

**Part F      Penalties and Interest Relating to Receivables Activities****98      LODGMENT PENALTY**

*The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.*

**Date of Effect: 4 July 2006** (*This replaces the 2003 version*)

*This chapter should be read in conjunction with the chapter entitled - 'Introduction to Part F – Penalties relating to Receivables Activities'.*

**98.1      PURPOSE**

98.1.1      This chapter discusses:

- (i)      how the law imposes lodgment penalty
- (ii)     policy in relation to application and remission of lodgment penalty
- (iii)    objection and appeal provisions.

98.1.2      To support the various legislative provisions that impose lodgment penalties this chapter has been divided into two parts, **Part A** and **Part B**.

98.1.3      **Part A** relates to the **failure to lodge on time (FTL) penalty** provided by Division 286 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) with effect from 1 July 2000.

The penalty is imposed for late lodgment or non-lodgment of the following documents:

- (i)      Income Tax returns for the 2000/01 income year and later years,
- (ii)     Fringe Benefit Tax (FBT) returns for the year of tax commencing 1 April 2001 and later years,
- (iii)    Pay as you go (PAYG) withholding annual reports for the 2000/01 year and later years,
- (iv)     Annual GST returns and annual GST information reports for the 2000/01 year and later years,
- (v)      Activity statements, and
- (vi)     any other return, notice, statement, application or other document that is required to be lodged in the approved form in terms of Division 388 of Schedule 1 to the TAA.

98.1.4      **Part B** relates to **additional tax and late lodgment penalty** imposed by various provisions of the *Income Tax Assessment Act 1936* (ITAA 1936) and the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) before the introduction of Division 286 of the Schedule 1 to the TAA. The penalties are imposed for late lodgment of the following returns:

- (i)      income tax returns for years prior to the 2000/01 income year; and
- (ii)     FBT returns for years prior to the year of tax commencing 1 April 2001.

*In this chapter the term:*

*'impose' refers to the establishment of a statutory penalty within the framework of the law; and*

*'apply' refers to the use of the authority to administer the law.*

*Consequently, whilst the law may 'impose' a penalty the Commissioner has the authority to determine if the circumstances are such that he will apply the penalty.*

## **PART A - Failure to lodge on time (FTL) penalty**

### **98.2 LEGISLATION**

#### **Liability to penalty**

98.2.1 Liability to FTL penalty for failing to lodge documents on time is provided by subsection 286-75(1) in Division 286 of Schedule 1 to the TAA. The provision imposes an administrative penalty on an entity which fails to give a return, statement, notice or other document in the approved form to the Commissioner by a particular day or date.

98.2.2 Under subsection 286-75(2) of Schedule 1 to the TAA documents required to be given to the Commissioner under the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation (Self Managed Superannuation Funds) Supervisory Levy Imposition Act 1991* are specifically excluded from the operation of Division 286.

#### **Amount of penalty**

98.2.3 The amount of FTL penalty is calculated in accordance with section 286-80 of Schedule 1 to the TAA.

98.2.4 Under subsection 286-80(2) of Schedule 1 to the TAA all entities, which include individuals, are liable for a 'Base Penalty Amount' (BPA) if they fail to lodge a return, statement, notice or other document with the Commissioner on time and in the approved form. The BPA is one penalty unit for each period of 28 days (or part thereof) that a document remains outstanding starting on the day when the document is due and ending when it is given to the Commissioner. The maximum BPA is 5 penalty units. The current value of a penalty unit under Section 4AA of the *Crimes Act 1914* is \$110.

98.2.5 Under subsection 286-80(3) and subsection 286-80(4) the BPA is increased by a multiplier that reflects the size of an entity. A large entity, whose information is likely to have a greater significance for risk purposes, will incur a higher penalty amount than a small or medium entity. The multiplier categories are:

- (i) small entity – liable to the BPA.
- (ii) medium entity – liable to 2 times the BPA.
- (iii) large entity – liable to 5 times the BPA.

