

REVENUE CIRCULAR GEN006.3
Penalty Tax – <i>Taxation Administration Act 1999</i>
Issue Date: 5 July 2019
Status: Current – Effective 1 July 2019
Previous Circular: GEN006.2

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Introduction

The *Taxation Administration Act 1999* (TAA) makes general provision in relation to the administration and enforcement of ACT tax laws under section 4 of the TAA. One of the purposes of the TAA is to make general provision in relation to the imposition of penalty tax.

This circular provides details of the penalty tax provisions under division 5.2 of the TAA as they apply to tax laws. It also sets out how the Commissioner for ACT Revenue (the Commissioner) administers discretionary powers under penalty tax provisions.

This circular should be read in conjunction with the latest version of Revenue Circular *Interest* (GEN009), which deals with interest provisions. Interest and penalties in relation to the *First Home Owner Grant Act 2000* are also dealt with separately: see the latest version of Revenue Circular *Offences and Penalties* (FHOG001).

All circulars are available at www.revenue.act.gov.au.

How this circular is applied

The Commissioner exercises discretions under penalty tax provisions to meet current standards of ethical, fair and reasonable tax administration.

On that basis, the Commissioner applies penalty tax in accordance with this circular except where a strict application would produce an unreasonable or inconsistent outcome.

A practice stated in this circular may be varied by the Commissioner in light of all the circumstances of a particular case.

Responsibilities of taxpayers

Taxpayers are expected to:

- exercise reasonable care in the calculation and timely payment of their tax liabilities;
- inform themselves of their obligations under tax laws; and
- comply with those obligations in a timely fashion.

Taxpayers are also encouraged to declare voluntarily, any tax liabilities as soon as they are known.

The Commissioner presumes that taxpayers have dealt with their tax affairs openly and honestly, unless evidence suggests otherwise.

Purpose of penalty tax

Penalty tax is imposed when a taxpayer fails to pay the whole or part of any tax that the taxpayer is liable to pay.

Penalty tax (and interest) plays an integral role in tax administration as it aims to:

- deter non-compliance by making it unprofitable for taxpayers;
- promote equity among taxpayers by ensuring that those who meet their obligations are not disadvantaged in comparison with those who do not;
- encourage the full and immediate disclosure of any tax default;
- encourage the payment of tax liabilities by the due date; and
- compensate the government for being denied the use of funds to which it is entitled.

Imposition of penalty tax

Division 5.2 of the TAA provides for the imposition of penalty tax in relation to a tax law. Penalty tax is payable in addition to the primary tax (the base amount of tax payable) as well as any interest payable.

Tax defaults

Under section 30 (1) of the TAA, a taxpayer is liable to pay penalty tax if a tax default happens. A tax default is defined in the dictionary to the TAA as ‘a failure by a taxpayer to pay, in accordance with a tax law, the whole or part of tax that the taxpayer is liable to pay’.

A tax default could arise in the following circumstances:

- a late payment – where a taxpayer pays tax after its due date; or
- an underpayment of tax or tax shortfall – where the taxpayer has paid less than the correct amount of tax;
- a failure to notify – such as not lodging a notification or return with the ACT Revenue Office of a tax liability.

Amount of penalty tax

The Commissioner determines the amount of penalty tax payable according to the provisions in division 5.2 of the TAA.

The penalty tax provisions are applied with the intent that the level of penalty should match the degree of culpability, and that voluntary compliance should be encouraged.

Penalty tax does not imply dishonesty on the part of a taxpayer. However, dishonest conduct by a taxpayer may result in higher levels of penalty tax being imposed. In these circumstances, the taxpayer may also be prosecuted if, as a result of their conduct, they appear to have committed a criminal offence.

25 per cent rate

Section 31 (1) of the TAA provides that the standard rate of penalty tax for a tax default is 25 per cent of the amount of tax unpaid. This rate may change subject to the other provisions in division 5.2 of the TAA.

50 per cent¹ rate

Section 31 (2) of the TAA provides that the rate of penalty tax may be increased to 50 per cent in circumstances where the Commissioner is satisfied that the tax default:

- was caused wholly or partly by the taxpayer (or person acting on behalf of the taxpayer) –
 - delaying the payment of tax; or

¹ Under the *Revenue Legislation Amendment Act 2019*, amendments were made to subsection 31 (2) of the TAA to specify circumstances where the 50 per cent penalty tax rate may apply. These particular amendments take effect from 1 July 2019.

- delaying the provision of information required for the assessment of tax; or
- providing information required under a tax law that is incorrect, incomplete or misleading; or
- is the taxpayer's second or subsequent tax default in relation to a tax liability, or in relation to a similar or related tax liability.

75 per cent rate

Section 31 (4) of the TAA provides that the Commissioner may increase the amount of penalty tax payable in relation to a tax default to 75 per cent of the amount of tax unpaid if the Commissioner is satisfied that the tax default was caused wholly or partly by the intentional disregard of a tax law by the taxpayer or a person acting on behalf of the taxpayer.

