



COMMISSIONER'S PRACTICE TAA 24.0

PENALTY TAX AND RECOVERY OF VALUATION COSTS FOR WRITTEN VALUATIONS

Commissioner's Practice History

| Commissioner's Practice | Issued | Dates of effect | |
|-------------------------|------------------|------------------|------------------|
| | | From | To |
| TAA 24.0 | 14 February 2014 | 14 February 2014 | 11 December 2019 |

This Commissioner's practice outlines the circumstances in which the Commissioner may:

- remit some or all of the penalty tax imposed for failure to provide, or late provision of, a written valuation required for transfer duty or landholder duty purposes;
- recover valuation costs from a taxpayer; and
- remit some or all of the penalty tax for undervaluation where valuation costs are to be recovered.

This practice only applies where the Commissioner has required a taxpayer to provide a written valuation in accordance with Commissioner's Practice TAA 23 'Circumstances When a Taxpayer will be Required to Provide a Written Valuation' ('CP TAA 23').

Background

Requirement to Provide Written Valuation

Under section 21(1) of the *Taxation Administration Act 2003* ('TAA'), the Commissioner may require a taxpayer to provide a written valuation by a *qualified valuer* of any property, consideration or benefit, together with any document or other records in the taxpayer's possession or control relevant to determining the value of the property, consideration or benefit.

Qualified valuer is defined in the Glossary to the TAA to mean a person who:

- (a) is licensed under the *Land Valuers Licensing Act 1978*; or
- (b) is licensed or registered under a law of another State or Territory corresponding to the *Land Valuers Licensing Act 1978*; or
- (c) the Commissioner is satisfied is suitably qualified or experienced to

provide a valuation.

In accordance with section 21(2) of the TAA, a request to provide a written valuation must specify the date by which a taxpayer must comply with it. Under section 21(3) of the TAA, a person who does not comply with such a requirement commits an offence.

Designated Valuation

For the purposes of recovery of valuation costs under section 23A of the TAA, and penalty tax for undervaluation under section 27A of the TAA, section 23A(3) of the TAA provides that a *designated valuation* is a reference to:

- (a) a valuation nominated by the taxpayer for the purposes of the section; or
- (b) in the absence of a nomination – the last valuation provided by the taxpayer prior to the Commissioner seeking a valuation under section 22 of the TAA; or
- (c) a valuation accepted as the designated valuation by the Commissioner under section 23A(7) of the TAA.

Under section 23A(7) of the TAA, the Commissioner may accept a valuation provided by the taxpayer after the taxpayer has nominated a valuation or the Commissioner has sought a valuation as the designated valuation, if it is reasonable to do so in the circumstances.

Recovery of Valuation Costs

Section 22 of the TAA provides that, regardless of whether the Commissioner has required the taxpayer to provide a valuation or whether the taxpayer has complied with such a requirement, the Commissioner may:

- (a) have a valuation made of any property, consideration or benefit; or
- (b) adopt any available valuation of the property, consideration or benefit that the Commissioner considers appropriate.

Section 23A(1) of the TAA provides that the Commissioner may recover from a taxpayer the costs of obtaining a valuation under section 22 of the TAA if:

- (a) the taxpayer does not comply with a requirement to provide a written valuation under section 21 of the TAA; or
- (b) the Commissioner is not satisfied with a valuation provided by the taxpayer and the value on which the taxpayer's liability is assessed exceeds the designated valuation provided by the taxpayer by 15 per cent or more.

However, section 23A(2) of the TAA provides that, if the taxpayer challenges the assessment referred to in subsection (1)(b), the Commissioner can only recover the valuation costs if:

- (a) the value on which the taxpayer's final assessment is based exceeds the taxpayer's designated valuation by 15 per cent or more; and

- (b) the value on which the taxpayer's liability is assessed referred to in subsection (1)(b) does not vary from the value on which the taxpayer's final assessment is based by 15 per cent or more.

Under sections 23A(4) and (5) of the TAA, the Commissioner may ask the taxpayer whether they wish to nominate in writing a valuation for the purposes of recovery of valuation costs. Where the Commissioner has not sought a nomination from the taxpayer, section 23A(6) of the TAA provides that the Commissioner cannot recover the costs of obtaining a valuation.

Under section 23A(8) of the TAA, the final assessment is the assessment applicable after any objection and review proceedings are discontinued or otherwise finally determined.

