PS LA 2021/3 - Remission of additional superannuation guarantee charge

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PS LA 2021/3
Remission of additional superannuation guarantee charge

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

This Practice Statement is an internal ATO document and 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) 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 it is appropriate for penalty relief to be applied (refer to section 7 of this Practice Statement).

All legislative references in this Practice Statement are to the SGAA, unless otherwise indicated.

2. Principles of the super guarantee regime you should consider when making decisions

The SG regime is designed to ensure that employers provide their employees with a minimum level of super support. 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), which comprises:

- the SG shortfall, calculated on salary and wages (including any overtime)
- nominal interest of 10% per annum (accrues from the start of the relevant quarter), and
- an administration fee of $20 per employee per quarter.

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. This information provides us with end-to-end visibility of where an employer has not met their SG obligations for their employees.

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.

3. The Part 7 penalty

The Part 7 penalty is an additional SGC imposed under Part 7 when an employer (when required to) fails to provide:

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

The Part 7 penalty arises in 2 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 the SGC for the quarter.

The Part 7 penalty is automatically imposed on an employer by law. It is equal to double the SGC payable

[1] Subsection 59(1). 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.

[2] See subsection 33(1) for lodgment due dates.

[3] Section 36. See also Law Administration Practice Statement PS LA 2007/10 *Making default assessments: section 36 of the Superannuation Guarantee (Administration) Act 1992*.

by the employer for the quarter (that is, 200% of the SGC).[4]

No Part 7 penalty is imposed if an employer lodges an SG statement on or before the lodgment due date, including an extended due date.[5]

If an employer claims a late payment offset (LPO) to reduce their SGC payable, this reduction is disregarded for the purposes of calculating the amount of Part 7 penalty imposed.[6] In other words, the Part 7 penalty imposed is equal to double the *total* SGC for the quarter if no LPOs were claimed.

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

If you amend[8] 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 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 circumstances, an administrative penalty for making a false or misleading statement may be imposed.[9]

Super guarantee charge assessments covered by the super guarantee amnesty

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

If an eligible employer lodged SG statements for historical quarters within the amnesty period (from 24 May 2018 to 7 September 2020), no Part 7 penalty is imposed on the SGC assessments.[10]

However, an employer who is notified they are disqualified from the amnesty is treated as though they were never eligible for the amnesty.[11] In these cases, the Part 7 penalty will be imposed and remission will need to be considered.

If an employer had an SGC assessment that was covered by the SG amnesty and they disclose new information after the end of the amnesty period that increases their SGC for the quarter, the new amounts will not receive the benefits of the amnesty.[12] As such, Part 7 penalty will be imposed on the new SGC and remission will need to be considered.

Example 1 – employer amends their super guarantee charge assessment in response to an audit after the super guarantee amnesty

An employer lodges SG statements on 1 July 2020 for 10 employees for the quarters from 1 January 2015 to 31 December 2015. The employer is not liable for Part 7 penalty as their statements qualified for the SG amnesty.

In February 2022, the employer is audited for the same period following an employee notification and, as a result, lodges SG statements for a further 20 employees.

As this lodgment has been made after the end of the amnesty period, it does not qualify for the amnesty, and Part 7 penalty is imposed on the SGC corresponding to the 20 employees.

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4. When you can remit the Part 7 penalty

You have the discretion to remit the Part 7 penalty, in full or in part.[13] 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 may be restricted to a final penalty of at least 100% of the SGC. For more information on this restriction and how to work out remission for a historical quarter, see Appendix 2 to this Practice Statement.

Employers have the right to object to an assessment of a Part 7 penalty.[14] If an employer is dissatisfied with the level of remission of their Part 7 penalty, they should object to the Part 7 penalty assessment – while there is no separate right to object to the remission decision itself, an objection to the assessment encompasses the decision to remit.

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[4] Subsection 59(1).
[5] Section 59.
[6] Section 62A.
[7] Subsection 59(3).
[8] Section 37.
[9] Subsection 284-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA). See also section 10 of Law Administration Practice Statement PS LA 2012/5 *Administration of the false or misleading statement penalty – where there is a shortfall amount* for more information.
[10] Section 60.
[11] Subsection 74(4).
[12] Subsection 74(2).
[13] Subsection 62(3).
[14] Section 42.

5. The process to follow to determine whether to remit the Part 7 penalty

The Part 7 penalty is automatically imposed at a rate of 200% of the SGC, meaning there is a wide range of potential final penalty amounts after full or partial remission. This reflects the wide variety of circumstances that can lead to an SG shortfall or failure to lodge an SG statement or both.

While many cases warrant some amount of penalty, the maximum 200% penalty should be reserved for rare cases where there is an employer engaging in egregious tax avoidance behaviour. For all other cases, 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 4-step penalty remission process outlined in Appendix 1 to this Practice Statement when deciding whether it is appropriate to remit the Part 7 penalty down from 200%.

