PS LA 2012/5 - Administration of the false or misleading statement penalty - where there is a shortfall amount

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PS LA 2012/5

Administration of the false or misleading statement penalty – where there is a shortfall amount

This Law Administration Practice Statement provides guidelines in relation to the penalty for making a false or misleading statement, where a shortfall amount arises.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

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

1. What this practice statement is about

1A. This Practice statement provides guidance on the administration of penalty, under subsection 284-75(1) of Schedule 1 to the *Taxation Administration Act 1953*[1], for making a false or misleading statement that results in a shortfall amount, including:

- when an entity will become liable to the penalty, in the situation where the statement results in a shortfall amount, and
- how the penalty is assessed, including factors to consider when making a remission decision.

1B. Remission guidelines in this Practice statement are to assist you in exercising the Commissioner's discretion to remit the penalty and ensure consistent treatment of entities with similar situations. These guidelines are not intended to lay down conditions that may restrict the exercise of that discretion, where it is appropriate not to do so.

1C. There must be a shortfall amount for this penalty to apply. Where the statement does not result in a shortfall amount, see guidance in Law Administration Practice Statement PS LA 2012/4 *Administration of the false or misleading statement penalty – where there is no shortfall amount*.

1D. This penalty does not apply to Crown entities.

2. Administering the penalty

2A. There are three steps in administering the false or misleading statement penalty, which must be undertaken in order.

- Step 1 – determine if a penalty is imposed by law.
- Step 2 – assess the amount of the penalty
  - determine the shortfall amount
  - determine the base penalty amount (BPA)
  - increase and/or reduce the BPA
  - determine if remission is appropriate.
- Step 3 – notify the entity of the liability to pay the penalty.

3. General principles

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

- The primary purpose of the penalty provision is to encourage entities to take reasonable care to comply with their tax obligations. Generally, an entity will not be penalised where they have made a reasonable and genuine attempt to comply, because:
  - of the reasonable care or safe harbour exceptions
  - the law was applied in an accepted way, or
  - we have remitted any remaining penalty.
- The penalty provision aims to achieve a level playing field, ensuring fairness and equity for all entities and for there to be consequences for failing to take reasonable care, or not making a reasonable effort to comply correctly with their reporting obligations.

[1] All legislative references in this Practice statement are to Schedule 1 to the *Taxation Administration Act 1953* unless otherwise indicated.

- The compliance model requires us to be fair to entities wanting to do the right thing, but firm with those who are choosing to avoid their tax obligations.
- The Taxpayers' Charter requires us to treat an entity as being honest. We accept that what they have told us is the truth and the information they have provided is complete and accurate unless we have reason to think otherwise.
- We must consider the individual circumstances of each case, including the background and experience of the entity.
- Decisions must be supported by the available facts and evidence. Conclusions about an entity's behaviour should only be made where they are supported by, or can be reasonably inferred from, the facts.
- The entity should be contacted and given the opportunity to explain their actions before a penalty decision is made. Exceptions to this general principle might include fully automated data matching cases or where the facts of the case clearly show deliberate disengagement from the taxation system.

STEP 1 – DETERMINE IF A PENALTY IS IMPOSED BY LAW

4. What is a false or misleading statement penalty for the purposes of this practice statement?

4A. A false or misleading statement penalty is imposed where an entity or their agent[2]:

- makes a statement to the Commissioner or another entity exercising powers or performing functions under a taxation law
- the statement is false or misleading in a material particular, whether because of things in it or omitted from it, and
- the statement results in a shortfall amount.[3]

5. What is a statement?

5A. A statement is anything that is disclosed for a purpose connected with a taxation law orally or in writing and includes those made electronically.

5B. Statements may be made in correspondence, in a registration form, an activity statement, a request for amendment or any other communication.

5C. Where an entity lodges a form, the form itself is not the statement that is made. The statement is the information at the individual labels or questions. This means more than one statement can be made on a form.

5D. Statements may also be made by omission, if an entity fails to include material information in a document that requires that information to be supplied.

6. Who is the statement made to?

6A. The statement must have been made to the Commissioner, or to another person who is exercising powers or performing functions under a tax law.

6B. 'Another person' will be a tax officer in the course of their duties, or a customs officer who in the course of their duties is authorised to administer an indirect tax law under a delegation from the Commissioner, for example, administering the indirect tax provisions on taxable importations.

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

False

7A. A statement is false if it is contrary to fact or wrong.

7B. It may be false because of something contained in the statement or because something is omitted from the statement.

7C. If a statement was correct at the time it was made but is subsequently made incorrect because of a retrospective amendment to the law, it is not later considered false (or misleading). It is the nature of the statement at the time that it was made that is relevant.

7D. It does not matter if the person who made the statement did not know that it was false.

Misleading

7E. A statement is misleading if it creates a false impression, even if it is literally true.

7F. It may be misleading because of something contained in the statement or because of something omitted from the statement.

7G. The reason it is misleading may be because it is uninformative, unclear or deceptive.

[2] Any reference to entity in this Practice statement should be read as 'the entity or their agent' unless explicitly noted.
[3] Determining the shortfall amount is covered in Step 2.

In a material particular

7H. A material particular is something that is likely to affect a decision regarding the calculation of an entity's tax related liability or entitlement to a payment or credit.

7I. An inconsequential statement which does not affect an entity's tax position will not be a material particular for penalties for false or misleading statements that result in shortfall amounts.

7J. Most of the information provided in a label in a tax return or activity statement will be a material particular. It will be used to calculate a tax-related liability.

8. Who is liable for the penalty?

8A. The entity lodging the statement, or on whose behalf the statement is lodged, is usually liable to the penalty.

8B. Generally, an entity will be liable to the penalty where a statement is made by their authorised representative. This includes statements made by the agent for the entity. Also, a company will be liable to penalties resulting from statements made by an authorised employee, public officer or director.

8C. Special rules apply to different entity types (such as trusts, superannuation funds and partnerships) when determining liability to the penalty.

Trusts

8D. Where a statement made by the trustee of a trust results in a shortfall amount for a beneficiary of the trust, the shortfall amount is treated as though it were also the trustee's shortfall amount for the purpose of the penalty.[4] This will mainly apply where a statement is made by the trustee about the net income of the trust, as this will affect the amount that a beneficiary has to include as assessable income in their tax return.

8E. Where neither the trustee nor the beneficiary have exercised reasonable care, the trustee and beneficiary will both be liable to a penalty.[5] This will usually occur where:

- the beneficiary controls the trustee (such as where the beneficiary is a director or shareholder of the trustee company)
- the trustee and beneficiary are the same person/entity
- the trustee and beneficiary acted in collusion in the matter resulting in the shortfall amount
- the beneficiary directed how the tax returns should be prepared, and the trustee has full knowledge of the issues leading to the shortfall, or
- there were reasonable grounds for the beneficiary to have doubts about the accuracy of the information provided by the trustee about their share of the net income, but they did not act on those doubts.

8F. The relevant behaviours of both the trustee and the beneficiary must be considered separately when imposing penalties, and no penalty will apply to a trustee or beneficiary who takes reasonable care, solely due to the other party failing to take reasonable care and having penalties imposed.

8G. Where a trustee has correctly reported the net income of the trust and the entitlements of the beneficiaries to that income, but a beneficiary has understated their distributions from that trust, only the beneficiary can be liable to a penalty, as the trustee has not made any false or misleading statements.

8H. In the case of widely-held trusts (other than Attributed Managed Investment Trusts), calculation of shortfalls relating to large numbers of ultimate beneficiaries may not be practical, and consultation will be required between the trustee and the ATO to establish an acceptable, workable solution for calculating the shortfall amounts on which penalties are based.

8I. Where a penalty has been imposed on both the trustee and beneficiary for the same shortfall amount, remission will generally be given to avoid duplicating or 'doubling' the penalty. Guidance on this type of remission is covered in the remission portion of this ruling and in example15.

Superannuation funds

8J. For superannuation funds, an authorised agent also includes an administrator or superannuation supplier.

8K. In cases where a superannuation fund does not have a trustee, the person who manages the fund is treated as a trustee of the fund.[6] If that person makes a false or misleading statement in relation to the fund

[4] Section 284-30.

[5] *Zeta Force Pty Ltd v Commissioner of Taxation (Cth)* 84 FCR 70; 39 ATR 277; 98 ATC 4681 accepted, in relation to the former penalty regime, that penalties can be imposed on both trustee and beneficiary (a 'non-exclusive code approach'), and that the appropriate remedy to avoid double-penalisation was the Commissioner's remission discretion.

[6] Section 444-50.

and the fund has a subsequent shortfall amount, that person is liable to the penalty.

Partnerships (other than corporate limited partnerships)

8L. A partnership can't have an income tax (or PAYG instalment) liability, but it can have a tax-related liability in relation to a net amount of indirect tax[7], PAYG withholding, fringe benefits tax (FBT) and some other taxes.

