unable to ascertain whether they have SG shortfalls as they:

- *were overseas when the COVID-19 pandemic began*
- *were unable to return to Australia due to border lockdowns, and*
- *could not access necessary business records to determine any shortfalls, as they are stored in Australia.*

The employer subsequently gains access to their business records and lodges SG statements.

Applying Step 1, the tax officer determines that the Part 7 penalty should be remitted by 50% to a base penalty of 50%, as the employer lodged an SG statement after ATO compliance action commenced.

Applying Step 2, the tax officer notes the employer's compliance history is good and leaves the penalty remission unchanged.

Considering Step 3, the tax officer does not remit any further amount of the penalty at this step as the employer did not take voluntary action to comply.

Applying Step 4, the tax officer determines that the COVID-19 pandemic impacted the employer's ability to disclose SG shortfalls from March 2020 onwards. However, the employer has not provided any evidence to suggest that they were prevented from identifying SG shortfalls and lodging SG statements between 24 May 2018 (the beginning of the SG amnesty period) and March 2020. While the unprecedented impacts of the pandemic would constitute exceptional circumstances from March 2020 onwards, the tax officer determines that exceptional circumstances did not prevent the employer from lodging SG statements from 24 May 2018 and further remission would not be appropriate.

After considering each of the steps, the Part 7 penalty is remitted by 50%, leaving a residual penalty of 50%. A Part 7 penalty assessment equivalent to 100% of the SGC is issued against the employer.

Example 11 – 95% remission with exceptional circumstances – ability to lodge impacted by COVID-19

An employer has SG shortfall amounts for the quarters ended 31 March 2020 and 30 June 2020. The employer does not respond to an initial early engagement letter from the ATO, and compliance action is commenced on 8 October 2020. In response to this compliance action, the employer lodges SG statements for the quarters.

They explain that they had discovered that they had SG shortfalls for the quarters, but that COVID-19 impacts delayed their ability to lodge SG statements:

- *they had not received the initial early engagement letter as it was posted to their business premises, which was closed at the time due to COVID-19 restrictions*
- *a significant portion of the employer's payroll staff had been stood down, which increased the length of time it took to ascertain the shortfall amounts and complete SG statements*
- *they could not attend the office of their tax agent due to COVID-19 restrictions, and instead needed to mail paper copies of their signed declarations to their agent.*

Applying Step 1, the tax officer determines that the Part 7 penalty should be remitted by 50% to a base penalty of 50%, as the employer lodged the SG statement after ATO compliance action commenced.

Applying Step 2, the tax officer notes that the employer has previously lodged SG statements after their due dates on two occasions during the period in question and has unpaid income tax debts. The officer considers that the employer's compliance history is neither good nor poor and uplifts the penalty by 5%.

Considering Step 3, the tax officer does not remit any further amount of the penalty at this step as the employer did not take voluntary action to comply.

Applying Step 4, the tax officer determines that the COVID-19 pandemic impacted the employer's ability to lodge an SG statement prior to the commencement of ATO compliance action, as it hindered their ability to take the administrative steps to establish their SG shortfalls and complete and lodge the statements. Given the unprecedented nature of the pandemic, the tax officer is satisfied that exceptional circumstances prevented the employer from lodging the SG statements. The tax officer provides further remission at Step 4 of 50%, The tax officer does not fully remit the penalty, recognising that some level of penalty is appropriate given the employer's compliance history was neither good nor poor.

After considering each of the steps, the Part 7 penalty is remitted by 95%, leaving a residual penalty of 5%. A Part 7 penalty assessment equivalent to 10% of the SGC is issued to the taxpayer.

Example 12 – 80% remission with no exceptional circumstances – voluntary disclosure after initial ATO contact, business impacted by COVID-19

An employer has SG shortfall amounts for the quarters ended 30 June 2020 and 30 September 2020. In response to an initial early engagement contact by the ATO on 15 December 2020, the employer lodges SG statements. The employer indicates that they failed to make SG contributions for their employees in the two quarters as their business suffered significant downturn due to the COVID-19 pandemic, and they were facing financial difficulties.

Applying Step 1, the tax officer determines that the Part 7 penalty should be remitted by 80% to a base penalty of 20%, as the employer lodged an SG statement after initial ATO contact, but before any ATO compliance action commenced.

Applying Step 2, the tax officer notes the employer's compliance history is good and leaves the penalty remission unchanged.

Applying Step 3, the tax officer does not identify any other mitigating circumstances warranting further remission.

Applying Step 4, the tax officer notes that whilst the COVID-19 pandemic had an unprecedented financial impact on the employer's business, there is no indication that this impact prevented the employer from lodging SG statements before their due date. Therefore, absent further information, the tax officer determines that there were no exceptional circumstances warranting further remission.

After considering each of the steps, 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 to the employer.

Example 13 – amended SGC assessment – 50% remission of new Part 7 penalty imposed at amendment

On 1 January 2021, an employer lodges an SG statement to disclose SG shortfalls for the quarters ended 30 June 2020 and 30 September 2020, in response to an initial early engagement contact by the ATO. Considering each of the steps in the four-step penalty remission process, the Part 7 penalty was remitted by 80% leaving a residual penalty of 20%. A Part 7 penalty assessment equivalent to 40% of the SGC was issued to the employer.

After receiving a further employee notification regarding the same quarters, the ATO commenced an audit. In response to this compliance activity, the employer lodged amended SG statements for the quarters disclosing significant additional SG shortfalls that were not originally disclosed.

The tax officer considers the remission percentage for the additional SGC that is assessed at amendment.

Applying Step 1, the tax officer determines that the Part 7 penalty should be remitted by 50% to a base penalty of 50%, as the employer lodged the new SG statements in response to ATO compliance action.

Applying Step 2, the tax officer notes that, as the employer previously lodged SG statements and significantly understated the amount of SG shortfalls, their compliance history is not considered good. However, as there are no other prior instances of SG non-compliance, the tax officer also does not consider their compliance history to be poor. The tax officer considers the employer's compliance history to be neither good nor poor. The penalty is uplifted by 5%.

Considering Step 3, the tax officer does not remit any further amount of the penalty at this step as the employer did not take voluntary action to comply, as the additional SG shortfalls were only disclosed after ATO compliance action.

Considering Step 4, the tax officer notes that there are no exceptional circumstances that would warrant further remission.

After considering each of the steps, the Part 7 penalty is remitted by 45%, leaving a residual penalty of 55%.

The tax officer determines a total remission percentage for the quarters that is equivalent to a remission percentage of 80% for the Part 7 penalty that was imposed with the original SGC, and 45% of the Part 7 penalty that was imposed with the further SGC assessed at amendment.

The TAA false or misleading statement penalty is fully remitted, as the Part 7 penalty has already been imposed as a consequence of the same statement.

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ISSN	2651-9526
ATOlaw topic	Administration ~~ Penalties Superannuation ~~ Employers ~~ Other