ATO Penalties and Interest

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ATO penalties and interest are some of the Commissioner’s powers to keep taxpayers in line.

ATO Penalties and Interest

The Commissioner has the power to levy administrative penalties against us as taxpayers. And the Commissioner can do that whenever we don’t effectively discharge our obligations under relevant taxation legislation.

ATO penalties can hit us when we make a false or misleading statement. Or fail to lodge a document on time. A false or misleading statement could be for example over-claiming deductions or understating income. Failing to lodge a document on time could be not lodging a BAS, IAS or tax return on time.

Statements

Subdivision 284-B of Schedule 1 to the Tax Administration Act (TAA) sets out the process for applying administrative penalties in relation to statements.

Taxpayers may receive a penalty where they make a false or misleading statement to the Commissioner. “False and misleading” is deliberately broad.

Reasonable Care

s 284-75 (5) of Schedule 1 to the TAA excuses taxpayers from penalties where they have taken reasonable care in relation to the statement made.

Miscellaneous Tax Ruling MT 2008/1 outlines the Commissioner’s view of “reasonable care”. MT 2008/1 states that the test for reasonable care should be considered objectively in the sense that having an intention to take reasonable care is not the same as taking reasonable care.

The threshold for reasonable care is subjective and is dependent on the facts of the taxpayer. In this regard, ordinary taxpayers receive a lower threshold. And tax professionals (including lawyers, accountants and tax agents) and large tax paying entities.

Shortfall Amount
So the Commissioner has determined that a false or misleading statement has been made. And that the taxpayer has failed to take reasonable care. The next step now is to determine the shortfall amount. The shortfall amount broadly represents the additional tax payable after removing the impact of the false or misleading statement.

**Base Penalty**

The next step is to determine the base penalty amount. You calculate the base penalty amount by multiplying the shortfall amount with the penalty rate.

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\text{Base Penalty Amount} = \text{Shortfall Amount} \times \text{Penalty Rate}
\]

The penalty rate depends on the perceived level of the taxpayer’s culpability. It is prescribed by s 284-90 of Schedule 1 to the TAA depending on the level of culpability. The penalty rate is 25% when the shortfall amount arises due to a failure to take reasonable care. It increases to 50% when the shortfall amount arises as a result of recklessness. And hits 75% when the shortfall amount is a result of an intentional disregard of a taxation law.

**20% Loading**

Penalties receive a 20% loading under s 284-220 of Schedule 1 of the TAA where:

- a taxpayer took steps to prevent or obstruct the Commissioner in uncovering a shortfall amount
- after a taxpayer makes a statement, they subsequently discover the statement to be false or misleading and the taxpayer did not inform the Commissioner
- a taxpayer has previously had a base penalty amount

So if for example a 75% penalty rate applies, it will be increase to 90%. This is important. It doesn’t increase to 95% as in 75% + 20%. But instead it increases to 90% as in 75% x 120% = 90%.

**Reduction**

You can significantly reduce the penalty amount through early voluntary disclosure. This reduction comes through ss284-225 (3) of Schedule 1 of the TAA. It provides for an 80% reduction in the base penalty amount for taxpayers who voluntarily disclose a shortfall to the Commissioner. However, that disclosure must happen before the Commissioner informs the taxpayer about the imminent start of a review or audit. The shortfall amount must be $1000 or more for this concession to apply.

So if for example a 25% penalty applies, it will reduce to 5%. This is 25% – (25% x 80%) = 5%.

Where a taxpayer receives a notice of an intention to commence a review or audit and voluntarily discloses to the Commissioner a shortfall prior to the actual commencement of the review or audit, subs 284-225(1) of Schedule 1 to the TAA provides for a 20% reduction in the base penalty amount.

**Failure to lodge on time**

When you don’t lodge an approved form by the due date, an administrative penalty can apply. The Commissioner can levy this penalty under Div 286 of Schedule 1 of the TAA. Examples of an approved form are an income tax return or an activity statement.

The rate of the penalty is one penalty unit. One penalty unit is currently $210 for each 28-day period or part thereof it is late. The penalty has a cap of a maximum of five penalty units.
The penalty is multiplied by two for taxpayers who are medium PAYG withholders. Or have an annual turnover of between $1m and $20m. Medium PAYG withholders have an annual PAYG W exceeding $20,000 but less that $1m.

And the penalty is multiplied by five for taxpayers who are large PAYG withholders. Or have an annual turnover of greater than $20m. Large PAYG withholders have an annual PAYG W exceeding $1m.

**Interest**

In addition to any penalties there is interest. And the interest can be significant, sometimes higher than the actual penalty.

The reason for that is twofold. The ATO's general interest charge (GIC) is significantly higher than anything you might receive from the bank. And the GIC is compounded daily. The shortfall interest charge (SIC) is less harsh since lower and not compounded daily. But either way try not to use the ATO as a bank.

The Commissioner may impose shortfall interest charges (SIC) based on Division 280 of Schedule 1 to the TAA and general interest charges (GIC) based on Section 8AAB of the TAA.

Both for SIC and GIC, the base interest rate is referable to the average yield of a 90-day bank bill. As published by the Reserve Bank of Australia (RBA).

**Shortfall interest charge**

The shortfall interest charge (SIC) only applies when there has been an amendment. So it is less common than the GIC. But for that SIC is significantly lower than GIC. SIC is payable in respect of overdue amounts in relation to an amendment.

Section 280-105 of Schedule 1 to the TAA sets the SIC rate at 3% plus the base interest rate. SIC is calculated on a daily basis. It is calculated for each day in between the date the original assessment was due and the date of the amendment. Different to GIC, SIC is not compounded.

**General interest charge**

The general interest charge (GIC) is the more common interest charge. It is payable in respect of overdue amounts, excluding cases where SIC is alternatively payable.

Section 8AAD of the TAA sets the GIC rate at 7% plus the base interest rate. GIC is calculated on a daily basis between the original due date for payment and the actual date of payment. It is compounded on a daily basis in accordance with s 8AAC(3) of the TAA.

**Remission**

The Commissioner has the discretion to remit administrative penalties under s298-20 of Schedule 1 to the TAA, SIC under s280-160 of Schedule 1 to the TAA and GIC under s8AAG(5) of the TAA.

The relevant legislation is silent as to which circumstances the Commissioner should consider in determining whether penalties and interest should be remitted.

PS LA 2012/5 sets out the Commissioner’s directive to ATO officers in making determinations to remit penalties. In this regard, the Commissioner considers the following factors:
“...the purpose of the penalty regime is to encourage entities to take reasonable care in complying with their tax obligations. Where the entity has made a genuine attempt to report correctly, it will generally be the case that no penalty applies because of the exercise of reasonable care, safe harbour or because the law was applied in the accepted way...

...remission decisions need to consider that a major objective of the penalty regime is to promote consistent treatment by reference to specified rates of penalty. That objective would be compromised if the penalties imposed at the rates specified in the law were remitted without just cause, arbitrarily or as a matter of course.

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