98.2.6 An entity's size is determined by either, the withholder status, assessable income or current annual turnover (for GST purposes) of the entity. Consequently:

- (i) a small entity is an entity that is neither a medium or large entity on the due date for lodgment
- (ii) a medium entity is either a medium withholder for PAYG withholding purposes, or has assessable income or current annual turnover between \$1million and \$20million on the due date for lodgment
- (iii) a large entity is either a large withholder for PAYG withholding purposes, or has assessable income or current annual turnover greater than \$20 million on the due date for lodgment.

### **Remission of penalty**

98.2.7 The Commissioner may remit the penalty in accordance with section 298-20 of Schedule 1 to the TAA.

### **Other legislation**

98.2.8 Under section 25-5 of the *Income Tax Assessment Act 1997* (ITAA1997) FTL penalty is not a tax deduction.

## **98.3 INTRODUCTION**

98.3.1 Taxpayers have a responsibility to meet their lodgment requirements as and when they fall due.

98.3.2 The lodgment of documents by the due date is essential to the efficient operation and administration of the taxation system. Integral to this is the value of the information contained in the document and the preservation of community confidence in the taxation system.

98.3.3 In response to this requirement, where a taxpayer fails to give a return, statement, notice or other document to the Commissioner on time and in the approved form Division 286 of Schedule 1 to the TAA- *Penalties for failing to lodge documents on time* - operates to impose an administrative penalty. Division 286 further sets out how the penalty amounts are calculated.

98.3.4 The Commissioner recognises that circumstances may arise which prevent a person or their agent from fulfilling their lodgment obligations on time and may, in some cases, allow additional time for lodgment of a document. Guidelines for allowing additional time to lodge can be found in the policy chapter entitled '*Deferral of the due date for lodgment and suspension of lodgment action*'.

98.3.5 If additional time to lodge is required it is expected that a taxpayer or their agent would, before the due date for lodgment, notify the Commissioner of the circumstances preventing lodgment of the document on or by the due date. Where a deferral is granted the FTL penalty, if applicable, will apply from the deferred due date.

98.3.6 FTL penalty is distinguishable from other penalties and charges that may be applied to safeguard Government revenues. Unlike the general interest charge (GIC), which is a charge on an amount for the period of time that the amount remains unpaid, imposition of FTL penalty is based solely upon the period of time that an approved form is outstanding. It is not dependant upon a related unpaid amount.

## **98.4 POLICY**

### Application of FTL penalty

98.4.1 The legislation provides the Commissioner with the authority to apply a penalty if a document is not lodged by its due date.

98.4.2 As a broad statement of policy:

**The Commissioner will apply a penalty on a return, notice, statement or other document required to be provided to the Commissioner, which, if not provided by the due date:**

(i) places at risk the efficient operation of the taxation system,

(ii) provides a significant benefit or advantage to the late lodger over the general community, or

(iii) erodes community confidence in the taxation system.

98.4.3 A risk to the efficient operation of the taxation system may occur where information required by the Tax Office is not received on time and in the approved form. For example, timely lodgment of the PAYG annual report by employers, providing information about payments to employees, is essential for the effective administration of the PAYG withholding system.

98.4.4 There is potentially a greater risk to efficient tax administration when information required from larger entities is not provided by the due date. Accordingly, more emphasis may be placed on obtaining timely information from large entities.

98.4.5 A taxpayer who does not provide information to the Commissioner on time may gain a significant benefit or advantage over taxpayers that comply with their obligations. For example, a taxpayer who lodges their income tax return late to delay an obvious increase in their PAYG income tax instalment rate. A delayed increase in the instalment rate may provide the taxpayer with an advantage over other taxpayers in the general community.

98.4.6 A loss of community confidence in the tax system may result from an unsupported argument being promoted as a reason for not lodging a document or documents. An example of this may be a claim that the provision of certain information is a breach of privacy and as such there is no obligation to lodge a document. While the Commissioner recognises an individual's right to have an argument determined by a court of law, the general community may lose confidence in the tax system if the Commissioner did not continue to pursue lodgment of the document pending the decision of the court.