Penalty Tax

Under the TAA, a taxpayer may be liable for a separate and distinct penalty tax for each contravention of a taxation Act. However, section 28 of the TAA limits the total amount of penalty tax payable by the taxpayer to the amount equal to the taxpayer's primary liability.

Penalty tax for contravention of a taxation Act

A taxpayer is liable to pay penalty tax under section 26(1) of the TAA where:

- (a) the taxpayer fails to provide information required under a taxation Act; or
- (b) as a result of any other contravention of a taxation Act, the taxpayer avoids or delays the submission of information required for the assessment of tax.

The amount of penalty tax payable is imposed under section 26(3) of the TAA and is the amount equal to the taxpayer's primary liability.

Penalty tax for undervaluation

Section 27A(2) of the TAA provides that the taxpayer is liable to pay penalty tax if:

- (a) the costs of obtaining a valuation are recoverable under section 23A of the TAA because the Commissioner is not satisfied with a valuation provided by the taxpayer and the value on which the taxpayer's liability is assessed exceeds the designated valuation provided by the taxpayer by 15 per cent or more; and
- (b) the Commissioner decides to recover those costs from the taxpayer.

Under section 27A(3) of the TAA, the amount of penalty tax payable is the difference between:

- (a) what would be the amount of the taxpayer's primary liability if the taxpayer's designated valuation were used in assessing their liability; and
- (b) the lesser of the value on which the Commissioner assessed the taxpayer's liability to duty or, if the taxpayer challenges the validity of the assessment, the amount of their primary liability in the final assessment.

Remission of penalty tax

Section 28 of the TAA limits the amount of penalty tax to the amount equal to the amount of the primary liability if the total amount of penalty tax assessed as payable by a taxpayer in relation to a primary liability exceeds, or would but for this section exceed, the amount of the primary liability.

Section 29 of the TAA provides that the Commissioner may remit penalty tax wholly or in part.

Section 30 of the TAA directs the Commissioner to publish the policy to be followed when deciding whether or not to remit penalty tax under section 29 of the TAA.

Commissioner's Practice

1. Where the taxpayer has provided a written valuation (whether or not in response to a request from the Commissioner to do so), or the taxpayer does not comply with a requirement to provide a written valuation under section 21 of the TAA, the taxpayer may, depending on the circumstances, be separately liable for:
 - 1.1 penalty tax for failure to provide, or late provision of, a written valuation; and
 - 1.2 recovery of valuation costs; and
 - 1.3 penalty tax for undervaluation.
2. Although a taxpayer may be separately liable for penalty tax for more than one contravention, where the total amount of penalty tax to be imposed is greater than the taxpayer's primary liability, the Commissioner will remit the total amount of penalty tax to an amount equal to the primary liability in accordance with section 28 of the TAA.
3. The table at Appendix 1 sets out the different circumstances in which one or all of the amounts set out in paragraph 1 may apply.

General Matters

Valuation costs

4. The costs of obtaining a valuation under section 22(1)(a) of the TAA ('valuation costs') are not limited to amounts invoiced to the Commissioner directly by a qualified valuer and may consist of other expenses associated with obtaining a valuation, including:
 - 4.1 legal costs incurred in relation to instructions for the valuer;
 - 4.2 travel costs; and
 - 4.3 other costs that the Commissioner incurs as a result of requiring third party expertise in a valuation matter.

Unforeseen and unusual circumstances

5. A reference in this practice to *unforeseen and unusual circumstances* means unanticipated circumstances outside the taxpayer's control, and are considered a higher benchmark than the criteria used in relation to *exceptional circumstances* of the type set out in other Commissioner's practices relating to the remission of penalty tax.¹
6. Circumstances which would be considered unforeseen and unusual include:
 - 6.1 the total destruction of the taxpayer's business records as a result of a fire, flood or other disaster;
 - 6.2 the serious illness, incapacitation or death of a valuer where the valuer is not part of a firm in which another valuer could take carriage of the matter; or
 - 6.3 the valuation methodology used by the taxpayer's valuer (not including the taxpayer's legal arguments) being subsequently overturned by a court or tribunal.