8M. Each partner is jointly and severally liable to a penalty assessed on the partnership shortfall amount. If one partner is not at fault for the partnership having a shortfall amount, that partner will still be liable to pay the penalty in full.[8]

8N. The penalty will be assessed on the shortfall amount of income tax reflected in the partner's individual tax return.[9]

8O. For example, if a partnership is made up of two partners who are entitled to share in profits equally, and the net partnership income was understated by $2.5 million, each partner will be liable to a penalty on the shortfall amount resulting from the understated $1.25 million in their individual tax returns.

9. Exceptions to the penalty

9A. The following two exceptions result in no liability to a penalty:

- the entity and their agent (if relevant), took reasonable care in connection with making the statement[10], or
- a 'safe harbour' applies to the statement.[11]

9B. For statements made on or after 4 June 2010 applying the law in an accepted way is not an exception but reduces the BPA when calculating the BPA.[12]

10. Reasonable care

10A. The concept of reasonable care is explained in Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard.*

10B. The 'reasonable care test' requires an entity to make a reasonable and genuine attempt to comply with obligations imposed under a taxation law. This means taking into account all actions leading up to the making of the statement.

10C. Making a genuine attempt means that the entity was reasonably attempting to comply with tax obligations. When considering if a reasonable or genuine attempt has been made we compare the entity's actions and circumstances with that of other entities in similar circumstances.

10D. The fact that a false or misleading statement was made does not automatically mean there was a failure to take reasonable care. An entity should be presumed to have taken reasonable care unless the facts or reasonable inferences suggest otherwise. There must be evidence that the entity's attempt to comply has fallen short of the standard of care that would reasonably be expected in the circumstances before they are liable to a penalty.

10E. The effort required is one commensurate with or appropriate to the entity's circumstances, including their knowledge, education, experience and skill.[13] A higher standard of care is expected of an entity dealing with a matter that involves a substantial amount of tax or involves a large proportion of the overall tax payable.[14] In borderline cases, it can be more readily accepted that an entity has exercised reasonable care where the entity has a good compliance history.

10F. All of the following factors are also relevant when assessing reasonable care:

- whether reasonable attempts were made to keep records and to set up processes and systems, including the training of staff
- if the error was an inadvertent mistake – for example an isolated transposition mistake or a data entry error which was not the result of systematic issues
- for mistakes in interpreting the law or the facts and law, if reasonable enquiries were made, including whether
  - the entity conducted a level of enquiry commensurate with the risk of the decision and their resources, or
  - the entity just assumed the statement was correct.

[7] A net amount includes amounts in respect of luxury car tax and wine equalisation tax.
[8] Section 444-30.
[9] Section 284-35.
[10] Subsection 284-75(5).
[11] Subsection 284-75(6), and former subsection 284-75(1A) prior to 4 June 2010.
[12] It is dealt with in the BPA section of this Practice statement. For statements made prior to 4 June 2010 refer to former subsection 284-75(1A).
[13] Paragraph 28 of MT 2008/1.
[14] Paragraph 92 of MT 2008/1.

- whether the entity was aware, or should have been aware, of the correct treatment of the law or of the facts, noting
  - an entity should not rely on advice they have received where a reasonable person would be expected to know the advice is not worthy of such reliance[15], and
  - an entity is not obliged or entitled to blithely accept assurance by their professional advisor
- whether any factors prevented the entity from seeking advice, understanding the requirements of the tax law or reporting correctly
- whether it was a new, unusual or extraordinary transaction, as these transactions should have higher levels of care associated with them (the care and investigation expected is also relative to the size of the transaction), and
- whether the entity's level of knowledge, understanding of the tax system or personal circumstances impacted their compliance, considering
  - whether a registered tax agent or BAS agent was used, and the agent's knowledge and understanding
  - the entity's level of sophistication relating to tax matters
  - the level of knowledge, education, experience and skills of relevant persons involved with the entity, and
  - the personal circumstances of relevant persons involved, including age, health and background.

Using a registered tax agent or BAS agent

10G. Even if an entity uses a registered tax agent or BAS agent, they are still expected to take a prudent attitude to their tax affairs. Engaging an agent does not, by itself, mean that reasonable care has automatically been taken, and entities are still required to set up appropriate reporting and recording systems, provide all relevant taxation information to their agent and answer questions or provide information to their agent.

10H. An entity will generally be found not to be making a genuine attempt to comply with their obligations where they do not query advice that:

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

10I. The more complex the area of tax law involved, the greater the monetary amount involved or the more 'sophisticated' the entity, the greater the level of enquiry that is expected.

10J. Before signing documents lodged on their behalf, an entity is also expected to confirm, to an appropriate extent, that the document reflects the information they provided to their tax agent.

10K. As noted earlier, the entity is liable to penalties for statements made by their agent, if reasonable care is not taken by the agent.

10L. A registered agent will be subject to a higher standard of care that reflects the level of knowledge and experience a reasonable person in their circumstances will possess. The appropriate benchmark is the level of care that would be expected of an ordinary and competent practitioner practising in that field and having the same level of expertise.

10M. Registered agents are not required to extensively audit or review books, records or other source documents to independently verify the entity's information. It will not be possible or practical for an agent to scrutinise every item of information supplied. What is appropriate will depend on the individual circumstances of the entity and the registered agent. However, reasonable enquiries must be made if the information appears to be incorrect or incomplete.

Reasonable care – beneficiaries of trusts

10N. If a beneficiary relies on the trustee's advice about their share of the net income of the trust, they will generally be taken to have exercised reasonable care unless they knew, or could reasonably be expected to have known, that the information was wrong.

10O. In most cases where incorrect, incomplete or misleading advice was provided to the beneficiary, it will be appropriate to consider whether the trustee took reasonable care in respect of the shortfall amounts of all the beneficiaries.

[15] *Weyers v FCT* [2006] FCA 818; 2006 ATC 4523; (2006) 63 ATR 268.

11. Safe harbour

11A. The safe harbour[16] provided for in subsection 284-75(6)[17] provides that an entity will not be subject to a penalty as a result of certain actions (or omissions) of their registered tax or BAS agent, as long as:

- they gave all the relevant tax information necessary for the statement to be correctly prepared to the agent,
- the agent made the statement and
- the agent did not act recklessly or with intentional disregard of the law.[18]

11B. This means the safe harbour exception applies only where the agent made the statement, is registered and has failed to take reasonable care.

11C. Each statement has to be considered separately.

11D. Where safe harbour applies, the penalty is not transferred to the tax agent.

All relevant taxation information

11E. The safe harbour exception will only apply if the entity provides their registered agent with all relevant taxation information about a particular matter.

11F. Whether or not all the relevant taxation information was provided needs to be considered objectively. It does not matter if the entity genuinely believed they provided all relevant information. The exception will not apply if the entity omitted or did not supply any part of the relevant information, or gave incorrect or conflicting information.

11G. Registered agents are not required to view all source documents, and it is often impractical for them to do so.

11H. An entity may provide some information to their registered agent in a summary and the registered agent may reasonably rely on that for preparation of the statement. However, a summary which is incorrect or omits material information will not meet the requirement to provide all relevant taxation information, even if reasonable care for a registered agent would have involved querying the information.

11I. The entity has the burden of proof to establish that they provided all relevant taxation information. The standard of proof required is 'on the balance of probability' or 'more likely than not'. If the probability either way is equal, then the standard is not satisfied.

11J. You would usually need to contact the registered agent if the entity is claiming the safe harbour exception to the penalty. Without doing so, it would be difficult to assess their actions and whether they exercised reasonable care, or know what information they requested from their client.

11K. However contact with the registered agent is not mandatory. If you have been unable to contact the registered agent, a decision can be made on the information available.

11L. Safe harbour can be considered even if the entity or agent do not explicitly request it, as it may be clear from the statement that all relevant taxation information was provided but the registered agent did not exercise reasonable care (see Example 2 of this Practice statement). In these cases, it is still generally appropriate to contact the registered agent to discuss safe harbour, but you are not required to do so in order to apply safe harbour.

Example 1

A case officer conducted an examination of interest income and rental deductions reported in an entity's tax return.

The case officer discovered that false or misleading statements had been made for both of these items.

They determined that the entity and its registered agent failed to take reasonable care in relation to the two shortfall amounts, and therefore the reasonable care exception in subsection 284-75(5) (or former subsection 284-215(2)) did not apply. To determine if the safe harbour exception in subsection 284-75(6) or former subsection 284-75(1A) applies, each item needs to be considered separately.

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

Example 2

Jock provides Ian (his registered agent) with details on the purchase of a new car for his business, as well as other information. Ian claims a deduction for the full price of the car in Jock's tax return.

During an audit the agent shows that the car was used solely for business purposes, but agrees the deduction should have been only for the depreciation of the car. The registered agent does not comment on or explain

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[16] Safe harbour is not a term found in the law but is commonly used to describe this exception, including in the Explanatory Memorandum to the law.

[17] Relevant to statements made on or after 1 March 2010.

[18] See section 14 of this Practice statement and MT 2008/1 for the meanings of the terms 'reckless' and 'intentional disregard'.

why the item was expensed instead of being depreciated.

