

REVENUE CIRCULAR GEN006.1

Penalty Tax

Issue Date: 24 February 2015

Status: Current – Effective 24 February 2015

Previous Circular: GEN006

Preamble

1. The *Taxation Administration Act 1999* (TAA) is intended to ensure consistency in the administration and enforcement of ACT taxation legislation which is, under s 4, defined as a **tax law**.
2. Under s 5A of the TAA an offence against a **tax law** is an offence under the *Criminal Code 2002*.
3. Penalty (and interest) provisions play an integral role in tax administration as they aim to:
 - (a) deter non-compliance by making it unprofitable for taxpayers;
 - (b) promote equity among taxpayers by ensuring that those who meet their obligations are not disadvantaged in comparison with those who do not;
 - (c) encourage taxpayers to make full and immediate disclosure of any tax default;
 - (d) encourage taxpayers to pay their tax liabilities by the due date; and
 - (e) compensate the government for being denied the use of funds to which it is entitled.
4. The policy intent of the penalty provisions is that the level of penalty should match the degree of culpability and that taxpayers should be encouraged to declare voluntarily any tax liabilities as soon as they are known. Taxpayers bear the onus of exercising reasonable care in the calculation and timely payment of their tax liabilities. Accordingly, taxpayers have a duty to inform themselves of their obligations under tax laws and to comply with those obligations in a timely fashion.
5. Penalty tax is imposed when the taxpayer fails to pay the whole or part of any tax that the taxpayer is liable to pay.
6. Taxpayers should note that penalty tax will not reduce where the taxpayer sought expert opinion or advice and the person 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.
7. 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.
8. The Commissioner for ACT Revenue (the Commissioner) may exercise the discretionary powers contained in penalty provisions to meet current standards of ethical, fair and reasonable tax administration. Taxpayers will be presumed to have dealt with their tax affairs openly and honestly unless evidence suggests otherwise.

9. On this basis, the Commissioner will assess penalty tax in accordance with this circular except where strict application of the circular would produce an unreasonable or inconsistent outcome. In this case, a practice stated in this circular may be varied in the light of all the circumstances of the particular case.
10. As noted, an offence against a tax law is an offence under the *Criminal Code 2002*. 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. Further, a conviction under section 65 of the TAA may result in the court ordering the taxpayer to pay the Commissioner up to double the amount of tax avoided.

Circular

11. **Part I** of this circular provides details of the penalty tax provisions under the TAA as applicable to tax laws (excluding the Land Rent Act and the Rates Act) and also sets out the general manner in which the Commissioner will administer penalty tax provisions.
12. **Part II** of this circular provides details of the penalty tax provisions under the Land Tax Act.
13. Interest is dealt with separately from penalty tax: see Revenue Circular **GEN009**.
14. Interest and penalties in relation to the *First Home Owner Grant Act 2000* are also dealt with separately: see Revenue Circular **FHOG001.1**.

PART I—Penalty tax under the TAA

15. Division 5.2 of the TAA provides for the imposition of penalty tax in relation to a tax law. Penalty tax applies when a tax default occurs, being when a taxpayer fails to pay, in accordance with a tax law, the whole or part of any tax that the taxpayer is liable to pay. This includes when there has been a late payment of tax by a taxpayer or a tax shortfall where the taxpayer has paid less than the correct amount of tax.
16. Penalty tax is payable in addition to the tax and any interest payable.
17. Penalty tax is not payable in relation to a tax default that consists of a failure to pay interest under Division 5.1, or penalty tax previously imposed under Division 5.2.
18. However, there may be circumstances in which no penalty tax will be imposed notwithstanding that a tax default exists. This circular addresses those circumstances, being where the Commissioner is satisfied that:
 - (a) the taxpayer (or a person acting on behalf of the taxpayer) took reasonable care to comply with the tax law (section 31 (6) (a), TAA); or
 - (b) the tax default happened solely because of circumstances beyond the taxpayer's control (or if a person acted on behalf of the taxpayer, because of circumstances beyond either the person's or the taxpayer's control) but not amounting to financial incapacity (section 31 (6) (b), TAA).
19. While certain provisions of the TAA are of general application, the provisions of the TAA providing for penalty tax (Division 5.2) do not apply:
 - (a) under section 6 of the Land Rent Act—to unpaid overdue land rent; and
 - (b) under section 20 of the Rates Act—to unpaid overdue rates.
20. Under section 19A (5) of the Land Tax Act, penalty tax under Division 5.2 of the TAA applies to the owner of the parcel of land as if the owner's failure to comply with section 14 of the Land Tax Act were a tax default, and the reference in Division 5.2 to the amount of tax unpaid were a reference to the amount of land tax payable.
21. The imposition of penalty tax does not imply dishonesty on the part of a taxpayer. However, dishonest conduct by the 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.
22. While Division 5.2 provides that where a tax default occurs, the taxpayer is liable to pay penalty tax in addition to the amount of tax unpaid, the Commissioner may, in the circumstances listed in the table below, determine the amounts of penalty tax applicable.