Step 1: Consider remission based on the employer's attempt to comply with their obligations through late payment.

Step 2: Consider remission based on the employer's attempt to comply with their obligations by lodging an SG statement.

Step 3: Consider any increase or reduction in penalty based on the employer's compliance history.

Step 4: Consider any other mitigating facts or circumstances that warrant further remission.

The 4-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:

- ensure there are appropriate consequences for employers for failing 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 who fail to pay super on time to take corrective action and 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. Examples illustrating the penalty remission process can be found in Appendix 3 to this Practice Statement.

6. Determining remission where an amendment increases the SGC and Part 7 penalty

If you undertake compliance activity that identifies additional SGC for a quarter that has previously been assessed, you should follow the 4-step remission process as normal in relation to the amendment.[15] This is a new remission decision, unrelated to any previous decision that has previously been made for the quarter.

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 Part 7 penalty which has already been remitted in a previous decision will not be affected (see Example 12 of this Practice Statement).

Sometimes, the original assessment will also need to be amended in order to correct mistakes or small amounts of information missing when an SG statement is lodged. In these cases, a single remission decision can be made for the total assessment.

7. 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

[15] An amendment can only be made within 4 years of the original assessment for the quarter unless you are of the opinion that there is an avoidance of the SGC due to fraud or evasion (subsection 37(2)).

- have lodged no more than 4 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 4 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 4 of the 4-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. Any education should focus on providing:

- the appropriate superannuation support to employees to ensure the employer does not have an SG shortfall, and
- the importance of taking corrective action and lodging SG statements on time if the employer fails to comply in the future.

It should advise the employer 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.[16]

8. What you should 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 remission is appropriately determined for the individual case 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 2 – we notify 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 we have been dealing with this authorised contact. The authorised contact provides SG statements on behalf of the employer for the full period under audit.

We phone the authorised contact and notify them of the anticipated penalty and the associated reasons. We also outline the relevant facts and circumstances known to us.

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 us directly to explain further relevant facts.

Considering these new facts, we decide to provide further remission of the penalty than was initially indicated.

9. How Part 7 penalty interacts 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[17] 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 accurately determine the tax-related liability.[18]

[16] Subsection 62(3).
[17] The SGC is a tax-related liability per table item 60 of subsection 250-10(2) of Schedule 1 to the TAA.
[18] Subsection 284-75(3) of Schedule 1 to the TAA.

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.[19]

You can remit the TAA default assessment penalty, in full or in part.[20]

You should consider remitting in full the employer's liability to the TAA default assessment penalty 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[21] to us under a taxation law[22], and
- the statement is false or misleading in a material particular, whether because of things in it or things omitted from it.[23]

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 an 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.[24]

Employers can object to an assessment of the TAA default assessment penalty or the TAA false or misleading statement penalty.[25]

10. 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
- *Delbake Pty Ltd and Commissioner of Taxation* [2024] AATA 449 (*Delbake*)
- *Geelong Turf Company Pty Ltd and Commissioner of Taxation* [2023] AATA 1718 (*Geelong Turf*).

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[19] Table item 7 of subsection 284-90(1) of Schedule 1 to the TAA.
[20] Subsection 298-20(1) of Schedule 1 to the TAA.
[21] 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.
[22] '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 section 43 of the SGAA.
[23] Subsection 284-75(1) of Schedule 1 to the TAA.
[24] Subsection 298-20(2) of Schedule 1 to the TAA.
[25] Subsection 298-30(2) of Schedule 1 to the TAA.

Appendix 1 – 4-step penalty remission process

Step 1: consider remission based on the employer's attempt to comply with their obligations through late payment

Using Table 1 of this Appendix, consider an initial amount of remission based on an employer's attempt to comply with their SG obligations by making late payments to employees' super funds. Where an employer has made these late payments, they can claim an LPO when they lodge their SG statement. While this LPO does not reduce the amount of penalty that is imposed, it is appropriate to recognise that the employer has met their employees' entitlements (albeit late), and some remission is warranted compared to an employer who has not met their employees' entitlements.

This step only considers late payments for which an LPO has been claimed in respect of the relevant quarters. It does not consider:

- SG contributions that were made on-time[26], as these did not give rise to an SGC liability or penalty
- late payments where an employer has elected to count those payments towards their obligations in a different quarter, instead of claiming the LPO, and
- payments of SGC (although these payments may be relevant when considering Step 4 of this decision-making process).