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

STEP 2 – ASSESSING THE AMOUNT OF THE PENALTY

12. Working out the penalty amount

12A. The penalty is assessed in four stages:

- Stage 1 – determine the shortfall amount
- Stage 2 – work out the base penalty amount (BPA)
- Stage 3 – increase and/or reduce the BPA
- Stage 4 – consider remission of the calculated penalty amount.

13. Stage 1 – determining the shortfall amount

13A. For the purposes of the false or misleading statement penalty, a shortfall amount[19] is the amount:

- by which a tax-related liability[20] is less than it would have been if the statement were not false or misleading, or
- by which a payment or credit that we must make under a taxation law is more than it would have been if the statement were not false or misleading.

13B. A shortfall amount is usually worked out for the accounting period for which the tax-related liability or credit is calculated. However, it might also be worked out on an 'event' basis. An event might be, for example, a taxable importation or wine equalisation tax raised on a custom's dealing.

13C. Shortfall amounts are not offset against credits arising from other accounting periods or events.

Example 3

Pellagreen Enterprises lodged its income tax return for the 2016-17 income year disclosing assessable income of $350,000 and deductions of $30,000. No tax offsets were claimed. During an examination, it was discovered that rental income of $200,000 and rental outgoings of $80,000 had not been disclosed. The tax rate is 30%. The shortfall amount is the amount by which the tax-related liability is understated:

Actual tax liability

($350,000 - $30,000) + ($200,000 - $80,000)
= $440,000 × 30%
= $132,000

Returned tax liability

($350,000 - $30,000) = $320,000 × 30%
= $96,000

Shortfall amount

= $36,000

Example 4

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

Example 5

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

13D. Where the statements result in a mixture of credit and debit adjustments for the tax-related liability for the accounting period, overall there must be an increase in the tax-related liability (or a decrease in the credit or payment) in order for there to be a shortfall amount.

13E. A shortfall amount can arise for distinct liabilities reported on a combined form such as an activity statement. In these instances, a credit for one tax type does not reduce the liability for another tax type when calculating the shortfall amount.

[19] Items 1 and 2 in subsection 284-80(1).
[20] Tax-related liabilities are outlined in section 250-10.

Example 6

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

GST net amount	*$320,000 DR*
PAYG withholding amount	*$100,000 DR*
PAYG income tax instalment	*$500,000 DR*
Net amount for activity statement	*$920,000 DR*

During an examination, the tax officer found that the PAYG withholding amount for the period was $200,000 and that the GST net amount was $300,000. All the other amounts notified were correct. Although the adjustment to the GST net amount results in a credit of $20,000, there is a shortfall amount of $100,000 in the PAYG withholding liability. The penalty will be worked out on the full PAYG withholding shortfall amount of $100,000, without taking the GST credit into account.

Shortfall amounts composed of more than one part

13F. An entity may make a number of statements in one document which result in a number of parts to a shortfall amount.

13G. Separate calculations are not necessary where the same BPA, or behaviour, applies to all parts of the total shortfall amount, unless an increase or reduction applies only to part of the shortfall amount.

13H. However where different BPA's apply for different parts of the shortfall amount you will need to calculate the proportion of the shortfall amount for each statement. This would include where different levels of care applied in respect of each statement, where there is a BPA and an exception for the one shortfall amount or different behaviours are evident in one statement.

Example 7

Scrooge Company Ltd notified in its activity statement that the GST net amount payable for a period was $25,000. During an examination, the tax officer found that the company intentionally disregarded a taxation law when it over claimed GST credits by $15,000 and over claimed other GST credits by $2,000 because of a failure to take reasonable care. The shortfall amount for the period is $17,000 but in order to calculate the penalty the part shortfalls of $15,000 and $2,000 respectively would need to be established.

Reduced liability apportionment

13I. If there are two or more debit adjustments and a credit adjustment or adjustments, the credit adjustment amount will be allocated on a pro rata basis between the debit adjustments. There is an explanation of this process in Attachment A of this Practice statement.

Where the entity is in a loss situation

13J. Adjustments may cause an entity in a loss situation to become taxable, either in the income year relating to the adjustment or in a later income year. The shortfall amount is the amount of tax properly payable.[21]

13K. However, a reduction in a loss that does not result in the entity being taxable does not create a shortfall amount.[22]

Other information on shortfall amounts

13L. A number of additional factors may affect the calculation of the shortfall amount. Explanation and examples are included in Attachment A of this Practice statement.

14. Stage 2 – working out the BPA

14A. The following formula is used to work out the BPA:

BPA = [(Shortfall amount – shortfall amount to extent applied a taxation law in an accepted way) × relevant percentage]

14B. Subsection 284-90(1) provides the BPA is worked out using the following table (and section 294-224 if relevant):

In this situation, where the behaviour is	*The BPA is*
Intentional disregard of a taxation law by the entity or their agent	75% of the shortfall amount or part
Recklessness by the entity or their agent as to the operation of a taxation law	50% of the shortfall amount or part
Failure by the entity or their agent to take reasonable care to comply with a taxation law	25% of the shortfall amount or part

14C. The behaviours considered are those exhibited at the time of, or in connection to the making of the statement. The guidelines for determining the behaviour are in MT 2008/1. They are described briefly

[21] Item 1 in the table in subsection 284-80(1).
[22] But the entity may be liable to an administrative penalty for making a false or misleading statement which does not result in a shortfall amount. See PS LA 2012/4.

in the following sections but you must use the precedential ATO view found in MT 2008/1.

BPA for a significant global entity

14D. For statements made on or after 1 July 2017, if an entity is a significant global entity (SGE)[23] and a BPA in an item of the table in subsection 284-90(1) applies the base penalty amount is taken to be doubled.[24]

14E. An entity's status as an SGE must be worked out on the day the statement was made, and is based upon the most recent income year for which an income tax assessment has been made for the entity[25] or a determination by the Commissioner that the entity is an SGE at the date of the statement.

Failure to take reasonable care

14F. Failure to take reasonable care occurs where reasonable care has not been taken in connection with making the statement, but neither the entity nor their agent has been reckless or intentionally disregarded the law.

Recklessness

14G. Recklessness is behaviour which falls significantly short of the standard of care expected of a reasonable person in the same circumstances as the entity. It is gross carelessness.

14H. Recklessness assumes that the behaviour in question shows a disregard of the risk or indifference to the consequences that are foreseeable by a reasonable person. However, the entity does not need to actually realise the likelihood of the risk for it to be reckless.

Intentional disregard

14I. Intentional disregard of the law is something more than reckless disregard of, or indifference to, a taxation law.

14J. Intention of the entity is a critical element – there must be actual knowledge that the statement made is false. The entity must understand the effect of the relevant legislation and how it operates in respect of their affairs and make a deliberate choice to ignore the law.

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

14K. The BPA is reduced[26] to the extent that the entity treated a taxation law in a particular way that agreed with:

- advice given to them by, or on behalf of, the Commissioner
- general administrative practice under that law, or
- a statement in a publication approved in writing by the Commissioner.

Reliance on advice or a statement from the Commissioner

14L. Where an entity has treated a taxation law as applying in a particular way, and that way agrees with advice we gave them (in writing or orally) or a statement in a document we have published, then they may be protected from application of a penalty.[27]

Alignment with a general administrative practice

14M. The BPA is also reduced to the extent that an entity's behaviour aligns with our general administrative practice.

14N. A general administrative practice under a taxation law is a practice which is applied by us generally as a matter of administration. It is the usual course of conduct that we apply, rather than any particular document, that is relevant in determining whether or not there is a general administrative practice. [28]

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

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

[25] Assessment may be based on the last return lodged, or an original default assessment.

[26] A reduction under section 284-224 is applied to the BPA *before* the formula in section 284-85 is used to determine the amount of penalty. Application of this provision is rare given in most cases where it is applied a decision would have been made that the taxpayer took reasonable care and there was no penalty liability. The reduction in the formula only refers to section 284-225 (voluntary disclosures).

[27] See Law Administration Practice Statement PS LA 2008/3 *Provision of advice and guidance by the ATO*.

[28] For more information on general administrative practice refer to Taxation Determination TD 2011/19 *Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?*

Reliance on a statement in a publication

14O. Publications and other documents we produce may also provide evidence of a general administrative practice. If we frequently provide advice to different taxpayers, which consistently adopts a particular practice, that will tend to support that a general administrative practice exists.

15. Stage 3 – increasing and/or reducing the BPA

15A. In certain instances, the BPA worked out in Stage 2 is increased and/or reduced, using the following formula[29]:

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

Increasing the BPA

15B. The BPA is increased by 20% where the entity[30]:

- prevents or obstructs us from finding out about the shortfall amount[31]
- becomes aware of the shortfall amount after the statement is made and does not tell us about it within a reasonable time, or
- had a BPA worked out for this type of penalty previously, even if the penalty was remitted.