Amounts of penalty tax—sections 31 and 34 TAA

23. Sections 31 and 34 of Division 5.2 provide for penalty tax in the following amounts.

When penalty tax is payable in relation to a tax default	25 per cent of the amount of tax unpaid, subject to Division 5.2 (section 31 (1), TAA)
	50 per cent of the amount of tax unpaid if the Commissioner is satisfied that the tax default was caused wholly or partly by a failure by the taxpayer (or a person acting on behalf of the taxpayer) to take reasonable care to fulfil the taxpayer's obligations under a tax law—unless the taxpayer satisfies the Commissioner that the taxpayer (or a person acting on behalf of the taxpayer) had a reasonable excuse for the failure (sections 31 (2) and (3), TAA)
	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 by the taxpayer (or a person acting on behalf of the taxpayer) of a tax law (section 31 (5), TAA)
	90 per cent of the amount of tax unpaid if the Commissioner is satisfied that, after the taxpayer was informed that an investigation is to be carried out and before it is completed, the taxpayer (or a person acting on behalf of the taxpayer) (section 34, TAA): <ul style="list-style-type: none"> • deliberately damages or destroys records required to be kept under the tax law to which the investigation relates; or • fails, without reasonable excuse, to comply with a requirement under Division 9.2 for the purposes of determining the taxpayer's tax liability; or • hinders or obstructs an authorised officer exercising functions under that Division for that purpose; or • otherwise shows intentional disregard of a tax law
When penalty tax is not 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 (section 31 (6) (a), TAA)
	If the Commissioner is satisfied that the tax default happened solely because of circumstances beyond the taxpayer's control (or if a person acted on behalf of the taxpayer, because of circumstances beyond either the person's or the taxpayer's control) but not amounting to financial incapacity (section 31 (6) (b), TAA)

Remission of penalty tax—section 37 TAA

24. The Commissioner may, under section 37 of Division 5.2, remit an amount of penalty tax in whole or part if satisfied that:

- (a) either—
 - (i) the person has taken reasonable steps to mitigate, or to mitigate the effects of, the circumstances that resulted in the liability for penalty tax; or
 - (ii) the circumstances that resulted in the liability for penalty tax were exceptional; and
- (b) it would be fair and reasonable to remit all or part of the penalty tax.

Objections

25. A taxpayer may lodge a written objection with the commissioner if the taxpayer is dissatisfied with:

- a) an assessment shown in a notice of assessment; or
- b) a decision listed in schedule 1 or 2 of the TAA; or
- c) a decision made under any tax law that is prescribed by section 100 of the TAA.

26. An objection must be accompanied by the appropriate fee. The fees are listed in the 'Objection Fees' Disallowable Instrument, created under section 139A of the TAA. The fee will be refunded if the objection is successful. All the grounds for the objection must be stated in detail and must be submitted in writing. An objection must be lodged not later than 60 days after the notice of assessment is served to the taxpayer. The commissioner may accept an objection after the 60 day period if all the circumstances and reasons for failing to lodge are explained in detail.

27. When determining the outcome on an objection the commissioner will consider:

- a) the nature and extent of the taxpayer's culpability;
- b) the complexity of the matter giving rise to the taxpayer's tax liability;

- c) the reasons for the taxpayer's failure to meet their tax obligations, including the extent to which they attempted to comply and the processes instituted by them to ensure compliance with tax laws;
- d) the taxpayer's previous failure (if any) to comply with tax laws, including repealed tax laws; and
- e) if an investigation has been or is being conducted into the taxpayer's tax liability—the taxpayer's level of co-operation with the Commissioner.

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.