The concept of intentional disregard of a tax law has been judicially considered. In the context of the provisions of a tax law, it has been held to require, among other things:

an understanding by the taxpayer of the effect of the relevant legislation or regulations, an appreciation by the taxpayer of how that legislation or regulation applies to the circumstances of the taxpayer, and finally, deliberate conduct of the taxpayer so as to flout the [legislation or regulations].²

The Commissioner would consider the following as demonstrating intentional disregard of a tax law:

- The taxpayer contrived an avoidance scheme.
- The taxpayer committed tax evasion or fraud.
- The taxpayer knowingly made false or misleading records or statements.
- The taxpayer knowingly concealed or omitted relevant facts about their tax liability.
- The taxpayer knowingly committed repeated, similar or closely related tax defaults, after being advised of the earlier tax default.
- The taxpayer knowingly hindered the ACT Revenue Office's issue of an assessment of a tax liability by unduly delaying the provision of information or material.

90 per cent rate

Section 34 of the TAA provides that the amount of penalty tax payable in relation to a tax default is 90 per cent of the amount of tax unpaid if the Commissioner is satisfied that, after the Commissioner has informed the taxpayer that an investigation is to be carried out and before the investigation is completed, the taxpayer or a person acting on behalf of the taxpayer:

- deliberately damages or destroys records required to be kept under the tax law to which the investigation relates;
- fails, without reasonable excuse, to comply with a requirement made by the commissioner under division 9.2 of the TAA for the purposes of determining the taxpayer's tax liability;

² *Price Street Professional Centre Pty Ltd v Commissioner of Taxation* [2007] FCA 345 (14 March 2007) [43].

- hinders or obstructs an authorised officer exercising functions under division 9.2 (Powers of investigation) or under division 9.2A (Authorised valuers) of the TAA for the purposes of determining the taxpayer's liability; or
- otherwise shows intentional disregard for a tax law.

The Commissioner may, under section 34 (b) of the TAA, impose an amount of penalty tax of 90 per cent of the amount of tax unpaid if the taxpayer fails to comply with a notice issued under section 82 of the TAA (Power to require information, instruments or records or attendance for examination).

No penalty tax payable

Although the TAA's penalty tax provisions are of general application, there is no liability for penalty tax where the tax default consists of a failure to pay interest under division 5.1, or a failure to pay penalty tax previously imposed under division 5.2 (section 30 (3) of the TAA), of if the amount that would otherwise be payable is less than \$20 (section 35 of the TAA).

Penalty tax does not apply to rates or land rent: see section 20 of the *Rates Act 2004* and section 6 (2) of the *Land Rent Act 2008*.

Other circumstances where no penalty tax is payable:

Where taxpayer took reasonable care

Section 31 (5) (a) of the TAA provides that no penalty tax is payable in relation to a tax default if the Commissioner is satisfied that the taxpayer or a person acting on behalf of the taxpayer took reasonable care to comply with the tax law.

In determining whether a taxpayer has taken reasonable care to comply with a tax law, the Commissioner will have regard to whether a taxpayer has:

- kept complete and accurate records;
- made diligent efforts to understand and comply with the law;
- sought expert advice on uncertain or complex matters;
- was honest and open in their dealings with the ACT Revenue Office; and
- put in place appropriate processes to ensure compliance with tax laws.

A taxpayer³ may be considered to have taken reasonable care in situations where:

- the taxpayer had taken reasonable steps to be aware of his or her taxation obligations by seeking professional advice, and applied the advice in good faith;
- the taxpayer had applied any Revenue Circulars in good faith;
- the taxpayer had properly maintained appropriate and complete records.

³ In this circular references in examples to a taxpayer include the taxpayer's agent.

Agents should note that section 53 of the TAA obliges them to ensure that taxpayer obligations are correctly discharged. Failure to do so is a criminal offence. The appointment of an agent does not relieve the taxpayer of their duty or liability to the Commissioner regarding tax payable or any associated penalty tax (or interest).

Circumstances beyond taxpayer's control

Section 31 (5) (b) of the TAA provides that no penalty tax is payable in relation to a tax default if the Commissioner is satisfied that the tax default happened solely because of circumstances beyond the taxpayer's control.

If a person acted on behalf of a taxpayer, the Commissioner must be satisfied that the tax default happened solely because of circumstances beyond either the person's or the taxpayer's control.

Financial incapacity to pay a tax liability does not constitute circumstances beyond the person's or taxpayer's control, however the following may be considered:

- Fire, flood, cyclone or other natural disasters.
- Unavailability of key personnel due to sudden resignation, ill-health or death.
- Computer system breakdowns including third party systems.
- Postal or delivery delays due to strikes or natural disasters — excluding those for which the taxpayer could have arranged an alternative method of delivery because the taxpayer was aware of the possible delay.

Reduction of penalty tax for certain disclosures

Voluntary disclosure

Under section 32 of the TAA, the amount of penalty tax determined under section 31 is reduced by 80 per cent if, before the Commissioner informs the taxpayer that an investigation relating to the taxpayer is to be carried out, the taxpayer discloses to the Commissioner, in writing, sufficient information to determine the nature and extent of the tax default.

A voluntary disclosure occurs when the taxpayer informs the Commissioner in writing that they have failed to comply with a tax law, providing information regarding the nature and period of the tax default and an explanation of how the tax default occurred.