Table 1: Degree of attempt to comply with SG late payment

Degree of attempt to comply	Remission
No late payments made for which an LPO has been claimed.	0%
Late payment made in response to our compliance action; for example, after an audit has commenced.	10%
Late payment made after our initial contact[27] but before any compliance action.	15%
Late payment made prior to our contact, and more than 9 months after due date.	30%
Late payment made prior to our contact, and between 6 and 9 months after due date.	33%
Late payment made prior to our contact, and between 3 and 6 months after due date.	36%
Late payment made prior to our contact, and less than 3 months after due date.	40%

Treatment of partial payments

The remission amounts in Table 1 of this Appendix are appropriate where the employer has paid the entire original SG obligation[28] for their employees but has an SGC liability due to paying late. If an employer has made late payments of a lesser amount, you should determine a remission percentage that is in proportion to how much has been paid. For example, if an employer made late payments equivalent to 80% of their SG obligations in response to our compliance action, an appropriate level of remission at this step would be 8% (that is, 80% of 10%).

Treatment of payments with varying degrees of lateness

Where payments have been made with varying degrees of delay in different quarters within a period that is being considered for remission, you do not need to make separate remission decisions for each quarter. It is appropriate to adopt a remission level corresponding to the greatest degree of attempt to comply that the employer has demonstrated across the period.

[26] The contributions must have also satisfied the 'choice of fund' requirements in Part 3A, otherwise the employer may still have an SGC liability.
[27] This may include activities, such as reminder letters, that are a preliminary ATO contact before any compliance action is considered.
[28] The amount of contributions required to reduce their charge percentage to zero for a quarter and avoid having a liability to SGC; generally, this is a set percentage of the employees' ordinary time earnings. See subsection 23(2).

Step 2: consider remission based on the employer's attempt to comply with their obligations through lodgment of an SG statement

Using Table 2 of this Appendix, consider an additional amount of remission based on the employer's attempt to comply through lodging an SG statement to self-assess their SGC liability. This recognises that there are 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.

Table 2: Degree of attempt to comply with lodging of SC statement

Degree of attempt to comply	Remission
The Commissioner makes a default assessment or a Commissioner-initiated amendment 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.	0%
The Commissioner makes a default assessment or a Commissioner-initiated amendment to a prior SGC assessment where the employer has failed to lodge an SG statement or provide relevant information in response to our compliance action.	25%
The Commissioner makes a default assessment or a Commissioner-initiated amendment to a prior SGC assessment based on information provided by the employer after the lodgment due date in response to our compliance action.	40%
An employer lodges an SG statement or requests an amendment to a prior SGC assessment in response to our compliance action; for example, after an audit has commenced.	60%
An employer lodges an SG statement or requests an amendment to a prior SGC assessment after the lodgment due date and after our initial contact[29] but before any our compliance action.	80%
An employer lodges an SG statement or requests an amendment to a prior SGC assessment after the SG statement lodgment due date[30] but before any contact by us.	90%

You do not need to consider remission if an employer lodges an SG statement on or before the lodgment due date, including an extended due date, as no Part 7 penalty is imposed.

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 purposes of Table 2 of this Appendix, this should be considered the same as a lodgment prior to any contact by us; 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.

Note: Even if you have calculated a remission amount of 100% or greater after considering Steps 1 and 2, you must still consider the remaining steps as the remission may be reduced at Step 3. As you cannot remit more than the penalty, if you have calculated an amount greater than 100%, treat it as being 100% prior to considering Step 3.

[29] This may include ATO activities, such as reminder letters, that are a preliminary ATO contact before any compliance action is considered.
[30] See subsection 33(1) for lodgment due dates.

Step 3: consider any increase or reduction in remission based on the employer's compliance history

You should consider the employer's compliance history for both SG obligations and other taxation laws[31] for the 3-year period leading up to the earlier of the day before:

- the disclosure occurred, or
- we commenced compliance action (either by phone or in writing).

You should evaluate their history by reviewing their ATO records, as well as information supplied by the employer[32] 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 previously failed to lodge an SG statement by the due date or for which we 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 that resulted in an SGC liability being assessed, 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 our compliance action will reflect a poorer compliance history than an SGC assessment that came via a voluntary disclosure.

Depending on an employer's compliance history, you may provide additional remission or may reduce the level of remission provided by the other steps in this remission process. Generally, the amount of additional remission or reduced remission should not exceed the amounts in the following table:

Table 3: Level of compliance history

Level of compliance history	Remission
Good compliance history (noting that 'good' does not have to mean flawless or exceptional)	15%
Neither good nor poor compliance history	No change
Poor compliance history	−15%
Extremely poor compliance history	−30%

The following examples illustrate some of the common situations of poor compliance history where a reduction in remission 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 failure to comply indicates that they have not modified their behaviour in response to that 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.
- The employer has several outstanding lodgments relating to other taxes.

[31] 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.
[32] 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.

- 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).

The following examples illustrate some of the situations where compliance history is considered extremely poor:

- The employer has repeatedly failed to meet their obligations even after multiple compliance actions by us (for example, where they have been audited for SG more than 3 times previously and were found to have failed to meet their SG obligations each time).
- The employer has repeatedly attempted to obstruct or hinder compliance action or provided false and misleading statements during compliance action on multiple occasions.