Non-imposition of penalty tax—section 31 (6) TAA

28. The Commissioner will not impose penalty tax for a tax default in the following circumstances:
- (a) circumstances beyond the taxpayer's control. Mere financial incapacity to pay a tax liability does not constitute circumstances beyond the taxpayer's control; and
 - (b) taking reasonable care. In determining reasonable care, the Commissioner may have regard to whether the taxpayer, in appropriate circumstances:
 - (i) kept complete and accurate records;
 - (ii) made diligent efforts to understand and comply with the law;
 - (ii) sought expert advice on uncertain or complex matters;
 - (iii) was honest and open in their dealings with the ACT Revenue Office; and
 - (iv) put in place appropriate processes to ensure compliance with tax laws.
29. See the **Attachment** for examples of circumstances beyond the taxpayer's control and where the taxpayer took or failed to take reasonable care.
30. In considering whether the taxpayer sought expert advice, the Commissioner must be satisfied that all of the following conditions were met:
- (a) the taxpayer provided satisfactory documentary evidence e.g. instructions to, and written advice from, the expert adviser that advice or specific lodgement services were sought on the subject in question. A general request for advice on issues arising in the establishment of a business will not be specific enough to satisfy the Commissioner that advice on the Territory tax implications of such an establishment was sought;
 - (b) the taxpayer provided the expert adviser with sufficient correct (i.e. not inaccurate or misleading) information as would enable the adviser to accurately provide tax advice or self-assess the taxpayer's liability for tax;
 - (c) it was reasonable in the circumstances for the taxpayer to believe that, in engaging the expert adviser, the taxpayer had taken all reasonable steps to comply with any relevant obligations under the tax law; and
 - (d) the advice or service provided by the expert adviser did not involve the taxpayer entering into an arrangement involving a deliberate tax default or an intentional disregard of the taxpayer's tax obligations.

Penalty tax not reduced

31. The Commissioner will not consider altering any penalty tax in the following circumstances:
- (i) where the taxpayer has deliberately committed a tax default in the form of fraud or evasion of tax, or knowingly misled the Commissioner or caused the Commissioner to be misled about the taxpayer's tax liability, including by deliberately omitting information to the Commissioner; or
 - (ii) where the taxpayer has intentionally disregarded their obligations under tax laws; or
 - (iii) where satisfied that the taxpayer entered into an arrangement to avoid tax, including where an anti-avoidance provision of a tax law applies.
32. The meaning of intentional disregard of a tax law is addressed in later sections of this circular. The **Attachment** includes examples of circumstances where the taxpayer's conduct demonstrates intentional disregard of a tax law.

Reduced penalty tax for voluntary disclosure—section 32 TAA

33. The Commissioner may, under section 32 of Division 5.2, reduce the amount of penalty tax determined under section 31 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 to issue an assessment.
34. A voluntary disclosure occurs when the taxpayer informs the Commissioner in writing that they have failed to comply with a tax law and provide information regarding the nature and period of the tax default and an explanation of how the tax default occurred. The disclosure must be made before an investigation under section 82 TAA is carried out.
35. A voluntary disclosure does not include any disclosure that is false, misleading or incomplete, or conduct involving delay, resistance, or the hindering of an investigation. A voluntary disclosure does not include the disclosure of a frivolous claim for a tax concession.
36. The reduction in the rate of penalty tax does not apply to a written disclosure by a taxpayer if the tax default involved a failure to lodge a return and pay tax by the due date under a taxation law.
37. 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 a section 82 TAA investigation to voluntarily disclose their liability.

Reduced penalty tax for disclosure before investigation—section 33 TAA

38. The Commissioner may, under section 33 of Division 5.2, reduce the amount of penalty tax determined under section 31 by 20 per cent if, after the Commissioner informs the taxpayer that an investigation under section 82 TAA 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.
39. The amount of penalty tax will not reduce if the disclosure is made after the section 82 TAA investigation has begun.
40. 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.
41. Where the Commissioner increases penalty tax under section 34 (Increase in penalty tax for concealment), a reduction under either section 32 or 33 for voluntary disclosure does not apply.

Increased penalty tax if section 34 TAA applies

42. The Commissioner may, under section 34 of Division 5.2, impose an amount of penalty tax of 90 per cent of the amount of tax unpaid if the Commissioner is satisfied that, after the taxpayer was informed that an investigation is to be carried out and before it is completed, the taxpayer:
 - (a) deliberately damages or destroys records required to be kept under the tax law to which the investigation relates; or
 - (b) fails, without reasonable excuse, to comply with a requirement under Division 9.2 (including a section 82 notice); or
 - (c) hinders or obstructs an authorised officer exercising functions under Division 9.2 for that purpose; or
 - (d) otherwise shows intentional disregard for a tax law.

Relevant case law – intentional disregard

43. 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].¹

Increased penalty tax if section 82 TAA notice not complied with

- 44. The Commissioner may, under section 34 (b) of Division 5.2, impose an amount of penalty tax of 90 per cent of the amount of tax unpaid if the taxpayer fails to comply with the requirements of a notice issued under section 82 without a reasonable excuse.