98.4.7 In deciding whether to apply FTL penalty the Commissioner will have regard to:

(i) the lodgment history of the taxpayer, and

(ii) the effort taken by the Tax Office to obtain lodgment.

Further, the penalty will only be applied where;

(iii) a penalty warning was provided to the taxpayer in relation to a similar type of document (eg an activity statement), and

(iv) the warning was provided in the current period or immediate prior period, or

(v) the penalty was applied to a similar type of document in the immediate prior period.

98.4.8 GIC will apply to any FTL penalty which remains unpaid after the due date for payment. Remissions for any GIC applied will be in accordance with the policy outlined in the policy chapter titled '*General Interest Charge*'.

### **Consolidations**

98.4.9 The head company of a consolidated group is required to lodge two activity statements – one for the consolidated PAYG income tax instalment of the group, and the second for any other obligations it may have in its own right (GST, FBT etc). The application of FTL penalty applies to both these activity statements separately.

98.4.10 The head company of a consolidated group is required to lodge a notice of choice to consolidate in the approved form, prior to or at the time of lodgment of the consolidated income tax return. Generally, the Commissioner will not impose FTL penalty on the late lodgment of the notice of choice.

### **Remission of FTL penalty**

98.4.11 A taxpayer is entitled to request a remission of FTL penalty. The request must be in writing and fully outline the reasons for the delay in lodgment.

98.4.12 The Commissioner has a discretion to remit FTL penalty, in full or in part, depending on the circumstances that led to the failure to lodge on time.

98.4.13 A decision on a request for remission of penalty will be made having regard to:

- (i) the facts of each individual case including:
  - (a) information provided by the taxpayer or their tax agent, and
  - (b) any other information available to the Commissioner.
- (ii) the Taxpayers' Charter and the ATO Compliance Model
- (iii) the chapter titled - '*Principles underlying the Receivables Policy of the Tax Office*', and
- (iv) the policy guidelines contained in this chapter.

98.4.14 Where the Commissioner is satisfied that a remission of penalty is warranted, either in full or in part, it will be remitted (section 298-20 of Schedule 1 to the TAA).

98.4.15 It would be inappropriate to exercise the discretion to remit FTL penalty for the following reasons:

- (i) as an inducement to encourage lodgment of the return, statement or other document,
- (ii) as an inducement to encourage payment of debts, or
- (iii) to finalise a case where the Tax Office has not attempted to collect outstanding amounts.

98.4.16 Generally, remission of FTL penalty will only be granted where the delay in lodgment occurred due to **circumstances beyond the control of the taxpayer** or in such other circumstances, by reason of which, it would be **fair and reasonable** for the Commissioner to remit the penalty. Requests for remission should demonstrate that circumstances were such that the timely lodgment of the document(s) was not possible, and that the

taxpayer or their tax agent was not in a position to request additional time to lodge prior to the due date.

98.4.17 Full remission of FTL penalty will be granted where the taxpayer or their tax agent can establish that special circumstances (that is circumstances beyond their control) existed that directly impacted on their ability to lodge the document on time

98.4.18 Where special circumstances do not exist it may still be appropriate for the Commissioner to remit the FTL penalty, in full or in part, where it would be fair and reasonable to do so. In these cases the Commissioner will consider such factors as the length of time the document was overdue, the taxpayer's circumstances, the tax agent's circumstances (where applicable), the taxpayer's lodgment history and any relevant contact with the Tax Office prior to the due date of the document.

98.4.19 Generally, a request for remission of FTL penalty would only be considered once the outstanding document has been lodged.

#### **Reasons for remission**

98.4.20 The Commissioner will consider all of the reasons put forward by a taxpayer in their request for remission of FTL penalty, their effect upon late or non-lodgment and any steps taken to alleviate the delay in lodgment. Remission would not be considered if the taxpayer were to rely on general grounds, nor would it be considered if the taxpayer were to rely on factors that could only be remotely linked to the late or non-lodgment

#### **Circumstances beyond the control of the taxpayer**

98.4.21 A taxpayer (or their tax agent) may be able to demonstrate that the difficulties they are experiencing were due to factors beyond their control and clearly could not be predicted and the taxpayer or their tax agent was not in a position to request further time to lodge. Such circumstances may include, but are not limited to, natural disasters including fire, flood, drought and earthquake, or the serious illness of the taxpayer or their tax agent that is a sole practitioner.