Non-compliance with a Request to Provide a Written Valuation

7. A request by the Commissioner under section 21 of the TAA to provide a written valuation by a qualified valuer ('section 21 notice') will allow a taxpayer four months to respond, unless an alternative period has been otherwise agreed in accordance with CP TAA 23.
8. Penalty tax will be imposed under section 26 of the TAA for failure to provide a written valuation when requested to do so, or provision of a written valuation after the specified due date, and will be remitted in accordance with paragraph 9.
9. Penalty tax will be remitted from 100 per cent of the primary liability to interest on the primary liability at a rate of 20 per cent per annum calculated daily for the penalty period as follows:

| CONTRAVENTION | PENALTY PERIOD | PENALTY REMITTED TO |
|--|--|---|
| Failure to provide valuation | Day after section 21 notice due date to date of issue of assessment notice | (primary duty x 20%) x (penalty period/365) |
| Valuation provided after section 21 due date | Day after section 21 due date to date valuation provided | |

¹ Commissioner's Practices TAA 18, TAA 19 and TAA 20.

10. Section 21(2) of the TAA does not authorise the Commissioner to extend the due date to respond to a section 21 notice. Subject to paragraph 11, where the taxpayer requires additional time to respond to a section 21 notice, the Commissioner will accept that the valuation will be provided after the specified due date, however, the taxpayer will be liable for penalty tax in accordance with paragraphs 8 and 9.
11. The taxpayer may make a written request for the remission of penalty tax because there are unforeseen and unusual circumstances preventing the taxpayer from providing the valuation by the specified due date. If the Commissioner accepts the submission, the Commissioner will usually agree to remit the penalty tax in full.

Nominating a Designated Valuation

12. A nomination to designate a valuation for the purposes of recovery of valuation costs and penalty tax for undervaluation must be in writing.
13. If the taxpayer has not already nominated a valuation, the Commissioner will make a written request to the taxpayer to do so. Where the taxpayer does not nominate a valuation when requested, the Commissioner will proceed on the basis that the last valuation provided by the taxpayer is the designated valuation.
14. Where a valuation was either nominated by the taxpayer as the designated valuation, or is a valuation that was obtained by the Commissioner under section 22 of the TAA ('original valuation'), and the taxpayer wishes to nominate a different valuation as the designated valuation ('subsequent valuation'), the taxpayer must make a written submission to the Commissioner addressing:
 - 14.1 the reasons the Commissioner should accept the subsequent valuation as the designated valuation; and
 - 14.2 if the taxpayer nominated the original valuation as the designated valuation, why that valuation should be superseded by the subsequent valuation; or
 - 14.3 if the taxpayer did not nominate a valuation as the designated valuation prior to the Commissioner seeking a valuation, the reasons why the taxpayer failed to do so.
15. The Commissioner will accept a subsequent valuation as the designated valuation when satisfied that there were circumstances beyond the taxpayer's control which caused the original valuation to be incomplete or inaccurate, or which prevented the taxpayer from providing a valuation or nominating a designated valuation prior to the Commissioner seeking a valuation under section 22(1)(a) of the TAA. Examples of circumstances beyond the taxpayer's control include changes to:
 - 15.1 an interpretation of the law or valuation methodologies as a result of the decision of a court or tribunal; or
 - 15.2 accounting or other financial standards.

16. The Commissioner will not accept a subsequent valuation as the designated valuation where the Commissioner considers, based upon the taxpayer's submissions and/or prior dealings with the taxpayer in relation to the transaction, that the request to nominate the subsequent valuation is made for a purpose which is, or includes, the avoidance of recovery of valuation costs and, where applicable, the imposition of penalty tax for undervaluation.

Recovery of Valuation Costs

17. Despite the fact that the Commissioner may remit penalty tax when a taxpayer fails to provide a written valuation in accordance with a section 21 notice, the Commissioner may still recover valuation costs under section 23A(1)(a) of the TAA.
18. Circumstances in which the Commissioner may not be satisfied with the taxpayer's valuation include where:
- 18.1 the Commissioner has different valuation information from previous or related transactions involving the same property;
 - 18.2 there is public information that is inconsistent with the taxpayer's valuation;
 - 18.3 the Commissioner considers that the allocation of value or consideration to non-dutiable assets is unreasonable; or
 - 18.4 the extent or complexity of the valuation issues requires independent review.