Summary of penalty tax provisions—sections 31 to 34 TAA

		Basic Rate	Disclosure before investigation begins		Intentional disregard for tax law
			Before notification	After notification	
1	Failure to take reasonable care	25%	5%	20%	90%
2	Failure to take reasonable care and no reasonable excuse	50%	10%	40%	90%
3	Intentional disregard of the law	75%	15%	60%	90%

Penalty tax must be paid within specified time—section 36 TAA

- 45. Under section 36 of Division 5.2, penalty tax must be paid by a taxpayer within the period specified in a notice of assessment of the tax liability of the taxpayer. A period of not less than 14 days must be specified.

Application of Criminal Code

- 46. As noted, an offence against a tax law is an offence under the Criminal Code. Making a false or misleading statement is a criminal offence.

Taxpayer on conviction may be ordered to pay twice the amount of tax avoided—section 65 TAA

- 47. 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 or imprisonment for 1 year or both.
- 48. 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.

PART II—Penalty Tax under the Land Tax Act

- 49. Under the Land Tax Act, land tax is payable quarterly by the specified date on certain parcels of rateable land. Under section 14 of the Land Tax Act, the owner of the parcel of land is required to advise the Commissioner in writing if the property is rented. If a parcel of land is owned by a trustee, the trustee is required to advise the Commissioner in writing within 30 days of this occurring.

Penalty tax payable on land tax if no disclosure that residential land is rented—section 19A

- 50. Where the trustee or owner of a parcel of land fails to notify the Commissioner of the trustee’s ownership or that the land is rented, penalty tax under Division 5.2 of the TAA applies to the owner of the parcel of land. The owner’s failure to comply with section 14 of the Land Tax Act is treated as a tax default and the reference in Division 5.2 to the amount of tax unpaid is a reference to the amount of land tax payable under the Land Tax Act.

SIGNED

Kim Salisbury
Commissioner for ACT Revenue
24 February 2015

Notes: 1. References in this attachment to a taxpayer include the taxpayer's agent.

2. 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.

Examples of circumstances beyond the taxpayer's control

- Fire, flood, cyclone or other natural disasters that destroy the taxpayer's records as to prevent them from meeting their tax obligations.
- An unforeseen traumatic or significant event affecting the taxpayer's health as to prevent them from meeting their tax obligations.
- Computer system breakdowns e.g. electronic funds transfer systems.
- Postal delays—excluding those for which the taxpayer could have arranged an alternative method of delivery because the taxpayer was aware of the possible delay.

Examples where the taxpayer took reasonable care

- The taxpayer took reasonable care to establish computer systems but a system programming error results in the primary tax being calculated incorrectly.
- The taxpayer acted to immediately redress any circumstances giving rise to a tax liability of which they were otherwise unaware.
- The taxpayer demonstrates that they took reasonable steps to mitigate, or to mitigate the effects of, the circumstances that resulted in their liability for penalty tax e.g. by keeping complete and accurate records, by seeking expert advice on uncertain or complex matters.
- The taxpayer made diligent efforts to understand and comply with tax laws in a timely fashion e.g. by visiting the revenue website, by acting on ACT Revenue Office notices and advisory letters, or by lodging an electronic inquiry with the Office and acting upon the advice provided.

Examples where the taxpayer did not take reasonable care

- The taxpayer did not know about the tax law or did not take reasonable steps to inform themselves of their tax obligations.
- The taxpayer did not act genuinely or honestly, or provided false or misleading information, or failed to provide all of the relevant facts to the Commissioner, or made a frivolous claim for a tax exemption or concession.
- The taxpayer did not inform the Commissioner in writing within the required timeframe (or within a reasonable timeframe if none is specified) upon discovering their failure to comply with a tax law.
- The taxpayer did not maintain appropriate and proper recording systems.
- The taxpayer did not apply any relevant revenue circulars in good faith.
- The taxpayer did not seek expert advice for uncertain or complex matters.
- The taxpayer did not actively co-operate by responding to inquiries and providing relevant information in a timely manner.
- In relation to payroll tax, the taxpayer did not register with the ACT Revenue Office to pay payroll tax once their liability for payroll tax was determined.
- In relation to duty lodgements, the taxpayer did not provide all information relevant to the assessment of duty when lodging documents for assessment with the ACT Revenue Office.

Examples where the taxpayer's conduct demonstrates 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.
- Repeating similar or closely related tax defaults, after being advised of the earlier tax default.
- Hindering the ACT Revenue Office issuing an assessment of a tax liability by unduly delaying the provision of information or material.