

27 August 2021

Benjamin Murphy
Australian Taxation Office

Via email: Benjamin.murphy@ato.gov.au

Dear Benjamin,

PS LA 2021/D1 – Remission of additional Superannuation Guarantee Charge

CPA Australia and Chartered Accountants ANZ (“the Major Accounting Bodies”) represent over 200,000 professional accountants in Australia and New Zealand. Our members work in diverse roles across public practice, commerce, industry, government and academia throughout Australia and internationally.

The proposed *Law Administration Practice Statement PS LA 2021/D1 – Remission of additional Superannuation Guarantee Charge* (PS LA 2021/D1 or the “draft PSLA”) provides written guidelines the Commissioner of Taxation (the Commissioner) and his delegates must have regard to when considering the remission of additional Superannuation Guarantee Charge (SGC) under Part 7 of the *Superannuation Guarantee (Administration) Act 1992* (the “SGAA”).

The Major Accounting Bodies welcome the draft PSLA. We have long had concerns about the severity of SGC for all employers especially for inadvertent errors and late payments that could not have been reasonably foreseen by an employer which had been doing its best to comply with the SGAA provisions. We have also had concerns about the complexities employers face when seeking to comply with the SGAA and the requirements of industrial relations instruments, especially when these might be in conflict.

We have [previously sought concessions](#) in relation to our concerns from Government and Treasury.

We agree that the draft PSLA generally achieves its objective. We are broadly happy with the proposed administrative approach that ATO decision-makers would be required to take¹ in relation to the items discussed.

¹ Refer [PS LA 1998/1](#), item 3

However, we believe that full SGC penalty remissions should also be provided in the following circumstances:

1. Late payments that are out of an employer's control

There are many instances when an employer has taken reasonable steps to ensure superannuation contributions are made on time yet regrettably fails the strict timing requirements because failure is out of an employer's control, including:

- Clearing houses – only one clearing house is approved under the *Superannuation Guarantee (Administration) Regulations*² ("SG Regs"). Under the Superannuation Guarantee ("SG") laws, contributions to that clearing house made by the due dates satisfies the contribution deadline requirements.

No other clearing houses are approved under the SG Regs, even though other clearing houses are used extensively by many employers via payroll software or providers. If the superannuation fund does not account for when contributions are made the employer has no ability to lodge a Superannuation Guarantee (SG) Statement by the due date, as they had no access to relevant information.

- Delays in processing payments and information about rejected contributions – there are several factors which may be relevant – Approved Deposit-taking Institution (ADI) processing times, public holidays in different jurisdictions, different processing schedules by clearing houses, superannuation fund processing times, rejected payments by clearing houses or superannuation funds and system failures at clearing houses and ADIs.

This area can be expanded to include the situation where clearing house and superannuation fund processing times are longer than normal indicative timeframes.

- Payments rejected by a superannuation fund because incorrect information is given to an employer, which then uses that information when it seeks to remit the contribution, but the notice of rejection arrives after SG contribution deadline.
- Payments rejected because of superannuation funds processing administration errors but again the rejection is not promptly provided.
- Payments rejected by a clearing house but the employer is not notified until after the SG contribution deadline.

² The ATO's Small Business Clearing House

It is our expectation that as the majority of employees now have choice of fund the incidence of the above inadvertent mistakes will increase.

2. Lack of knowledge about payment delays

Many employers mistakenly believe that as long as the superannuation contribution has left their bank account by the due date then they have satisfied the SGAA requirements in terms of timing. What many may not understand, is that the contribution must be received into an employee's superannuation fund bank account.

3. Unintentional non-lodgement of SG Statement by due date

We agree that employers should know their obligations and ideally should submit an SG Statement by the due dates and before the ATO commences compliance action. However, the legislative deadline for submitting SG Statements after each quarter is extremely tight. As noted above there are many instances when an employer will be unaware they have not complied with their SG obligations: This may be for a period of time beyond the timeframe in which the SG Statement must have been lodged.

The ATO is permitted by sub-section 33(1A) of the SGAA to permit the SG Statement to be submitted at a date later than the tight specific timeframes. The draft PSLA should be amended to make this allowance the default setting in situations when an employer acted reasonably to comply with the SG obligations but found out much later that for reasons beyond their control that they failed to comply. This should be available for trivial matters delaying SG Statements which would have been lodged on time in normal circumstances.

4. Unintentional underpayment of employer superannuation contributions because of the definitional complexity of Ordinary Time Earnings (OTE) compared to Salary and Wages (S&W) with the SGAA

The differences between OTE and S&W have been the subject of a lengthy complex ATO ruling, complex court cases and constant requests for Private Binding Rulings. Employers who can demonstrate that they have made a good faith attempt to pay the correct SG, but have made an honest mistake in their interpretation of what is included/excluded from OTE and S&W for SG and SGC purposes respectively should be eligible for Part 7 penalty remissions.

5. Unintentional underpayment of employer superannuation contributions because of the often complex interactions between the SGAA provisions and industrial relations instruments

Similar to point 3 above, many employers struggle to work through the complex SG rules when combined with various industrial relations instruments. For example, where a contractor under industrial relations laws might be an employee under SG legislation, it is possible that businesses in these situations may make a reasonable attempt to comply with the law yet find out many years later that they had made the wrong interpretation. Employers in this situation should be eligible for Part 7 penalty remissions.

The Major Accounting Bodies believe that "PS LA 2021/D1 contains positive changes, and we commend the ATO for responding to the issues that have been raised with them by industry, employers and the tax profession. Given that, with its retrospective date of effect, PS LA 2021/D1 will replace PS LA 2020/4, information on how the ATO will remediate earlier decisions and anticipated timeframes should be provided when PS LA 2021/D1 is finalised.

For further information in relation to our submission, please contact Richard Webb, Policy Advisor Financial Planning and Superannuation at CPA Australia at richard.webb@cpaaustralia.com.au or Tony Negline, Superannuation Leader at Chartered Accountants ANZ at Tony.Negline@charteredaccountantsanz.com.

Yours sincerely

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