



Tax Insights

Increased penalties for significant global entities

Material penalties ahead for failure to lodge, and false and misleading statements

From 1 July 2017, it could cost a significant global entity (SGE) \$105,000 if it lodges a tax return just one day late.

The new penalty regime will extend to the failure to lodge any tax document required to be lodged with the Australian Taxation Office (ATO) on time or in an approved form.

The maximum penalty that a SGE could pay where there is a five month delay in lodging just one document late after 1 July 2017 is \$525,000.

Lodging numerous tax documents late could therefore result in material, and non-tax deductible, amounts being payable by SGEs, with no certainty of the remission of penalties.

Background

In the 2016-17 Federal Budget, the Government announced increased administrative penalties from 1 July 2017 for SGEs which fail to comply with their tax-related lodgment obligations. A SGE is broadly an entity that is part of a group with an annual global income of A\$1 billion or more.

When announced in May 2016, this announcement was initially triggered in respect of concerns about possible non-lodgment of the new Country-by-Country (CbC) reporting requirements. However, the proposed changes are of extremely wide application, and the legislation, when enacted, will apply to late or non-lodgment of all tax documents by SGEs that are required in an approved form on or before a certain date.

Materials published at the time of the original announcement in May 2016 stated that the proposed new penalty rate will cover failing to lodge:

- income tax returns,
- business activity statements,
- country-by-country reports,
- GPFS required to be given under the taxation law, and
- similar tax documents.

There are also many other categories of ATO statements or documents that could trigger this penalty for late lodgment. This will include FBT returns, annual GST information forms, tax consolidation notices, PAYG and taxable payment annual reports, and information required to be lodged under the Common Reporting Standard (CRS) and FATCA regimes.

This measure is to be distinguished from the late 2015 measures, introduced together with the multinational anti-avoidance law (MAAL) provisions, that doubled penalties intended to combat tax avoidance and profit shifting activities by SGEs which have not adopted a “reasonably arguable position”.

A Private Member’s Bill, the *Tax Laws Amendment (Tougher Penalties for Country-by-Country Reporting) Bill 2016* was also introduced by the Opposition on 29 February 2016 but this lapsed at prorogation in April 2016, and the subsequent Budget announcement in May 2016 made its reintroduction unnecessary.

On 20 December 2016, the Government released Exposure Draft (ED) legislation and Explanatory Material (EM) in respect of these announcements.

Current status of legislation

The legislation was introduced into Parliament on 9 February 2017 in the *Treasury Laws Amendment (Combating Multinational Tax Avoidance) Bill 2017* (the Bill) together with the diverted profits tax measures and provisions to ensure that the Australian transfer pricing rules align with the current OECD guidelines.



Failure to lodge (FTL) penalties

The measures in the Bill propose amendments to Division 286 of the *Taxation Administration Act 1953* (TAA 1953). These provisions set out maximum base penalties where taxpayers fail to lodge a required return, notice, statement or other document by the due date (known as the 'failure to lodge' (FTL) penalty).

As noted, this means that the increased penalty regime will apply to any failure to give a return (such as a tax return, BAS), notice, statement or other document on time or in the approved form. The Bill also ensures that these increased penalties can apply where SGEs are required to lodge general purpose financial statements (GPFS) under the taxation law.

Under most Commonwealth laws, financial penalties are expressed in terms of penalty units instead of dollar figures. Since 31 July 2015, the value of a penalty unit has been \$180. However it was announced in the Mid-Year Economic and Fiscal Outlook (MYEFO) on 19 December 2016 that the government will increase the value of a tax penalty unit by approximately 15% to \$210 with effect from 1 July 2017. The value will be then indexed every three years in line with the CPI with the first indexation occurring on 1 July 2020. Measures to effect these changes were introduced into Parliament on 16 February 2017 in the *Crimes Amendment (Penalty Unit) Bill 2017*.

The base penalty amount of a FTL penalty is calculated at the rate of one penalty unit for each period of 28 days, or part thereof, for which a document is overdue. The maximum penalty that can be imposed is five penalty units when a document is 140 days or more overdue.

Under current law, and having determined the period for which the document is late, a size-based multiplication factor is then applied with taxpayers classified as medium entities having the base penalty amount multiplied by a further factor of two, and entities classified as large by a further factor of five.