98.4.22 General statements such as adverse business conditions affecting an industry, general economic downturn would not be an acceptable basis for remission under this heading as these factors are more likely to prevail across the whole community. Taxpayers would need to demonstrate that such factors had specific impacts on their ability to lodge before they could be considered as reasons for remission.

#### **Fair and Reasonable**

98.4.23 A decision by the Commissioner to remit penalty because it is fair and reasonable must be considered in view of the legislative policy that taxpayers should be liable to a penalty if they lodge late. Not only must the exercise of the power to remit be fair to the taxpayer concerned, it must be fair to the whole community. In other words a taxpayer who lodges late or fails to lodge should not be given any undue advantage over those taxpayers who organise their affairs to ensure they can lodge on time. Taxpayers will need to demonstrate that it is fair and reasonable to remit the penalty, having regard to the nature of the specific event or decision.

### **Objection and Appeal Provisions**

98.4.24 Where the Commissioner refuses to remit an amount of FTL penalty he must advise of the decision and the reasons for the decision in writing. If the taxpayer is not satisfied with the decision he may have a right to object against the decision under Part IVC of the TAA.

98.4.25 An objection under Part IVC of the TAA 1953 may be made if the Commissioner has refused, to any extent, to remit a penalty amount and the penalty amount that remains payable after the refusal is more than 2 penalty units (section 298-20 of Schedule 1 to the TAA).

98.4.26 Where a decision by the Commissioner not to remit a penalty cannot be reviewed under Part IVC of the TAA (ie the amount of penalty that remains payable after the refusal to remit is 2 penalty units or less) the taxpayer may seek a review under the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act).

### **PART B - Additional tax and late lodgment penalty**

#### **98.5 LEGISLATION**

98.5.1 Taxpayers have a responsibility to meet their lodgment obligations as and when their income tax returns and other documents fall due for lodgment. Various taxation laws provided for the automatic imposition of additional amounts when a return was not lodged on time.

98.5.2 The Commissioner recognises that circumstances do arise from time to time that temporarily prevent a person carrying out their statutory obligations and may allow further time for lodgment of a return where the circumstances meet certain criteria.

98.5.3 Relevant provisions of the more common taxing statutes that impose penalties for late lodgment and non-lodgment of:

- income tax returns for years prior to the 2000/01 income year,
- fringe benefits tax returns for years prior to the year of tax commencing 1 April 2001

and the circumstances in which the Commissioner may remit such penalties are set out below.

The relevant provisions of the more common taxing statutes imposing penalty interest for late lodgment of income tax returns for the years prior to the 2000/01 income year are contained in the appendix to this chapter.

#### **1994-95 or Earlier Year of Income**

98.5.4 A taxpayer will be liable to Additional Tax for Late Lodgment (ATLL) where a return is lodged late; tax is payable; and in respect of the 1995 year of income or earlier years.

98.5.5 In practice, the full statutory ATLL imposed by section 222 of the ITAA 1936 is not normally levied, as in all but the most exceptional circumstances, the Commissioner exercises the discretion provided by subsection 227(3) of ITAA 1936 and remits part of the ATLL at the time of making the assessment.

98.5.6 In respect of individual returns for the years ended 30 June 1993 to 1995 inclusive, ATLL was and is imposed at the rate of 20% per annum if the return was lodged involuntarily or 10% if voluntarily lodged.

98.5.7 In the case of voluntary lodgments which result in debit assessments, remission of the statutory ATLL to an amount calculated at 10% per annum of the lesser of the tax assessed or tax payable, subject to a maximum in respect of any year of 50% of the tax assessed is applied.

98.5.8 Returns relating to relevant entities attract ATLL equal to the lesser of:

- (i) the section 222 of the ITAA 1936 amount as calculated in accordance with IT 2475, or
- (ii) \$25 per week to a maximum of \$500.