15C. The increase is 20%, even if more than one of the above points applies.[32]

Increasing the BPA – prevent or obstruct

15D. Examples of what would constitute preventing or obstructing us would include where the entity, without an acceptable reason:

- repeatedly defers or fails to keep appointments
- repeatedly fails to supply information
- repeatedly fails to respond adequately to reasonable requests for information, such as
  - by not replying to the request for information
  - giving information that is not relevant
  - not addressing all the issues in the request or
  - supplying inadequate information
- fails to respond to formal information gathering notices
- provides false or misleading information or documents[33]
- destroys records, or
- a combination of single actions mentioned above.

15E. You should also note the use of the term 'repeatedly' when considering increases for prevention or obstruction. Simply not replying to a letter or not returning a call does not indicate the entity is taking steps to prevent or obstruct us.[34] It will also not be obstruction where the incorrect information, or the failure to provide information, was the result of the taxpayer not understanding the request.

15F. However, we hold the expectation that entities will cooperate with us. Whether or not an entity's failure to reply constitutes obstruction will depend upon the facts of the particular situation.

15G. We expect that where legal professional privilege (LPP) claims are made, they are made properly.[35] Claims of LPP are not in themselves obstructive. However, in cases where the claim itself is false or misleading, for example where the statement claiming LPP is baseless or without foundation, you should consider whether the claim was made to obstruct us.

15H. If the hindrance occurs for part of a shortfall amount the BPA is increased only on that part of the shortfall amount.

Increasing the BPA – previous calculation of BPA

15I. The BPA is increased where the entity has a previous BPA calculated of the same type as the penalty being assessed. For false or misleading statements which result in a shortfall amount, the previous calculation must also have been for a false or misleading statement which resulted in a shortfall amount. However the previous penalty calculation does not have to be for the same issue, tax type or behaviour.

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[29] Subsection 284-85(2).
[30] Section 284-220.
[31] The increase in this case will only apply to that part of the shortfall for which hindrance occurs.
[32] Where more than one applies the facts for each should be recorded in the explanation to the taxpayer.
[33] False or misleading statements provided during audit may incur false or misleading statement penalty which does not result in a shortfall amount, which should be taken into account when considering remission of the uplift portion of this penalty.
[34] *Re Ebner v FCT* [2006] AATA 525 at [19]; *Ciprian v FCT* [2002] AATA 746; 2002 ATC 2099; (2002) 50 ATR 1257.
[35] Guidance on our approach to dealing with claims for Legal Professional Privilege can be found in the publication *Our approach to information gathering*, available on ato.gov.au.

15J. For example, where an entity has a shortfall penalty imposed for income tax in 2016, and a shortfall penalty imposed for GST in 2018, the previous BPA calculation will result in the 20% increase in the 2018 penalty. Also, if the 2016 penalty had been remitted in full, the BPA would have been calculated despite there ultimately being no liability, and the increase will still apply.

15K. The increase will apply regardless of whether the previous penalty was assessed during a previous interaction, or whether it occurs on the same day. There is no requirement for the entity to be aware of the penalty for the increase to apply. This means that, where we assess multiple penalties of the same type at the same time, the increase will apply to the second and subsequent statements.[36]

15L. The order of the statements is determined by the date on which they were made, not the period to which they relate.

Example 8

An audit takes place and the entity is found to have made a false or misleading statement for GST claims for the months ending 31 May 2016 and 30 June 2016. The entity has not had a previous BPA amount worked out under items 1, 2 or 3 of subsection 284-90(1). A BPA of 25% is worked out for the two periods for a failure to take reasonable care. However, for the June period, as the entity has had a previous penalty, that is the May activity statement, the BPA for the June activity statement is increased by 20%. (Generally this increase in the penalty is remitted, see paragraph 17E of this Practice statement) However, if the entity had previously had a BPA worked out for another period, for an income tax audit in 2014, the BPA would be increased for the GST periods under examination and would not be remitted.

Reducing the BPA for voluntary disclosure

15M. The BPA can be reduced[37] in certain circumstances where an entity voluntarily discloses a shortfall amount in 'the approved form', and this information allows us to work out the shortfall amount. This reduction only applies to that part of the shortfall amount for which the disclosure is made.

15N. You must refer to Miscellaneous Taxation Ruling MT 2012/3 *Administrative penalties: voluntary disclosures* when making any decision regarding voluntary disclosure and the rates of penalty reduction applicable in certain situations.[38]

The approved form

15O. Currently the approved form for voluntary disclosures does not require a specific format. It lists the type of information required and methods of delivery, and is available on ato.gov.au. The precise form and structure in which the information is supplied does not matter provided the information required by the approved form is supplied.

15P. If we can accurately determine the shortfall amount based on the information provided, the disclosure should be treated as one meeting the requirements of the approved form. The entity does not have to work out the shortfall amount itself.

15Q. In determining whether a voluntary disclosure has been made, it is important to recognise that an entity, making a genuine attempt to inform us of a mistake, may not be fully aware of all the information we require.

15R. If the disclosure fails to meet the strict requirements of the approved form, but substantially complies with the requirements, and you can accurately determine the nature of the false or misleading statement from the information provided, the disclosure should be treated as meeting the requirements of the approved form.

Example 9

Mai writes a letter to the ATO advising that she has over-claimed her work-related expenses for the 2017 income year by $8,700. She does not identify which item in the tax return the expense relates to. She signs the letter and provides information to prove her identity but does not make the required declaration.

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

15S. If additional information is sought on an incomplete disclosure and it is provided within a reasonable time, the original incomplete disclosure should be treated as sufficiently complete.

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[36] *Gashi v Commissioner of Taxation* [2013] ATC 20-377; *Picton Finance Ltd v Commissioner of Taxation* [2013] AATA 116. Also note that often in such situations the increase will be remitted. See paragraph 17E of this Practice statement for detailed explanations.

[37] Section 284-225.

[38] For shortfall penalties, the reduction rate depends on whether a disclosure is made before or after an entity is notified of an examination. The rates are 20% (for post-notification disclosures), 80% (for pre-notification disclosures or post-notification disclosures we have treated as being pre-notification) or to nil (where a pre-notification disclosure is of a shortfall amount of less than $1,000).

15T. The entity's original disclosure would not be regarded as constituting a voluntary disclosure if the facts or reasonable inferences indicate that the entity supplied incomplete information in an attempt to obstruct or hinder us from identifying the correct information (that is, the false or misleading nature of the statement), particularly where the degree of incompleteness is significant. [39]

Example 10

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

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

Example 11

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

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

15U. In more complex, low-volume reviews and audits, you should:

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

16. Stage 4 – considering whether to remit the penalty

16A. We have the discretion to remit all or part of the penalty.[40] This discretion is 'unfettered' meaning that there is no legal restriction on when we can and cannot remit. Remission provides the administrative flexibility to ensure the penalty imposed is aligned with the observed behaviour.

16B. However, this Practice statement sets out guidance that must be used in exercising this discretion. Remission is not limited to the reasons listed here, and you should consider remission in any situation where the final penalty is not a just outcome.

16C. You must make a remission decision whenever penalties are imposed. You may decide that there are no grounds for remission or that there are grounds to remit in full or in part. The final penalty you apply must be defensible, proper and have regard to the overall circumstances of the entity, and the purpose of imposition and remission of this penalty.

16D. You need to consider each case on its own merits, looking at all of the relevant facts and circumstances.

16E. Entities in the same circumstances should be treated consistently for remission purposes. This is particularly relevant for entities involved in examinations relating to the same arrangement. However, this should not be used as justification for replicating an incorrect penalty decision made in relation to another entity.

16F. Relevant matters to consider in making a remission decision include:

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

16G. Matters that you shouldn't usually consider include:

- behaviour or situations unrelated to the relevant statement, such as the entity or registered agent

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

[40] Section 298-20.

becoming ill at the time of the examination, well after the statement was made

- that there is 'no harm to the revenue', such as when a refund has been stopped before issuing[41], or a credit was available in another accounting period
- where GST was 'not included' in working out the selling price for the transaction, because the entity could not or would not collect the GST on that supply from the purchaser, or
- whether there is a capacity to pay the penalty[42] (except in relation to determining whether a trustee or beneficiary is the more appropriate entity to bear their penalty).

17. *Examples of situations warranting remission*

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

17B. Some examples of where an unjust result could arise are outlined here. You should also consider remission in other instances where the result is unjust, having regard to the particular circumstances.

Mechanical process of the law

17C. In some instances, the mechanical or calculation process of the law could result in an unintended or unjust result, and remission in part or full may be warranted.

17D. A tax credit for amounts withheld, such as amounts withheld from wages or interest are included as an addition to an assessment notice, but do not form part of the assessment or shortfall amount. Where a taxpayer under reports credits available, the shortfall amount does not change because of the credits. Because the entity has paid these amounts in the income year in question, the penalty should be remitted to the extent of the penalty calculated on an amount equal to the credit. See Example 16 in Attachment A of this Practice statement.