Step 4: consider any other mitigating facts and circumstances that may warrant further remission

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 Steps 1 and 2) and the employer's compliance history (in Step 3), you should not consider these circumstances again for further remission at Step 4.

For example, an employer may be found to have a good compliance history at Step 3 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 also an 'other mitigating fact or circumstance'.

An employer's penalty should not be remitted at Step 4 merely because the penalty may be 'relatively small'.

Different mitigating facts or circumstances may warrant different levels of further remission, depending on their significance in contributing to the employer's non-compliance. Where there are multiple mitigating circumstances present, they should each be considered for remission.

Mitigating facts or circumstances that only warrant very minor further remission (generally not exceeding 5%) include:

- the facts indicate the employer's SG shortfall arose due to an error or honest mistake
- you are satisfied that the employer has addressed the issue that led to their SG shortfalls or failure to lodge SG statements or both, or
- the employer has entered into a payment arrangement to pay their SGC.

Mitigating facts or circumstances warranting minor further remission (generally not exceeding 10%) include:

- the employer has fully paid their SGC – a lesser amount of remission may be given if the employer has paid part of their SGC, or
- the employer's non-compliance with their SG obligations occurred in their first year of operation and their principals had no previous business experience.

Mitigating facts or circumstances that may warrant moderate further remission (generally not exceeding 20%) include:

- the employer's ability to comply was impacted by the ill health of the employer or a key employee of the employer
- the employer did make a significant proportion of their SG contributions on time and the SG shortfalls represent a small portion of their overall SG obligations for the quarters[33]
- the employer miscalculated the amount that they needed to contribute for an employee in a quarter due to complex legal interpretative issues[34], or

[33] This could occur, for example, because the employer miscalculated the required amount of contributions for the quarter, or because a particular kind of payment was not included in their calculation of their employees' ordinary time earnings.
[34] This could be, for example, complexities in the interpretation of payments as being ordinary time earnings as compared to salary and wages, or complex interactions between the SGAA provisions and an applicable industrial award or agreement.

- the employer took reasonable steps to ensure that contributions were made on time, but a third-party issue or error led to the contributions being late by a small amount. This could include payments made to a non-ATO-administered clearing house, where payments were made to the clearing house before the due date.[35]

Mitigating facts or circumstances that may warrant a larger additional remission (generally not exceeding 50%) include:

- the malfunction or outage of a key ATO system which the employer can demonstrate caused them to narrowly miss the lodgment due date[36]
- a natural disaster, emergency or other similar event has significantly impacted the employer's ability to comply with their obligations, either in terms of making contributions or lodging SG statements
- the employer's 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 SG purposes under the extended definition in the SGAA[37]
- the employer's SG shortfalls are due to them misclassifying their workers and you are satisfied that they took reasonable steps to get their workers' classifications right prior to the period being considered[38], or
- the employer participates in a penalty relief arrangement and is given an education direction as a more appropriate treatment for their behaviour.

Note: These lists are not exhaustive.

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.[39] 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 other entities, such as a previous company run by the same individuals
- took steps to prevent or obstruct us from determining their SGC liability. This would be more than not responding to our letter. Examples would be where they repeatedly failed to meet agreed timeframes to supply information for no acceptable reason, deliberately supplied irrelevant, inadequate or misleading information, or engaged in behaviour delaying the provision of information
- has demonstrated a history of repeated disengagement, or
- 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.

[35] In some circumstances, where an employer took all reasonable steps to ensure contributions would be made on time, an assessment of SGC may not be made (see Law Administration Practice Statement (General Administration) PS LA 2007/1 (GA) *Assessing superannuation guarantee charge where the employers have done what they could reasonably be expected to do to comply with the law by the due date*).

[36] 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 issue the clearing house was unable to accept the payment, and an accepted payment was not able to be processed until after the cut-off date.

[37] Section 12.

[38] Reasonable steps may include getting legal advice on the workers' classification, seeking advice from us or using the Employee or independent contractor decision tool with accurate information.

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

Appendix 2 – Treatment of historical quarters where remission may be restricted

When the remission restriction applies

For SGC assessments made after 7 September 2020, the law generally limits your ability to remit Part 7 penalties for historical quarters (quarters from 1 July 1992 to 31 March 2018).

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:

- the employer voluntarily came forward to lodge an SG statement prior to being notified of our compliance action[40], 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 our compliance action.[41]

If you are considering remission for a historical quarter, the employer did not lodge prior to being notified of our compliance action and there are no exceptional circumstances, you must not remit the penalty beyond 50% (that is, the final penalty must be at least 100% of the SGC) even if it would be lower after you consider Steps 1 to 4 of the penalty remission process in Appendix 1 to this Practice Statement. You should still follow the penalty remission process to ascertain a level of remission but reduce your remission to 50% if it exceeds that level.