A voluntary disclosure does not include:

- any disclosure made after an investigation has commenced;
- any disclosure that is false, misleading or incomplete;
- conduct involving delay, resistance, or the hindering of an investigation; or
- the disclosure of a frivolous claim of a tax concession.

As voluntary disclosures assist the Commissioner to identify outstanding tax liabilities, the Commissioner will give greater consideration to the reduction of penalty tax where a

voluntary disclosure is made than where no voluntary disclosure is made. This is intended to provide an incentive to taxpayers who discover their tax default independently of an investigation to voluntarily disclose their liability.

Disclosure before investigation

Under section 33 of the TAA, the amount of penalty tax determined under section 31 is reduced by 20 per cent if, after the Commissioner informs the taxpayer that an investigation relating to the taxpayer is to be carried out and before the investigation begins, the taxpayer discloses to the Commissioner, in writing, sufficient information to enable the nature and extent of the tax default to be determined.

The amount of penalty tax will not reduce if the disclosure is made after the investigation has begun.

Disclosure will be taken to have been made within the required timeframe if, immediately after the taxpayer is advised of the investigation relating to them and before it begins, the taxpayer responds to the Commissioner in the manner and within the timeframe specified in the Commissioner's letter advising them of the investigation, or any longer period subsequently approved by the Commissioner.

Where the Commissioner increases penalty tax under section 34 of the TAA, a reduction under either section 32 or 33 for voluntary disclosure does not apply.

Remission of penalty tax

Under section 37 of the TAA, the Commissioner may if the Commissioner considers it appropriate in the circumstances, remit penalty tax by any amount. In deciding whether to remit, the Commissioner will consider all relevant circumstances and take into account any mitigating factors such as:

- whether the person took steps to mitigate, or to mitigate the effects of, the circumstances that resulted in the liability for penalty tax;
- whether the circumstances that resulted in the liability for penalty tax were complex or exceptional;
- the compliance history of the taxpayer;
- whether the ACT Revenue Office contributed to any delays, errors or omissions in assessing the tax default.

Taxpayers should note that penalty tax will not be remitted where the taxpayer sought expert opinion or advice and the expert consulted did not take reasonable care or intentionally disregarded the law in acting on the taxpayer's behalf.

A failure by a professional advisor to take reasonable care does not excuse the taxpayer. Further, evidence by the taxpayer that the taxpayer sought advice from a professional advisor is not of itself sufficient to reduce a penalty.

When Commissioner will not alter penalty tax

The Commissioner will not consider altering any penalty tax in the following circumstances:

- where a professional advisor intentionally disregarded the law while acting on the taxpayer's behalf;
- where the taxpayer has deliberately committed a tax default in the form of fraud or evasion of tax, or knowingly misled or caused the Commissioner to be misled about the taxpayer's tax liability, including by deliberately omitting information to the Commissioner;
- where the taxpayer has intentionally disregarded their obligations under tax laws; or
- where the taxpayer entered into an arrangement to avoid tax, including where an anti-avoidance provision of a tax law applies.

Application of Criminal Code

Under section 5A of the TAA, the *Criminal Code 2002* applies to offences against the TAA. Making a false or misleading statement is a criminal offence.

Additional penalty for avoidance of tax

Under section 65 (1) of the TAA, a person liable to pay an amount of tax must not knowingly avoid paying or disclosing the person's liability to pay part or all of that amount. The maximum penalty is 100 penalty units, imprisonment for 1 year or both.

The conviction of a person for an offence against section 65 may result in an order by the court that the person pay to the Commissioner an amount not exceeding double the amount of tax avoided.

Taxpayers should note that pecuniary penalties imposed by the court on conviction for an offence against a tax law are in addition to penalty tax imposed by the Commissioner under the TAA.

Objections to penalty tax

Under section 100 of the TAA a taxpayer may lodge a written objection with the Commissioner if the taxpayer is dissatisfied with:

- an assessment, other than a compromise assessment, that is shown in a notice of assessment given to the taxpayer;
- a decision mentioned in schedule 1 or schedule 2 of the TAA; or
- a decision made under a tax law that is prescribed under that law for section 100 of the TAA.

Schedule 1, section 1.2 of the TAA provides that objections can be lodged to the following TAA decisions:

- a decision to impose penalty tax (section 31);
- a decision to impose increased penalty tax (section 34); or
- a refusal to remit penalty tax (section 37).

The taxpayer bears the burden of demonstrating to the Commissioner's satisfaction the existence of any facts they assert when they submit an objection with the Commissioner. This may include evidence of claims against insurance providers, auditors, consultants or other professional services.

When determining whether to allow or disallow an objection relating to penalty tax, the Commissioner will consider whether penalty tax was imposed correctly.

If a determination is made regarding an objection and the taxpayer is still dissatisfied they may apply to the ACT Civil and Administrative Tribunal for a review of the decision.

More information about taxpayers' rights is provided in the latest version of Revenue Circular *Your Rights* (GEN005).

Signed

Kim Salisbury
Commissioner for ACT Revenue
5 July 2019