17E. As noted in paragraph 15K and Example 8, remission of the 20% uplift is usually given where:

- a BPA is increased because two or more penalties were assessed at the same time
- the entity has not been advised of a previous penalty (usually because of concurrent calculation), and
- the behaviour is not intentional disregard of the law.

17F. Where information is provided prior to lodgment, or as part of lodgment, of a document that, but for the timing, would meet or exceed the requirements of a voluntary disclosure in the approved form, remission of 80% of the BPA should generally be given to the extent of the disclosure. In some cases it may also be appropriate to remit the remaining 20%, but is not automatic. Normal remission principles apply and specific factors to consider in these circumstances include:

- how, why and when the entity disclosed the information to us, and
- the extent to which the entity was aware of a potential risk when they chose to make the relevant statement.

Example 12

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

Example 13

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

If GHI Ltd provided us information to the ATO, either in the RTPS or as a supplement to the RTPS, that is sufficient for the Commissioner to identify the basis of this statement and calculate the shortfall amount, remission of the shortfall penalty may be given to the extent of the shortfall amount identified by the information. However, remission is not given where there is evidence or reasonable inference to suggest there was intentional disregard of the law in filling in the tax return for those items. GHI Ltd may also make a voluntary disclosure after lodgment of the tax return

[41] *FC of T v Dixon (As Trustee for the Dixon Holdsworth Superannuation Fund)* 2007 ATC 4748.

[42] Capacity to pay and hardship may be dealt with through payment arrangements, compromise, release and insolvency and under other taxation or insolvency provisions, and not remission of penalties.

and the appropriate reduction and remission will apply (see paragraphs 17AD to 17AF of this Practice statement and MT 2012/3).

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

17G. We have the discretion to treat a document as a tax invoice or adjustment note, despite it not meeting the requirements to be a tax invoice or adjustment note.[43] Where we accept that a creditable acquisition or decreasing adjustment has been made, but do not exercise the discretion, a shortfall amount may arise.

17H. In these instances, you should usually remit any shortfall penalty in full unless it is clear the recipient:[44]

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

17I. Any decision not to remit the shortfall penalty relating to the GST credit or decreasing adjustment must be approved by an EL 2 officer or above.

Where the actions of the tax agent are more culpable than the entity's actions

17J. Sometimes an agent's behaviour is more culpable than the entity's. This can result in an unjust result.

17K. For example an unjust result may also occur in certain situations where the entity has made a genuine attempt to comply (they have taken reasonable care), but because of the actions of their tax agent the entity is liable to a penalty and safe harbour does not apply (for example, because the agent was reckless in their application of the law).

17L. As an entity is responsible for the actions of their agent, except where safe harbour applies, it would be unusual for full remission to be given unless the taxpayer took reasonable care.

17M. An entity does not give up responsibility simply by appointing a tax agent. They are still required to ask questions or make reasonable enquiries, commensurate to their knowledge and experience, with the tax agent about the reporting that is occurring.

Additionally, they are liable for the penalty outcomes of actions of their agent unless safe harbour applies.

17N. Where the entity failed to take reasonable care some remission may still be appropriate. However, in the absence of exceptional circumstances, remission (if any) on this basis should not be below the level of behaviour exhibited by the entity unless other circumstances apply.

Example 14

Donald changed accountants on the recommendation of a friend as the friend had received a large refund. Donald used the agent and received a significantly higher than usual refund. A subsequent audit identified significant shortfall amounts as a result of exaggerated deduction claims related to private expenditure. Interest deduction claims included 50% of the mortgage loan interest for the family home in which his family lived and from which Donald occasionally worked, 40% of his family's private phone bill and Donald had a work phone, some travel to work, some family grocery expenses, and numerous other private expenses. The behaviour was assessed as intentional disregard of the law.

Donald said this was his tax agent's fault, stating he provided his agent the information he had requested. Donald did say that he did not question the agent. He just signed the document.

While the ATO did not expect Donald to ask sophisticated questions about the tax law, it would be expected for him to review the documents, to ask questions about some items – he knew he couldn't claim his mortgage interest and hadn't in the past but hadn't noticed it was included in the return. He did not ask if his previous agent was wrong and why. In not making appropriate enquiries with the tax agent, and not checking, and in choosing to be 'un-curious' of their accuracy Donald failed to take reasonable care, and has been reckless. Remission of penalty was not considered appropriate.

This compares to Mo who went to the same agent. He checked the return and noticed the large claim for interest. He told his agent he only used one room to work from home not half the property and that amount was reduced. Although we later found that Mo was not entitled to claim the deductions for the interest and a few other items, in this case Mo has made appropriate enquiries by asking questions about some other items and been given explanations by the agent as to why he could claim the travel expenses to work.

Safe harbour did not apply because of the agent's behaviour but Mo, while he could have confirmed certain more extreme information, made an attempt to understand and question the situation. Significant remission is appropriate in this situation.

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[43] PS LA 2004/11 *The Commissioner's discretions to treat a particular document as a tax invoice or adjustment note* contains guidance on exercising this discretion.

[44] PS LA 2007/4 *Remission of penalty for failure to comply with obligations in relation to tax invoices, adjustment notes or third party adjustment notes.*

Trustees and beneficiaries

17O. Where both trustee and beneficiary have penalties imposed for the same shortfall amount, it may be appropriate to remit one or both of the penalties, depending upon the facts and circumstances of each particular case. This is to ensure that penalties are ultimately only imposed once for any given shortfall amount.

17P. In determining who should ultimately bear the penalty, you should consider:

- the extent to which the respective actions of either the trustee or the beneficiary have caused the false or misleading statements
- the extent to which penalising the trustee for the shortfall amount of a culpable beneficiary may penalise other 'non-culpable' beneficiaries (where the trustee can draw on the trust's assets for payment)
- the capacity of the parties to pay the penalty, and
- that there should be no 'double penalty' ultimately imposed on any given part of the shortfall amount (notwithstanding that penalties may be imposed on both parties until such time as information is provided to determine who should ultimately bear the penalty).

17Q. Where a beneficiary has knowledge of the trustee's behaviour or is in a position to control the trustee, we would generally remit the part of the trustee's penalty relating to that beneficiary's shortfall amount, and maintain the full penalty on the beneficiary.

17R. Where despite our attempts to obtain information from the trustee and/or beneficiaries, there remains insufficient information available to fairly determine which party should bear the penalty, we would maintain the full penalty amount on both the trustee and the beneficiaries, with no remission to either, and invite them to provide the necessary information to us.[45]

Example 15

A delicatessen is operated by a discretionary trust. The sole beneficiaries, a husband and wife, work the shop and are sole directors of the corporate trustee of the trust.

Audit identifies shortfall amounts for multiple tax returns for the trust and beneficiaries, due to trust income and distributions to beneficiaries having been understated over a three-year period. The beneficiaries took cash from the business which they omitted from the trust's business records. They provided the incorrect records to their tax agent for preparation of both their individual tax returns and the trust tax returns.

The trustee and both beneficiaries are liable to statement penalties and the same BPA behaviours apply, given the beneficiaries are the controlling minds of the trust.

In this case it was deemed appropriate for the beneficiaries to bear the full weight of the penalties. The penalties were maintained on the beneficiaries and remitted in full on the trustee.

Alternatively, using the above example, if one of the two beneficiaries was not culpable (for example, was not actively involved in the administration of the business and trust and unaware of the omitted trust income and distributions), that beneficiary will not be liable to a penalty related to their own shortfall amounts. However the trustee is liable to penalty related to the shortfall amounts for the trust, potentially affecting all beneficiaries including the non-culpable party. It would be appropriate to remit the trustee's penalty to the extent related to distributions made to the culpable beneficiary and to not remit the culpable beneficiary's penalty related to their own tax return shortfall amounts.

Alternatively, if the trustee of the trust was not the corporate entity but rather an independent accountant (individual) who was provided with incorrect business records (from the beneficiaries), was unaware of the understated income and distributions and took reasonable care in preparing the trust tax return, no penalty liability would apply for the trust's shortfall amounts. However as the beneficiaries have knowingly provided false business records to the trustee, resulting in the net income of the trust being understated and shortfalls arising in their own tax returns, they are liable to penalty.

Multiple penalties

17S. There may be some circumstances where the entity's behaviour results in more than one type of penalty applying under the law. The remission treatment of the penalties will differ according to the penalties that apply and the action or actions that lead to each penalty.[46]

[45] The trustee and/or beneficiaries should be asked to provide this information in their response to our position paper or, if they fail to do that, it can be supplied in the form of an objection to our remission decision.

[46] Law Administration Practice Statement PS LA 2008/18 *Interaction between Subdivisions 284-B and 284-C of Schedule 1 to the Taxation Administration Act 1953*

17T. For example, an entity may be liable to a penalty for failing to keep or retain records[47], as well as false or misleading statement penalties for incorrectly reporting. However, while the failure to keep records may have led to the false or misleading statements, keeping records and reporting correctly are not the same obligations and may not necessarily comprise the same actions. The failure to keep records reflects day to day business management practices. The underreporting of income or over claiming of credits is a separate action and separate decisions need to be made.