Employer comes forward voluntarily prior to being notified of any compliance action by us

Considering the table at Step 2 of the 4-step penalty remission process in Appendix 1 to this Practice Statement, if the employer has lodged an SG statement before any contact by us or after our initial contact but before any compliance action, they will satisfy this requirement and there will be no restriction on remission.

This will be the case even if an employer was previously notified of our compliance action for the quarter in question, where that compliance action was completed and the current lodgment is a disclosure of new information that was not identified during the previous compliance action.[42]

Exceptional circumstances that prevented the employer from lodging an SG statement

Where exceptional circumstances prevented an employer from disclosing information by lodging an SG statement, your ability to remit is not restricted.

Exceptional circumstances need to have prevented the employer from lodging the SG statement continuously from the start of the amnesty period (24 May 2018) until the date of lodgment or notification of our compliance action (whichever is earlier).[43]

The Commissioner's position in the foregoing paragraphs regarding the temporal application of exceptional circumstances has been affirmed by the decisions in *Geelong Turf* and *Delbake*.[44]

It is not possible to set precise rules for what constitutes exceptional circumstances. The core idea of exceptional circumstances and similar terms is that there is something unusual to take the case out of the ordinary course.[45] In addition, in determining whether exceptional circumstances exist, you should bear in mind the purpose of the

[40] Subsection 62(4).
[41] Subsection 62(5).
[42] See paragraph 57 of Miscellaneous Tax Ruling MT 2012/3 *Administrative penalties: voluntary disclosures*.
[43] Paragraph 62(4)(c) and subsection 62(5).
[44] In *Geelong Turf*, while Senior Member Lazanas agreed at [45] that exceptional circumstances must have prevented an employer from disclosing information by lodging an SG statement, and noted the Commissioner's argument that such circumstances must have continuously existed throughout the period mentioned in paragraph 62(4)(c), the latter was an issue that she ultimately found did not arise for determination in that matter given the relevant factual context. However, in the subsequent decision of *Delbake*, Member Reitano made findings at [36] that are consistent with our view that the exceptional circumstances need to apply continuously throughout the period mentioned in paragraph 62(4)(c) in order to exercise the remission power in subsection 62(5).
[45] *Ward v Commissioner of Taxation* [2016] FCAFC 132 at [39-41].

discretion that is being exercised.[46] 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.[47]

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.[48]
- An employer did not understand the law or their obligations – this includes if the employer has relied on poor advice from a third party.[49]
- 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 previous 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 our 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 our 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.[50]
- 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 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.

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[46] *Re Rosemarie Beadle and Director-General of Social Security* [1984] AATA 176.
[47] Paragraphs 1.81 to 1.90 of the Explanatory Memorandum to the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019.
[48] See *Geelong Turf* at [44], affirming that an employer's financial difficulties do not constitute exceptional circumstances. Also refer to Member Reitano's comments in *Delbake* at [15], to the effect that any unjust, unintended or unfair repercussions of the penalties are not relevant considerations for the purposes of applying remission in accordance with subsection 62(5).
[49] See *Geelong Turf* at [44], affirming that a lack of knowledge on behalf of the employer or their agent as to accounting and tax matters does not constitute exceptional circumstances.
[50] See PS LA 2008/3. See also Our Charter.

Appendix 3 – Examples

Example 3 – no remission – default assessment with disengagement and phoenix arrangements

Default assessments of an employer's SGC are made on 22 July 2021 for the quarters ending 30 September 2020 and 31 December 2020.The employer has been subject to 2 previous audits, resulting in default SGC assessments being issued at the conclusion of each audit.

We also identify that the director of the employer company is linked to 4 liquidated companies which have also had compliance issues, suggesting the director has engaged in phoenix activity.

Considering the 4-step penalty remission process:

- *Step 1: the employer has not made any late payments for which they have claimed an LPO – No remission.*
- *Step 2: the employer did not provide information for us to make an assessment of the employer's SGC and has demonstrated severe disengagement – No remission.*
- *Step 3: the employer has been subject to 2 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 employer's compliance history is poor – No remission (you cannot reduce the remission level as it is already at no remission).*
- *Step 4: no other mitigating circumstances have been identified – No remission.*

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 4 – 40% remission – default assessment with information unable to be provided

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

During the compliance activity, the employer:

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

Considering the 4-step penalty remission process:

- *Step 1: the employer has not made any late payments for which they have claimed an LPO – No remission.*
- *Step 2: the employer did not provide information to us to make an assessment of the employer's SGC but did not display severe disengagement – 25% remission.*
- *Step 3: the employer has no outstanding lodgments or debts in relation to their other taxation law obligations and this is the first time they have been subject to a compliance activity regarding their SG obligations. The employer's compliance history is good – 15% remission.*
- *Step 4: no mitigating facts or circumstance have been identified – No remission.*

After considering each of the steps, the Part 7 penalty is remitted by 40% [25% + 15%], leaving a residual penalty of 60%. A Part 7 penalty assessment equivalent to 120% (that is, 60% × 200%) of the SGC is issued against the employer. The TAA default assessment penalty is fully remitted.