98.5.9 Prior to 1993, ATLL was imposed at a rate of 20% in all cases.

**1996 and Subsequent Years - Other Than Relevant Entities - lodged late up to 30 June 1999**

98.5.10 A taxpayer will be liable to Late Lodgment Penalty (LLP) and/or Late Lodgment Penalty Interest where a return is lodged late; tax for penalty is a debit; and in respect of the year of income ending 30 June 1996 or subsequent year's returns up to 30 June 1999. The GIC will be applied from 1 July 1999 should the return(s) be lodged after that date.

98.5.11 Where an income tax return is lodged late and is lodged by the taxpayer without any Tax Office involvement, then the return will be treated as a voluntary lodgment.

98.5.12 When a return is lodged voluntarily, LLP will not be imposed; penalty interest will be imposed. The liability to the penalty interest arises irrespective of whether the Commissioner has remitted the additional tax imposed by section 163B of the ITAA 1936.

98.5.13 Where an income tax return is lodged late and is lodged as a result of one of the following:

- (i) the issue of a final notice or demand for lodgment,
- (ii) the raising of a default assessment under section 167 of the ITAA 1936,
- (iii) telephone or personal contact by the Tax Office regarding the non-lodgment of an income tax return, or
- (iv) an audit or an audit of associated entities carried out by the Tax Office,

late lodgment penalty interest will be imposed and late lodgment penalty will be imposed.

**1996 to 2000 Years - Other Than Relevant Entities - lodged late after 30 June 1999.**

98.5.14 Prior to 1 July 2001, the penalty was charged at the rate of the Treasury Note Yield Rate plus eight (8) percentage points. From 1 July 2001, the GIC rate for a day is worked out by adding 7 percentage points to the base interest rate for that day, and dividing that total by the number of days in the calendar year. For each day in a specified quarter of the year, the base interest rate equals the monthly average yield of 90-day Bank Accepted Bills for a specified month.

98.5.15 The interest is charged on the lesser of:

- (i) 'income tax payable on assessment,; or
- (ii) the 'net tax payable'

and applies from the due date of the return to the day before the return is lodged. The legislation repeals section 163C of the ITAA 1936 interest and replaces section 163B of the ITAA 1936 penalty with the GIC.

98.5.16 This is the only calculation that will apply after 1 July 1999 to 1999 and 2000 returns lodged late.

98.5.17 All 1996 and 1997 returns lodged late after 1 July 1999 will have penalty tax and penalty interest applied from the day after the gazetted due date for lodgment (31 October 1996 and 1997 respectively) until 30 June 1999. The GIC will then apply from 1 July 1999 until the day prior to the lodgment date of the return(s).

98.5.18 For 1998 returns, penalty tax and penalty interest will apply from the day after any further period of time granted to lodge, (eg due date for lodgment under tax agent lodgment program) until 30 June 1999. The GIC will apply from 1 July 1999 until the day prior to the lodgment date of the return(s).

### **1996 to 2000 years - Relevant Entities**

98.5.19 A relevant entity will be liable to Late Lodgment Penalty (LLP) where a return is lodged late; in respect of the 1996 to 2000 years of income; and applies to all relevant entities whether taxable or non-taxable.

98.5.20 The rate of LLP as applied to relevant entities is \$10 per week or part of a week up to a maximum of \$200. The minimum penalty is \$10.

### **Fringe Benefits Tax**

98.5.21 Section 114 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) provides for additional tax for failure to furnish a return as and when required. The legislation provides for additional tax equal to double the amount of tax payable, unless this amount is less than \$20.00, in which case the additional tax will be \$20.00. Section 117 of the FBTAA gives the Commissioner discretion to remit all or part of any additional tax payable in accordance with section 114 of the FBTAA to an amount that is considered reasonable given both the circumstances surrounding the failure to furnish the return and its consequences.

98.5.22 Until 1996 the policy adopted when determining additional tax for late lodgment (LLP) was, with due consideration given to each case, based on a per annum component of 5% pa of the net tax payable (being tax assessed less any instalments raised) together with - if appropriate – a culpability component of 1.25% if the return was lodged after 1 July or 3.75% if the return was lodged after 1 October. In addition any late payment penalty (LPP) applicable in accordance with section 93 was applied.