17U. In those circumstances, both penalties apply and there is no automatic remission of the lesser penalty. The relevant remission principles should be considered for each penalty. However, we should consider whether maintaining both penalties produces an unjust result.

17V. This is especially relevant where multiple penalties arise from the same course of action. For example, where an amount in an assessment is both a shortfall amount for the purposes of both a false or misleading statement penalty and a scheme shortfall penalty[48] although both penalties might apply by law, one would generally be remitted to prevent an unjust result.

Amount reported or claimed in incorrect period

17W. In some cases, a shortfall amount may represent an amount of tax deferred rather than an amount of tax permanently avoided. This generally occurs where an amount is reported in a period later than it should be or credit claimed in a period earlier than it should be.

17X. If it is reasonable to assume that not reporting in the correct period was not an attempt to defer or avoid the payment, we generally should fully or partially remit the penalty assessed.

17Y. In income tax cases, if there has been a reduction in the rate of tax between the two years in question, there will be an amount of tax avoided. Remission of the penalty relating to the avoided tax would generally not be warranted.

17Z. If the shortfall amount for the period is determined prior to lodgment of the second statement (which could have reported the amount), generally remission would not be given on this basis, and general remission principles may apply.

Amount reported or credit claimed in another entity's tax return or activity statement in the same accounting period

17AA. If an amount omitted by one entity is mistakenly included by another entity in their tax return or activity statement for the same accounting period, you may remit the penalty in full if, after the relevant amendments, there was no tax avoided in overall terms.

17AB. This principle applies equally for deductions or credits claimed in the wrong entity's tax return or activity statement.

17AC. However, if there were different tax rates for the two entities, or one entity has losses, other tax deductions or offsets which created a tax advantage by treating the amounts incorrectly, there may be an amount of tax avoided. Remission of the penalty relating to the avoided tax would generally not be warranted.

Voluntary disclosure

Before notification of examination

17AD. Where penalties are reduced by 80% for a voluntary disclosure made before notification of a review, audit or other examination[49] any penalty remaining after the reduction should be remitted in full, unless the entity was reckless or intentionally disregarded the law.

17AE. However, a disclosure made after being told of an examination (even if we treated it as being before notification or it was during a review) does not get remission of the remaining 20% of the penalty because the voluntary disclosure was made.

After notification of examination

17AF. Where a review moves to an audit it is generally expected the entity will be notified at the closure of the review. However in limited cases a delay may occur between closure of a review and commencement of an audit and there is a gap period where the entity is not subject to examination. A voluntary disclosure made during this 'gap' period, does not get remission of the remaining 20% of the penalty on the basis they are not currently 'told' of an examination.

Significant global entities (SGE)

17AG. An entity (which is not an SGE at the time they make a false or misleading statement) may be treated as an SGE on the basis of their last lodged return,

provides details of the policy in relation to imposition and the Commissioner's discretion to remit where Subdivisions 284-B and 284-C penalties apply to the same statement.

[47] Section 288-25.

[48] Section 284-150.

[49] The definition of examination is broad and includes audits and reviews. Refer to MT 2012/3.

default assessment or a determination by the Commissioner, and have a penalty multiplier used to assess their penalties.

17AG. When the entity subsequently lodges a tax return for the income year in which the false or misleading statement was made which shows that they were not an SGE at the time of the statement, the penalty will be recalculated without the SGE multiplier on that basis.

17AH. However, if the entity requests remission of the penalty prior to that tax return being lodged, on the basis they were not an SGE at the time of lodgment, and is able to provide sufficient evidence that they were not an SGE at the time of the statement, partial remission to the non-SGE rate would be appropriate.

STEP 3: NOTIFY THE ENTITY OF THEIR LIABILITY

18. Notifying the entity

18A. There are two parts to notifying the taxpayer of the penalty:

- explaining why there is a liability to a penalty, and
- issuing a notice of assessment for the penalty which raises the liability to pay the penalty.

Reasons for decision

18B. Where there is a liability we must give a written explanation to the entity[50] informing them of:

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

18C. This explanation, called reasons for the decisions, will set out the facts that we have used to make the decision, and explain how the law works for penalties in a matter appropriate to the entities client group.

18D. In more complex cases or where objection or litigation is likely, it will set out the findings on material questions of fact and refer to the evidence or other material that those findings were based on. In other words, you must explain not only what the decision and the penalty is, but why you have made it, the law used and the facts you considered. In all cases, you must also address all issues raised by the entity regardless of whether they are relevant to normal penalty considerations.

18E. The law does not specify when the explanation must be supplied. However, a case officer should usually ensure the reasons for a liability to a penalty are supplied prior to, or at the same time as the entity is notified of the penalty. In those instances where this is not possible they should be provided as soon as possible after issuing a notice of assessment of penalty.

18F. The law does not require us to give reasons for the penalty decision where the penalty has been reduced or remitted to nil. The extent to which we explain this to the entity will depend on a number of factors. This includes the type of entity and interaction, whether it is reasonable care or remission[51] and what the behaviour was and that, in order to positively influence compliance behaviour, the basis of a penalty decision or the error should be clearly and promptly explained to an entity, or education should be provided.

18G. We may:

- provide a full explanation of the penalty decision
- advise the entity the penalty outcome with a summary of our reasons and offer to provide reasons if requested, or
- advise the entity of the outcome only where the explanation for the primary tax decision identifies the potential reason for the error and explains how to correct it and report correctly in future.

18H. You must also record complete reasons for the penalty decisions on the relevant ATO system – regardless of the level of explanation provided to the taxpayer – although this could be the same document as the reasons for decision sent to the taxpayer).

Notice of assessment

18I. You must make an assessment of the amount of an administrative penalty and give (or serve) the taxpayer with that notice.

19. Right of review

19A. An entity that is dissatisfied with any element of the penalty assessment may object to the penalty assessment.[52] The grounds of the objection may include all elements of the penalty assessment, including the remission decision where it is made as part of the penalty assessment.

19B. Tax officers are generally required to make a remission decision as part of the assessment of the

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

[51] Generally, remission decisions.
[52] Subsection 298-30(2).

penalty. However in exceptional circumstances this might not occur.

19C. If a remission decision is made after an assessment of the penalty, the entity may also object to the separate remission decision if the amount remaining after remission is more than 2 penalty units.[53]

19D. If the entity objects against a primary tax liability (usually an assessment), and the objection results in a reduction of the shortfall amount, then the amount of the corresponding shortfall penalty is proportionately reduced. This is not a remission decision and no separate objection rights attach to the recalculation of the penalty.

19E. Where there is no liability to a penalty because of an exception, reduction or remission, there is no objection right.

20. More information

For more information, see:

- MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*
- MT 2012/3 *Administrative penalties: voluntary disclosures*
- PS LA 2008/3 *Provision of advice and guidance by the ATO*
- PS LA 2012/4 *Administration of false or misleading statement penalty - where there is no shortfall amount.*
- PS LA 2016/5 *The disclosure of information and documents collected by the Registrar of the Australian Business Register*
- TD 2011/19 *Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?*

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[53] The value of a penalty unit is contained in section 4AA of the *Crimes Act 1914* and is indexed regularly. A table containing penalty unit values can be found by searching for 'penalty unit' on ato.gov.au.

ATTACHMENT A – CALCULATIONS

This attachment explains how the different components in the penalty formula are calculated.

Credits which do not form part of an income tax assessment

Some credits, such as PAYG withholding and TFN withholding amounts, which are reported in the tax return do not form part of the income tax assessment. Where there is an increase in the credits from the amount originally reported any income tax shortfall amount is not reduced to reflect the increased credits [54], but remission of penalty may be appropriate in this circumstance.

A reduction in the credit reported is a shortfall amount in respect of the amounts withheld.

Example 16

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

One of the payment summaries also included PAYG withholding amounts totalling $4,000. These credits are applied to reduce the amount of tax payable (or other debts) after the (amended) assessment is made. Therefore, while the shortfall amount is $5,200, the amount payable is only $1,200. (The penalty should be remitted to the extent that it relates to the $4,000 of tax which is offset by the credit for tax withheld.)

Head company of consolidated group

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

Amendment not required in certain situations

If an entity makes a request for an amendment to its tax position, we are not required to make the amendment if we believe the entity is not entitled to the amounts claimed or the reduction in tax payable. Therefore, it is possible for a shortfall penalty to be assessed where the Commissioner does not make an adjustment or issue an amended assessment.

Example 18

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

The shortfall amount is the difference between the amount incorrectly claimed ($37,200) and the correct entitlement which is nil. A shortfall amount of $37,200 exists.

Further information available prior to issuing income tax assessment

Where we have information available when the tax return is lodged and that information is not subsequently reported in the return, what happens next will depend on the entity type:

- Full self-assessment entities, such as companies or superannuation funds, are deemed to have been assessed[55] by us upon lodgment of a tax return in the approved form. Where any adjustment is subsequently

[54] *Commissioner of Taxation v. Ryan* (1998) 82 FCR 345.
[55] Examples are from section 166A of the *Income Tax Assessment Act 1936* and section 72 of the *Fringe Benefits Tax Assessment Act 1986.*

made an amended assessment must issue. The shortfall amount is generally the difference in the relevant liability as originally reported in the tax return (deemed assessment) and the notice of amended assessment.