Example 5 – 75% remission – voluntary disclosure prior to our contact with poor compliance history

An employer has SG shortfall amounts for the quarters ending 30 September 2020 and 31 December 2020, and on 20 May 2021 lodges the required SG statements for these quarters. This is the third time in the past 2 years that the employer lodges SG statements after the lodgment due date.

Considering the 4-step penalty remission process:

- *Step 1: the employer has not made any late payments for which they have claimed an LPO – No remission.*
- *Step 2: the employer lodged SG statements after the due date but prior to any ATO contact – 90% remission.*

- *Step 3: 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. The employer's compliance history is poor – 15% reduction in remission.*
- *Step 4: no mitigating facts or circumstance have been identified – No remission.*

After considering each of the steps, the Part 7 penalty is remitted by 75% (90% − 15%), leaving a residual penalty of 25%. A Part 7 penalty assessment equivalent to 50% (that is, 25% × 200%) of the SGC is issued against the employer.

Example 6 – full remission – SG statement provided with full LPO claim

For the quarters ending 31 March 2020 to 30 September 2020, an employer fails to make SG contributions to the respective super funds of their employees by the due date for each quarter. The employer makes contributions equivalent to the total amount they were originally required to contribute for all 3 quarters, within 3 months after the due date for each quarter. The employer also fails to lodge an SG statement disclosing the SG shortfalls.

In response to an audit notification letter issued on 14 November 2021, the employer lodges SG statements on 10 December 2021. In these statements, they claim LPOs for the late payments they made. The employer indicates that it is their first year of operation and they did not understand their lodgment obligations.

Considering the 4-step penalty remission process:

- *Step 1: the employer made full late payment, prior to our contact and within 3 months of the due date – 40% remission.*
- *Step 2: the employer lodged SG statements in response to our compliance action – 60% remission.*
- *Step 3: the employer's compliance history is neither good nor poor – No remission.*
- *Step 4: the shortfalls occurred during the business' first year of operation – 10% remission.*

After considering each of the steps, it is reasonable for the Part 7 penalty to be fully remitted. We determined a remission percentage of 110% [40% + 60% + 10%], however remission cannot exceed 100%.

Example 7 – 78% remission – SG statement provided with partial LPO claim

For the quarters ending 31 March 2020 to 31 December 2020, an employer fails to make SG contributions to the respective super funds of their employees by the due date for each quarter. The employer makes some late contributions:

Table 4: Late contributions

Quarter ending	***Amount of late contribution***	***Total amount they were originally required to contribute***	***Timing of late contribution***
31 March 2020	*$6,000*	*$6,000*	*7 months late*
30 June 2020	*$5,000*	*$8,000*	*5 months late*
30 September 2020	*$4,000*	*$7,000*	*4 months late*
31 December 2020	*None*	*$9,000*	*not applicable*
Total	*$15,000*	*$30,000*	*not applicable*

The employer also fails to lodge an SG statement disclosing the SG shortfalls. In response to an audit notification letter issued on 15 January 2022, the employer lodges SG statements on 28 January 2022. In these statements they claim LPOs for the late payments they made.

Considering the 4-step penalty remission process:

- *Step 1: the employer made partial late payment with differing circumstances across quarters*
  - *the timeliest payments were made between 3 and 6 months after the due date, for the quarters ending 30 June 2020 and 30 September 2020 – remission of 36% as per step 1 (refer to the table in Step 1 of Appendix 1 to this Practice Statement)*
  - *their payments were equivalent to 50% of the total amounts they were originally required to contribute across the 4 quarters.*

  We adjust the remission they attribute to this attempt to comply proportionately – 18% remission [50% × 36%].
- *Step 2: the employer lodged SG statements in response to our compliance action – 60% remission.*
- *Step 3: the employer's compliance history is neither good nor poor – No remission.*
- *Step 4: no mitigating circumstances identified – No remission.*

After considering each of the steps, the Part 7 penalty is remitted by 78% (18% + 60%) leaving a residual penalty of 22%. A Part 7 penalty assessment equivalent to 44% (that is, 22% × 200%) of the SGC is issued against the employer.

Example 8 – penalty relief applied and SG education direction imposed – voluntary disclosure after our initial contact

An employer has SG shortfall amounts for the quarter ending 30 September 2019. In response to an early engagement letter from us on 15 February 2021, the employer lodges an SG statement. Although the employer has previously voluntarily lodged an SG statement and has some outstanding income tax debts, this is the first time the employer has been contacted by us regarding their SG obligations.

We note that the employer is eligible for penalty relief. We believe education will be a more effective tool to improve the employer's compliance and decide to apply penalty relief, offering further remission in conjunction with an education direction.