Penalty Tax for Undervaluation

19. The penalty tax payable under section 27A(3) of the TAA is the difference between the duty liability based upon the Commissioner's valuation and what the duty liability would be based upon the designated valuation.
20. The penalty tax will be remitted from 100 per cent of the amount of penalty tax payable to a percentage of the penalty amount as follows:

| VARIANCE BETWEEN COMMISSIONER'S VALUATION AND DESIGNATED VALUATION | PENALTY TAX REMITTED TO |
|--|-------------------------|
| 15% - 20% | 5% |
| Greater than 20% - 35% | 10% |
| Greater than 35% - 50% | 25% |
| Greater than 50% - 80% | 40% |
| Greater than 80% - 100% | 50% |
| Greater than 100% | 75% |

21. There will be no remission of penalty tax where:
 - 21.1 the variance between the Commissioner's valuation and the designated valuation is greater than 100 per cent; and
 - 21.2 the Commissioner considers that the taxpayer has attempted to avoid, reduce or defer the payment of tax, or mislead the Commissioner, by providing an underestimated valuation.
22. Further remission of penalty tax beyond the amounts specified in paragraph 20 will only be considered where there are circumstances outside the taxpayer's control that caused the designated valuation to be incomplete or inaccurate (see paragraph 15 for examples).
23. The table at Appendix 2 provides examples of how penalty tax for undervaluation will be remitted.

Date of Effect

This Commissioner's practice takes effect from 14 February 2014.

Bill Sullivan
COMMISSIONER OF STATE REVENUE
14 February 2014

SUPERSEDED

Appendix 1 – Penalty Tax and Recovery of Valuation Costs

| CIRCUMSTANCES AT TIME OF ASSESSMENT | PENALTY TAX FOR LATE PROVISION OF WRITTEN VALUATION s26(1)(c) | PENALTY TAX FOR FAILURE TO PROVIDE WRITTEN VALUATION s26(1)(E) | RECOVERY OF VALUATION COSTS s23A(1)(A) | RECOVERY OF VALUATION COSTS s23A(1)(B) | PENALTY TAX FOR UNDERVALUATION s27A(2) |
|--|---|--|--|--|--|
| Taxpayer provides valuation without section 21 notice; Commissioner obtains valuation; valuation differential is 15% or more | No | No | No | Yes | Yes |
| Taxpayer provides valuation without section 21 notice; Commissioner obtains valuation; valuation differential is less than 15% | No | No | No | No | No |
| No valuation provided in accordance with section 21 notice; Commissioner obtains valuation | No | Yes | Yes | No | No |
| Valuation provided after due date in section 21 notice; Commissioner accepts valuation | Yes | No | No | No | No |
| Valuation provided after due date in section 21 notice; Commissioner obtains valuation; valuation differential is 15% or more | Yes | No | No | Yes | Yes |
| Valuation provided after due date in section 21 notice; Commissioner obtains valuation; valuation differential is less than 15% | Yes | No | No | No | No |
| Valuation provided in accordance with section 21 notice; Commissioner obtains valuation; valuation differential is 15% or more | No | No | No | Yes | Yes |
| Valuation provided in accordance with section 21 notice; Commissioner obtains valuation; valuation differential is less than 15% | No | No | No | No | No |

Appendix 2 – Calculation of Penalty Tax for Undervaluation

| COMMISSIONER'S VALUATION (CV) | | DESIGNATED VALUATION (DV) | | REMISSION OF PENALTY TAX | | | |
|----------------------------------|------------|------------------------------|------------|-------------------------------------|---|---------------------------------|-------------------|
| Dutiable Value \$ | Duty \$ | Dutiable Value \$ | Duty \$ | Variation Between CV and DV % | Penalty Amount (difference between duty on CV and duty on DV) \$ | Penalty Tax Remitted To % | Penalty Tax \$ |
| 115,000,000 | 5,916,415 | 100,000,000 | 5,143,915 | 15% | 772,500 | 5% | 38,625 |
| 125,000,000 | 6,431,415 | 100,000,000 | 5,143,915 | 25% | 1,287,500 | 10% | 128,750 |
| 150,000,000 | 7,718,915 | 100,000,000 | 5,143,915 | 50% | 2,575,000 | 25% | 643,750 |
| 175,000,000 | 9,006,415 | 100,000,000 | 5,143,915 | 75% | 3,862,500 | 40% | 1,545,000 |
| 200,000,000 | 10,293,915 | 100,000,000 | 5,143,915 | 100% | 5,150,000 | 50% | 2,575,000 |
| 300,000,000 | 15,443,915 | 100,000,000 | 5,143,915 | 200% | 10,300,000 | 75% | 7,725,000 |