- For entities which are not full self-assessment taxpayers, such as individuals and trusts, an assessment cannot be deemed on the basis of a statement and must be actually made by us. We may issue an original assessment with adjustments to the items as stated in the tax return taking into account additional information prior to issuing the assessment. The shortfall amount is the difference between the amount of tax-related liability, if we calculated it based upon statements in the tax return, and the tax-related liability in the notice of original assessment. There is no amended assessment.

Example 17

Mavis lodges her 2009-10 tax return. Prior to making an assessment we review the tax return and identify deductions claimed in error. An assessment of the tax-related liability is made for an amount of $60,000.

For the shortfall amount, we compare the tax-related liability worked out using Mavis's original statements in her return. A refund of $20,000 would have resulted. However, the correct liability after disallowing the deductions is a tax-related liability of $60,000. The shortfall amount is therefore $80,000.

Apportionment of a shortfall amount within the same accounting period, including credits

In determining a shortfall amount, a number of labels in a statement may be adjusted. Where there is a mixture of adjustments (and/or BPA behaviour rates) you will need to apportion the total shortfall amount into individual components.

Where there are a number of increasing and decreasing adjustments, the resulting shortfall amount is allocated on a pro rata basis between the adjustments that result in an increase in liability (or decrease in the amount of a credit or payment).

The reduction in the tax-related liability (from the credit adjustment/s) is apportioned in the same ratio as each component to the shortfall amount. That is, a pro rata portion of the reduction is subtracted from each of the various parts of the shortfall amount.

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

Example 19

A GST examination results in three adjustments, two of which increase the tax-related liability by $10,000 and $5,000 and the third which reduces the liability by $6,000. The shortfall amount, after all the adjustments are made, is $9,000.

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

- *Label 1A: $10,000 – recklessness*
- *Label 1B: $5,000 – reasonable care.*

The 'notional' shortfall amount (excluding the credit adjustment) is $15,000 ($10,000 + $5,000).

The individual BPA components of the shortfall amount are calculated by multiplying the shortfall amount by the fractional percentage for each part of the notional shortfall amount as follows:

$9,000 × ($10,000 ÷ $15,000) = $6,000

and

$9,000 × ($5,000 ÷ $15,000) = $3,000

Therefore, the total BPA will be

$3,750 ($6,000 × 50% + $3,000 × 25%)

The calculation process may be easier to understand if a fractional or percentage is calculated for each part of the shortfall amount using the following formula:

$$\frac{\text{Shortfall amount related to issue}}{\text{Notional shortfall amount}} = \text{Fraction or percentage}$$

The fraction or percentage of each part of the shortfall is then multiplied by the shortfall amount to calculate the amount of that part of the shortfall to which the prescribed penalty rate for that part is applied. Example 19 uses this process.

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

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

Reduced liability for income tax

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

- basic income tax liability – which is the taxable income multiplied by the appropriate rate/s. Adjustments to assessable income or allowable deductions, that is, adjustments to the taxable income are considered in one broad category
- tax offsets – which directly reduce the net income tax liability, and
- levies and charges – such as the Medicare levy surcharge, the superannuation surcharge and the termination payments surcharge.

Example 20

Compli Pty Ltd lodges their tax return. An audit identified two separate tax offsets claimed by Compli that they were not entitled to claim. The tax officer also identified an additional amount of an unrelated tax offset that Compli was entitled to claim.

The total net shortfall amount is $900,000.

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

- *$500,000 resulting from intentional disregard*
- *$1 million resulting from failure to take reasonable care.*

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

The penalty is calculated as follows:

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

   $500,000 + $1 million = $1.5M

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

   $900,000 × ($500,000 ÷ $1.5m) = $300,000

   $900,000 × ($1.0m ÷ $1.5m) = $600,000

3. *Calculate the BPA for each part:*

   $300,000 × 75% = $225,000

   $600,000 × 25% = $150,000

4. *Calculate the penalty amount:*

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

$225,000 + $150,000 = $375,000

Example 21

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

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

The amounts of the adjustments and the relevant behaviour are:

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

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

The penalty is calculated as follows:

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

For the basic income tax liability stage:

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

The sum of the debit adjustments is:

$1,000 + $2,000 + $500 = $3,500

$$\frac{\$1,000}{\$3,500} = 2/7$$

$$\frac{\$2,000}{\$3,500} = 4/7$$

$$\frac{\$\ 500}{\$3,500} = 1/7$$

2. Determine the proportional shortfall amount for each part:

$1,435 × 2/7 = $410

$1,435 × 4/7 = $820

$1,435 × 1/7 = $205

3. The BPAs for each part is then calculated:

$410 × 50% = $205

$820 × 25% = $205

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

For the net income tax liability stage:

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

The sum of the debit adjustments is

$1,000 + $500 = $1,500

$$\frac{\$1,000}{\$1,500} = 2/3$$

$$\frac{\$\ 500}{\$1,500} = 1/3$$

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

   $1,080 × 2/3 = $720

   $1,080 × 1/3 = $360

3. *The BPAs for each part are then calculated:*

   $720 × 25% = $180

   $360 × 50% = $180

The total penalty is the sum of the BPAs.

4. *Calculate the penalty amount:*

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

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

GST situations

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

Example 22

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

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

The penalty will be calculated as follows:

Shortfall amount for understated sales (as adjusted for proportion of under-claimed GST credits):		
$5,000 – ($2,500 × 5000 ÷ 7000) =	*$3,214.00*	
Penalty for recklessness:		
$3,214 × 50% =		*$1,607.00*
Shortfall amount for misclassification (as adjusted for proportion of under-claimed GST credits):		
$2,000 – ($2,500 × 2000 ÷ 7000) =	*$1,286.00*	
Penalty for lack of reasonable care:		
$1,286 × 25% =		*$321.50*
Total GST penalty		*$1,928.50*
Calculation of penalty on PAYG instalment shortfall amount:		
Understated income (recklessness):		
($50,000 × 2%) × 50% =		*$500.00*
Total penalty for activity statement		*$2,478.50*

ATTACHMENT B – PENALTY RELIEF

1. As set out in this attachment, penalty relief can be given to certain groups or types of taxpayers, generally individuals and small business. This means where the entity has a liability to a specified category of administrative penalty, the relevant penalty will not be applied and a notice of assessment will not be issued.

Reasons for penalty relief

2. The individual and small business taxpayer populations sometime have:

(a) lower levels of financial literacy, business experience and taxation knowledge

(b) more limited financial capacity to engage taxation and business professionals to provide taxation advice, or

(c) less time to manage their affairs on their own given the complexity of the tax system for small businesses and superannuation funds.

3. This can result in individual and small business taxpayers managing all or part of their own taxation affairs, or engaging with tax practitioners with the potential for errors in underlying information. This frequently results in low value shortfall amounts with a low BPA which penalty relief specifically addresses.

4. Accordingly the penalty relief is confined to most taxpayers within the individual and small business groups. The specific types of entities (or taxpayer groups) who may or may not get penalty relief are explained in paragraphs 11 to 14 of Attachment B of this Practice statement. Even if you consider the taxpayer to have access to advice and resources because of their circumstances, penalty relief is to apply unless they fall into one of the categories that excludes its application.

5. The penalties within scope of penalty relief are set out in paragraphs 6 to 10 of Attachment B of this Practice statement. Penalty relief is typically provided in situations where there is a failure to take reasonable care, often for the reasons noted in paragraph 3 of Attachment B of this Practice statement. This excludes penalties where disregard or indifference to the law or intentional disregard of the law has occurred. In such cases, for example it is appropriate for there to be a consequence for failing to try to meet obligations for correct reporting.

Penalties where penalty relief may be considered

6. Only penalties arising from statements made in income tax returns and business activity statements (excluding FBT instalments) are eligible for penalty relief. Statements for FBT and superannuation guarantee are excluded, as are statements made for other taxation purposes.

7. The penalties for which penalty relief can be given are:

(a) shortfall penalty for false or misleading statements which result in a base penalty amount for failure to take reasonable care (25% of the shortfall amount)

(b) penalty for false or misleading statements that do not result in shortfall amounts for failure to take reasonable care where the statements relate only to the reduction in carry forward losses, and

(c) penalty for not having a reasonably arguable position.

8. All penalties listed in paragraph 7 of Attachment B of this Practice statement, to which the entity is liable, for each period and issue in the examination (generally a review or audit) can be considered for penalty relief. That is, if there are penalties for more than one period or issue, penalty relief can apply to all. An exception to this will be where the eligibility to penalty relief changes in those periods.[56].

9. Penalty relief will not apply to penalty at the 25% BPA rate, if any one or more of the periods or issues in the examination has a false or misleading statement BPA for recklessness or intentional disregard.