Considering the 4-step penalty remission process:

- *Step 1: the employer has not made any late payments for which they have claimed an LPO – No remission.*
- *Step 2: the employer lodged SG statements in response to our initial contact – 80% remission.*
- *Step 3: the employer's compliance history is neither good nor poor – No remission.*
- *Step 4: we remit the remaining penalty in line with their application of penalty relief – 20% remission.*

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 9 – 95% remission – disclosure after our initial contact – multiple mitigating circumstances

An employer has SG shortfall amounts for the quarters ending 30 September 2019 to 31 March 2021.
On 20 July 2021, in response to an initial early engagement letter from us, the employer voluntarily discloses to us that they have these shortfalls and lodges the required SG statements for these quarters. After lodging SG statements, the employer pays the full SGC liability to us (not including any potential Part 7 penalty). They cannot claim an LPO. The employer indicates that the shortfalls arose because their payroll system had been disorganised and ineffective, and that they have since updated their processes.

Considering the 4-step penalty remission process:

- *Step 1: the employer has not made any late payments to the employee funds for which they could claim an LPO – No remission.*
- *Step 2: the employer lodges SG statements in response to our initial contact – 80% remission.*
- *Step 3: the employer's compliance history is neither good nor poor (they had previously lodged SG statements for paid SGC for 2 quarters) – No remission.*

- *Step 4: the SGC has been paid, and the employer has taken steps to rectify the issue that led to the shortfalls – 15% remission (10% + 5%).*

After considering each of the steps, the Part 7 penalty is remitted by 95% (80% + 15%) leaving a residual penalty of 5%. A Part 7 penalty assessment equivalent to 10% (that is, 5% × 200%) of the SGC is issued against the employer.

Example 10 – full remission – voluntary disclosure prior to our contact – proportionality of shortfalls

An employer has SG shortfall amounts for the quarters ending 30 September 2019 to 31 March 2021.
On 20 July 2021, the employer voluntarily discloses to us that they have these shortfalls and lodges the required SG statements for these quarters. The employer explains that they had made what they believed to be the full required contributions for their employees on time but had mistakenly believed a particular allowance was not part of ordinary time earnings. As such, there were small shortfalls for several of their employees across the period.

Considering the 4-step penalty remission process:

- *Step 1: the employer has not made any late payments for which they have claimed an LPO – No remission.*
- *Step 2: the employer lodges SG statements before any contact by us – 90% remission.*
- *Step 3: the employer's compliance history is neither good nor poor (they had previously lodged SG statements and paid SGC for 2 quarters) – No remission.*
- *Step 4: the shortfalls represented a small proportion of the SG obligations that the employer had for the quarters in question – 10% remission.*

After considering each of the steps, the Part 7 penalty is fully remitted. We could have determined a remission percentage of up to 20% at Step 4; however, the total remission cannot exceed 100%.

Example 11 – full remission – mitigating circumstances – employer's ability to comply impacted by COVID-19

An employer has SG shortfall amounts for the quarters ending 31 March 2020 and 30 June 2020. The employer does not respond to an initial early engagement letter from us and compliance action is commenced on 8 October 2021. In response to this compliance action, the employer lodges SG statements for the quarters.

The employer explains that they had discovered they had SG shortfalls for the quarters, but that COVID-19-impacts delayed their ability to lodge SG statements as:

- *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 their payroll staff had been stood down, which contributed to their failure to correctly make SG contributions and increased the length of time it took to ascertain the shortfall amounts and complete SG statements, and*
- *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.*

Considering the 4-step penalty remission process:

- *Step 1: the employer has not made any late payments for which they have claimed an LPO – No remission.*
- *Step 2: the employer lodges SG statements in response to our compliance action – 60% remission.*
- *Step 3: the employer has no outstanding lodgments or debts in relation to their other taxation law obligations and this is the first time they have been subject to a compliance activity regarding their SG obligations – 15% remission.*
- *Step 4: the COVID-19 impacts significantly impacted the employer's ability to comply with their SG obligations – 25% remission.*

After considering each of the steps, the Part 7 penalty is fully remitted. We could have determined a remission percentage of up to 50% at Step 4; however, the total remission cannot exceed 100%.

Example 12 – amended SGC assessment – 45% remission of new Part 7 penalty imposed at amendment

On 1 January 2021, in response to an initial early engagement contact by us, an employer lodges SG statements to disclose SG shortfalls for the quarters ending 30 June 2020 and 30 September 2020. Considering each of the steps in the 4-step penalty remission process, the Part 7 penalty was remitted by 95% leaving a residual penalty of 5%. A Part 7 penalty assessment equivalent to 10% (that is, 5% × 200%) of the SGC was issued to the employer.

After receiving a further employee notification regarding the same quarters, we commence an audit. In response to this compliance activity, the employer lodges amended SG statements for the quarters disclosing significant additional SG shortfalls that were not originally disclosed. The employer does not provide any reasonable explanation for why these additional shortfalls were not disclosed originally.

