

REVENUE CIRCULAR GEN006.2
Penalty Tax – <i>Taxation Administration Act 1999</i>
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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 includes:

- a late payment, where a taxpayer pays tax after its due date; or
- a tax shortfall, where the taxpayer has paid less than the correct amount of tax.

Penalty tax in relation to land tax

In relation to land tax, a tax default includes a failure to comply with section 14 of the *Land Tax Act 2004* (Land Tax Act). Section 14 requires a relevant person to tell the Commissioner within 30 days if there is a change of circumstances that would cause land tax to become payable for a parcel of land.

Under section 19A (5) of the Land Tax Act, the failure to comply is taken to be a tax default. The amount of tax unpaid is taken as a reference to the amount of land tax payable.

When penalty tax provisions do not apply

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.

In addition, 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*.

Finally, there are some circumstances when less or no penalty tax is payable by the taxpayer, notwithstanding that a tax default exists: see **Amount of penalty tax**, **Reduction of penalty tax for certain disclosures** and **Remission of penalty tax**.

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.

Standard rate (25 per cent)

Section 31 (1) of the TAA provides that where penalty tax is imposed, the standard amount of penalty tax is 25 per cent of the amount of tax unpaid (subject to the other provisions in division 5.2).

Failure to take reasonable care (50 per cent)

Section 31 (2) of the TAA provides that the amount of penalty tax payable in relation to a tax default is 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.

Meaning of reasonable care

In determining whether reasonable care was taken, the Commissioner may have regard to whether or not the taxpayer, in appropriate circumstances:

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

Examples where taxpayer¹ took reasonable care

- *The taxpayer established computer systems, but a system programming error resulted in the primary tax being calculated incorrectly.*
- *The taxpayer acted immediately to 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 or 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 ACT Revenue Office website, acting on ACT Revenue Office notices and advisory letters, or lodging an electronic enquiry with the Office and acting upon the advice provided.*

Examples where 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.*

¹ In this circular references in examples to a taxpayer include the taxpayer's agent.

- *The taxpayer did not act genuinely or honestly, provided false or misleading information, 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 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 information for assessment by the ACT Revenue Office.*

Expert advice

In considering whether the taxpayer sought expert advice, the Commissioner must be satisfied that all of the following conditions were met:

- 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;
- 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;
- 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
- 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.

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.

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.

Failure to take reasonable care with reasonable excuse (25 per cent)

Section 31 (3) of the TAA provides that the 50 per cent rate for failure to take reasonable care does not apply if the taxpayer satisfies the Commissioner that the taxpayer (or a person acting on behalf of the taxpayer) had a reasonable excuse for the failure.

Intentional disregard of the law (75 per cent)

Section 31 (5) of the TAA provides that the amount of penalty tax payable in relation to a tax default is 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).

Meaning of intentional disregard

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

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.*
- *The taxpayer committed repeated, similar or closely related tax defaults, after being advised of the earlier tax default.*
- *The taxpayer hindered the ACT Revenue Office's issue of an assessment of a tax liability by unduly delaying the provision of information or material.*

Concealment (90 per cent)

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 of the TAA for the purposes of determining the taxpayer’s liability;
- hinders or obstructs an authorised valuer exercising functions under division 9.2A of the TAA for the purposes of determining the taxpayer’s liability; or
- otherwise shows intentional disregard for a tax law.

Failure to comply with section 82 of the TAA

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 (under division 9.2) for the purposes of determining the taxpayer’s tax liability.

Taxpayer took reasonable care (no penalty tax payable)

Section 31 (6) (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. (See **Meaning of reasonable care.**)

Circumstances beyond taxpayer’s control (no penalty tax payable)

Section 31 (6) (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 the 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.

Mere financial incapacity to pay a tax liability does not constitute circumstances beyond the person’s or taxpayer’s control.

Examples where circumstances beyond 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.*

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 under section 82 of the TAA is carried out;
- 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.

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 tax law.

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 under section 82 of the TAA 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 under section 82 of the TAA.

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 remit all or part of an amount of penalty tax payable by a person, if satisfied that:

- either:
 - 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
 - the circumstances that resulted in the liability for penalty tax were exceptional; and
- it would be fair and reasonable to remit all or part of the penalty tax.

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:

- the nature and extent of the taxpayer's culpability;
- the complexity of the matter giving rise to the taxpayer's tax liability;
- 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;
- the taxpayer's previous failure (if any) to comply with tax laws, including repealed tax laws; and
- 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.

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

When Commissioner will not alter penalty tax

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

- where a professional advisor did not take reasonable care or intentionally disregarded the law while acting on the taxpayer's behalf (see **Expert advice**);
- 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;
- 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.

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.

Signed

Kim Salisbury
Commissioner for ACT Revenue
6 July 2018