10. The practical effect of the penalty relief measure on administration is that we are using resources more efficiently through not having to engage the machinery provisions of the law which provide for the assessment and review of penalties. Where penalty relief is applied, there is no penalty amount to be paid in that instance.

[56] For example a company that was a small business for the 2016 and 2017 income years but not 2018, but is audited for all three years will only have penalty relief apply to statements made for 2016 and 2017.

Eligible entities that may get penalty relief

11. The following entities are eligible for penalty relief consideration, subject to the exceptions noted in paragraphs 14 and 15 of Attachment B of this Practice statement:

(a) *Individuals*

(b) *Small business entities* – sole traders, partnerships, companies or trusts[57] that meet both of the following during the income year the statement is under examination, where the entity:

i) operates a business for all or part of the income year

ii) has an aggregated turnover less than the small business turnover threshold.[58]

12. This means that while most entities will get penalty relief for all periods in an examination, where the entity moves between eligible and ineligible groups, they will only be considered for penalty relief for the periods (generally income years) for which they are not in an ineligible group.

13. Further explanation on situations that can arise for eligible entities:

(a) **Partnerships**

Activity statements: the partnership is a separate entity with penalty relief eligibility assessed at the partnership level. Only if a partner who is not eligible for penalty relief has control of the partnership will the partnership be ineligible for penalty relief.

Corporate limited partnerships: penalty relief eligibility is assessed at the partnership level. Only if a partner who is not eligible for penalty relief has control of the partnership will the partnership be ineligible for penalty relief.

Income tax: a shortfall penalty cannot be imposed as there is no shortfall amount for the partnership. The penalty is imposed on the individual and their individual eligibility is determined.

(b) **Trusts**

Income tax: penalty relief will apply to a trust, where they are relevant entities for penalty relief, where the trust meets the small business eligibility criteria.[59]

Activity statements: the trust is a separate entity and is subject to the penalties for the small business entity criteria.

(c) ***Cooperatives, not for profit organisations and strata title body or body corporates*** – penalty relief is considered where turnover does not exceed $10 million (aligned to small business entities).

Ineligible entities

14. The following entities are not eligible for penalty relief consideration for any period that they were considered to have the status of a:

(a) ***Non-small business entity*** – sole traders, partnerships, companies and trusts that do not meet the small business entity eligibility criteria as detailed in paragraph 11 of Attachment B of this Practice statement.

(b) ***Wealthy individuals including high wealth individuals and the entities they control, and their associates*** – wealthy individuals are resident individuals who, together with their business associates, control net wealth of $5 million or more. Wealthy individuals who control net wealth of $30 million or more are classified as high wealth individuals.

Business entities controlled by wealthy individuals that are small business entities will not be eligible for penalty relief.

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[57] If the trustee and beneficiary are both liable to the penalty, and penalty relief applies only to one entity, penalty relief will not automatically be given for the other entity.

[58] Section 328-110 of the *Income Tax Assessment Act 1997* defines the criteria for a small business and the small business turnover threshold, which increased to less than $10 million from 1 July 2016 (and is current to publication date of this PSLA). The small business turnover threshold of less than $2 million should be used for statements for periods prior to 1 July 2016 when considering if an entity is a small business and is eligible for penalty relief.

[59] Beneficiaries will be assessed as individuals or the entity type they are for their own personal income tax reporting.

The definition of associates is available on ato.gov.au. [60]

(c) ***Public group, significant global entity and associates*** – public groups and significant global entities are excluded, as are their subsidiaries that might ordinarily be included as a small business entity.

(d) ***Self-managed superannuation funds*** – the fund is excluded if any member is a ***wealthy*** or ***high wealth*** individual.

Reset period and further exceptions to penalty relief

15. Penalty relief may not be a one-off event. Penalty relief can be given multiple times however it cannot be given for three years after an earlier penalty relief or other certain events.

16. Penalty relief is not available where, in the three years prior to the date that the entity is (or would be) advised of the final decision in the current audit, an entity has one or more of the following:

- had penalty relief previously applied, that is, currently have an active reset period
- been assessed with false or misleading statement penalty for reckless or intentional disregard[61]
- evaded tax or committed a fraudulent act relating to taxation law
- been involved in the control or management of another entity which has evaded tax
- had debts incurred without the intention of being able to pay including but not limited to involvement in phoenix activity
- during the examination they sought to prevent or obstruct the Commissioner from finding out about the shortfall amount as detailed in paragraphs 15D to 15H of this Practice statement.
- had no penalty imposed as part of a special project – see paragraph 18 of Attachment B of this Practice statement.

17. If penalty relief is given for an examination and a later examination occurs within the reset period, penalty relief will not be applied even if the statement was made prior to the previous penalty relief decision. Except if the penalty relates to the same issues examined by us in an earlier examination and the statement or return in the later examination was lodged prior to the relief advice in the earlier examination. In such circumstances penalty relief can apply.

18. Special projects may provide incentives to entities that come forward on targeted risks, such as knowing that they will not be penalised under the normal provisions. Where an entity has received a concession under a special project, that is not a concession available under law, such as under the voluntary disclosure provisions, they will not be eligible for penalty relief until the three-year reset period expires.

Commencement date and scope

19. The penalty relief strategy commencing on 1 July 2018 will apply to any ongoing examination (such as a review or audit) that is underway on or after 1 July 2018. An examination will be ongoing if the final decision on the examination has not been issued to the taxpayer or their authorised representative.

20. Penalty relief will apply to any examination (review or audit) in progress on or after 1 July 2018. It will also apply to any directly linked issues in previous income tax returns and activity statements lodged prior to the final case decision being formally advised[62] for the first review or audit that is in progress on or after 1 July 2018.

21. Where statements for periods later than the review or audit period are lodged during the course of an examination in progress, those statements with directly linked issues to the active review or audit can also be brought into scope and penalty relief will apply.

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[60] Where necessary interpretation of the term associates should be undertaken by reference to the definition in section 318 of the *Income Tax Assessment Act 1936*.

[61] The date the penalty, reasons for decision or audit/review finalisation letter was issued to the taxpayer will be used in this instance.

[62] Advice of the final case decision typically will be aligned to the issue date of the case finalisation letter, or the date the final decision is told to the entity through any alternate communication channel used for particular audit or review products.

22. Directly linked issues include:

- The same issue for an earlier or later period than in the first audit, provided lodgment for the period occurred prior to the final decision.
- Where one adjustment resulted in another adjustment and the later did not occur during the first audit. For example, an entity underreported sales in their activity statement and used the same incorrect amount in their income tax return. The first audit amended the error in the activity statement (and applied penalty relief) but not the tax return. As the tax return error is a directly linked issue (to the activity statement error) penalty relief will apply, notwithstanding the tax return error is identified separately or in a later audit.

Objections

23. Penalty relief will be considered in any penalty objections where the original audit or review case was in progress on or after 1 July 2018. If the objection decision reduces the penalty to the base penalty for failure to take reasonable care penalty relief will be applied.

24. If penalty relief is applied and the objection decision determines that there is no penalty because of the reduction of the shortfall amount, penalty relief will be deemed not to have occurred, and the reset period will be not triggered.

25. Existing provisions including administrative review, remission and/or objection rights remain available.

General items

26. Improving the understanding of the entity of the regular and correct reporting outcome or of the risks in not taking reasonable care is a key element of penalty relief.

27. Therefore after an examination an entity should be aware of the errors they made, and they should have enough information to understand how to avoid making the same error in future.[63]

Administration

28. You are required to make and record those decisions about the BPA (behaviour) with the supporting facts and evidence and note the application of the law explained when penalty relief is given. These decisions must be recorded in any relevant case management system.

29. Where there is no penalty liability in the audit because the entity took reasonable care or because of safe harbour or a mix of the two, the entity's penalty relief opportunity will remain available in the future without triggering a reset period.

30. Where there are no changes in the voluntary disclosures practices:

- voluntary disclosures are still to be invited at the commencement of an audit, if that is the current practice
- voluntary disclosures reductions will be applied, and where the shortfall amount is less than $1,000 the penalty will be reduced to nil, without the application of penalty relief. If the reduction is 80% or 20% of the base penalty amount, penalty relief will be applied where eligible.[64]

31. You are not required to consider or record a decision on an increase in penalty or remission of penalty, where penalty relief is to be applied.

32. Where penalty relief is given the taxpayer must be informed of this.

33. The date the final decision is given to the entity is the commencement date of the reset period and must be recorded in the relevant case management system.

[63] Where the taxpayer or their agent voluntary disclosures the shortfall amount it can be appropriate to assume that they now have this awareness.

[64] Where a voluntary disclosure is made for an issue or period is outside of the identified scope of the examination, any penalty remaining after reduction for that specific voluntary disclosure will be remitted in full.

34. Where penalty relief has been given, a BPA has been calculated and for any subsequent false or misleading statement penalty the BPA would be increased. Where the only BPA is a penalty relief calculation, the uplift amount in the next penalty is to be remitted.