We need to determine a new level of remission for the additional SGC that is assessed at amendment.

Considering the 4-step penalty remission process:

- *Step 1: the employer has not made any late payments for which they have claimed an LPO – No remission.*
- *Step 2: the employer lodges the amendments in response to our compliance action – 60% remission.*
- *Step 3: the employer's compliance history is considered poor, as the evidence suggests the employer knowingly failed to disclose the amounts – 15% reduction in remission.*
- *Step 4: no mitigating circumstances identified – No remission.*

After considering each of the steps, the Part 7 penalty is remitted by 45% (60% – 15%), leaving a residual penalty of 55%.

We determine a total remission percentage for the quarters that is equivalent to a remission percentage of 95% 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.

Example 13 – historical quarter example 3 – exceptional circumstances – ability to lodge impacted by natural disaster

An employer has SG shortfall amounts for the quarters ending 31 December 2017 and 31 March 2018. A notification of audit letter is issued on 14 July 2021. In response to our compliance action, the employer advises us that they had been unable to determine any SG shortfalls for the periods as their business premises were badly damaged by floods that occurred in early 2018. The employer provides estimates of their liability which we use to raise default assessments.

As these are historical quarters and the SG shortfalls were not disclosed prior to notification of compliance action, our ability to remit will be restricted unless there were exceptional circumstances that prevented the employer from lodging.

We determine 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. We determine that there are exceptional circumstances that prevented the employer from disclosing SG shortfalls.

We can consider the 4-step penalty process without any restriction.

Example 14 – historical quarter example 4 – no exceptional circumstances – ability to lodge impacted by COVID-19

An employer has SG shortfall amounts for the quarters ended 31 March 2017 to 30 September 2017. A notification of audit letter is issued on 20 October 2021. In response to our compliance action, the employer explains that they were unaware that they had SG shortfalls requiring them to lodge an SG statement. They explain that from March 2020, they were 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 has subsequently gained access to their business records and lodges SG statements.

As these are historical quarters and the SG shortfalls were not disclosed prior to notification of compliance action, our ability to remit will be restricted unless there were exceptional circumstances that prevented the employer from lodging.

We determine that the COVID-19 pandemic impacted the employer's ability to disclose SG shortfalls from March 2020 onwards. However, the employer had 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, we determine that exceptional circumstances did not prevent the employer from lodging SG statements from 24 May 2018.

Therefore, we must ensure that their remission does not exceed 50%, even if the 4-step penalty process would lead to a greater amount of remission.[51]

[51] See subsection 62(4) for legislative restrictions for Part 7 penalty remission for historical SG quarters.

Amendment history

10 October 2024

Part	Comment
Throughout	Content checked for technical accuracy and currency. Updated in line with current ATO style and accessibility requirements.

References

Legislative references	SGAA 1992 12 SGAA 1992 23(2) SGAA 1992 Pt 3A SGAA 1992 33(1) SGAA 1992 36 SGAA 1992 37 SGAA 1992 37(2) SGAA 1992 42 SGAA 1992 43 SGAA 1992 Pt 7 SGAA 1992 59 SGAA 1992 59(1) SGAA 1992 59(3) SGAA 1992 60 SGAA 1992 62(3) SGAA 1992 62(4) SGAA 1992 62(4)(c) SGAA 1992 62(5) SGAA 1992 62A SGAA 1992 74(2) SGAA 1992 74(4) TAA 1953 Sch 1 250-10(2) TAA 1953 Sch 1 284-20 TAA 1953 Sch 1 284-75(1) TAA 1953 Sch 1 284-75(3) TAA 1953 Sch 1 284-90(1) TAA 1953 Sch 1 298-20(1) TAA 1953 Sch 1 298-20(2) TAA 1953 Sch 1 298-30(2) ITAA 1997 995-1(1) Treasury Laws Amendment (Recovering Unpaid Superannuation) Act 2020
Case references	Archibald Dixon as Trustee for the Dixon Holdsworth Superannuation Fund v Commissioner of Taxation [2008] FCAFC 54; 167 FCR 287; 2008 ATC 20-015; 69 ATR 627 Delbake Pty Ltd and Commissioner of Taxation [2024] AATA 449; 2024 ATC 10-716 Geelong Turf Company Pty Ltd and Commissioner of Taxation [2023] AATA 1718

	Re Rosemarie Beadle and Director-General of Social Security [1984] AATA 176; 6 ALD 1; 1 AAR 362 Ward v Commissioner of Taxation [2016] FCAFC 132; 247 FCR 372; 2016 ATC 20-583; 103 ATR 823
Other references	Employee or independent contractor Explanatory Memorandum to the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 Our Charter
Related public rulings	MT 2012/3
Related practice statements	PS LA 2007/1 (GA) PS LA 2007/10 PS LA 2008/3 PS LA 2012/5

ATO references

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