Financial impact of proposed FTL changes

Currently the late lodgment of forms by a large taxpayer (which, until the proposed changes are enacted, includes SGEs) results in a maximum fine of \$4,500: calculated as \$180 (penalty unit) x 5 (maximum of 5 units: assume more than 140 days late) x 5 (multiplication factor for large companies). This will increase to \$5,250 from 1 July 2017 due to the proposed increase in the value of a penalty unit.

However, based on the measures in the Bill, a new multiplication factor will be applied to the base penalty amount for SGEs being a multiplication factor of 500.

Based on the new penalty unit amount of \$210 which will also apply from 1 July 2017 (if enacted), this could result in a maximum FTL penalty for a SGE of \$525,000 (calculated as \$210 x 5 x 500).

For example, after enactment, if a SGE lodges a tax return just one day late, the penalty could be \$105,000 ($\$210 \times 1 \times 500$). If the return is 60 days late, the penalty would be \$315,000 ($\$210 \times 3 \times 500$).

FTL - due dates and lodgment deferrals

The due dates for lodgment as required by the Commissioner are generally specified annually within a legislative instrument. However under the current principles set out in PS LA 2011/15, there is an ability for the Commissioner to defer lodgment obligation and extend the due date for lodgment of a document, which provides additional time to lodge without incurring a FTL penalty.

Statement penalties

False & misleading statements / failing to make a statement

As also announced in May 2016, the measures in the Bill will also double existing penalties for SGEs:

- making false and misleading statements to the ATO, and
- failing to give documents necessary to determine tax-related liabilities to the Commissioner on time (failing to make a statement).

Where there is no tax shortfall, the penalties relating to such situations currently range between 20 and 60 penalty units. The doubling of the highest penalty of 60 penalty units will result in a new maximum penalty of \$25,200 (being $120 \times \$210$).

If there is a tax shortfall, the penalties relating to statements are calculated as a percentage of the relevant amount of the tax shortfall depending on the behaviours that led to the false or misleading statement, or failing to make a statement at all.

This percentage will be doubled for SGEs under the proposed amendments, and, for example in the worst case scenario, will lead to a maximum penalty of 150% (rather than 75% currently) of the relevant tax shortfall where there has been intentional disregard of a taxation law.

The related penalty for 'failing to make a statement' where the document is necessary for the Commissioner to determine a tax-related liability accurately will also lead to a maximum penalty of 150% (rather than 75% currently) of the tax-related liability concerned.

Each of these statement penalties can be further increased by 20% for additional culpability factors such as if the taxpayer takes steps to prevent the Commissioner from finding out about the statement, or became aware of it and did not notify the Commissioner within a reasonable time.

On the other hand, the penalty can be reduced in circumstances where the taxpayer voluntarily discloses a tax shortfall amount – the reduction will depend on what stage of an examination the information is disclosed.

Interaction with FTL penalties

Generally a SGE could be liable under both sets of penalties; for example, both a FTL penalty and failure to make a statement penalty if documents necessary to determine tax-related liabilities are not lodged on time. In such circumstances, PS LA 2014/4 states that an unjust result does not arise as each applies for a different purpose, but that the total amounts of penalties and interest should be considered by the ATO to ensure it represents a defensible and reasonable amount given the actions of the taxpayer.

Application and remission of penalties

The measures in the Bill contain some specific remission rules to deal with "borderline" cases where a taxpayer is thought to be a SGE when it transpires that this is not the case.

In all other circumstances, the Commissioner does have the existing discretion to remit penalties if fair and reasonable, and PS LA 2011/19 sets out the circumstances in which the ATO is currently likely to remit a FTL penalty.

There is no further clarification in the EM of how the discretion will be exercised in relation to these significantly increased penalties, except that the Explanatory Memorandum to the Bill states that SGEs will be treated like all other taxpayers.

It will remain to be seen what the attitude of the ATO will be on the remission of penalties under the new regime after 1 July 2017.

Implications for SGEs

The proposed start date is the later of 1 July 2017 and the day after the legislation receives Royal Assent.

It is also clear from the drafting of the measures that the provisions will apply where any statement is made, or a missed due date occurs, on or after 1 July 2017 (assuming enacted in time), regardless of the event or tax period to which the statement, form or return relates.

Similarly the application of the higher penalties and the discretion to remit, discussed above, will require consideration of the status of the entity on the date on which the statement was made, or the date by which the form or return was due.

It is critical for SGEs to be aware that any failure to lodge tax documents on time on an ongoing basis after these provisions have been enacted could give rise to **significantly** increased FTL penalties, especially where the entity has a history of late lodgments.

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