98.5.23 In May 1995 the Commissioner issued Taxation Ruling TR95/4 – Fringe Benefits Tax: guidelines for the remission of penalty taxes arising from audit action. This ruling resulted in discrepancies between the treatment of late lodgers in audit and non-audit situations, particularly since the ruling provides that LLP should include a per annum and a culpability component, and any LPP should be remitted in full.

98.5.24 As a consequence, in 1996 the guidelines in TR95/4 were adopted in all situations when LLP applied, be they audit or non-audit initiated. LLP has been imposed using these guidelines since then, and has only changed to comply with the TR95/4-Addendum issued 25 August 1999, as a consequence of the new GIC that came into effect on 1 July 1999.

98.5.25 TR95/4 provides that the penalty imposed under section 114 of the FBTAA will be remitted with reference to the guidelines applicable to the remission of section 115 of the FBTAA penalties (that is, those relating to the making of false and misleading statements). Both a per annum and culpability component are to be included in the calculation to arrive at the appropriate level of remission under subsection 117(3) of the FBTAA. From 1 July 1999, the GIC applies in lieu of the per annum component.

98.5.26 These provisions apply in respect of FBT returns for the years ended 31 March 2001 and earlier years.

## **98.6 REMISSION OF PENALTY**

98.6.1 Basically, the Commissioner has identified three sets of circumstances when he may exercise a discretion to remit the additional taxes. He may remit if he is satisfied that:

- (i) the circumstances that contributed to the delay in lodgment of the return were not due to, or caused directly or indirectly by, an act or omission of the taxpayer; and the taxpayer has taken reasonable action to relieve, or relieve the effects of, those circumstances; or
- (ii) the circumstances that contributed to the delay in lodgment of the return were due to, or caused directly or indirectly, by an act or omission of the taxpayer; and the taxpayer has taken reasonable action to relieve, or relieve the effects of, those circumstances; and having regard to the nature of those circumstances, it would be fair and reasonable to remit the additional tax or part of the additional tax; or
- (iii) there are special circumstances by reason of which it would be fair and reasonable to remit the additional taxes or part of the additional taxes.

98.6.2 The Commissioner may remit in whole or in part any portion of a penalty, penalty interest and general interest charge. Where the Commissioner decides to either not remit or remit part only of a penalty amount or general interest charge, he must advise of his decision and the reasons for his decision in writing. The right a taxpayer has to a further review of the decision made is set out in Part IVC of the TAA. A decision not to remit late lodgment penalty interest is neither reviewable nor appealable, under the TAA, although a taxpayer may seek redress under the AD(JR) Act.

98.6.3 Where a taxpayer seeks a remission of additional amounts, the taxpayer's request should be considered having regard to:

- (i) the facts of each individual case,
- (ii) the chapter entitled - '*Principles underlying the Receivables Policy*' Tax Office, and
- (iii) the policy guidelines contained in this chapter.

98.6.4 It would be inappropriate to exercise the discretion to remit additional taxes for the following reasons:

- (i) as an inducement to encourage lodgment of the return, statement or other document,
- (ii) as an inducement to encourage payment of debts, or
- (iii) to finalise a case where the Tax Office has not attempted to collect additional taxes.

## **98.7 POLICY**

98.7.1 The various taxation laws provide for the automatic imposition of additional amounts when a return is lodged late or not at all. The Commissioner expects that the additional amount will be payable and will take steps to recover those charges. The Tax Office recognises that circumstances do arise from time to time that temporarily prevent a person carrying out their statutory obligations. The Commissioner of Taxation may allow further time for lodgment of a return, statement or other document where the circumstances meet certain criteria. It is expected that a taxpayer would notify the Commissioner of any circumstances that prevent the lodgment of the return by the due date. Refer further to the chapter entitled – *‘Deferral of the Due Date for Lodgment and Suspension of Lodgment Action’*.

98.7.2 However, the legislation acknowledges that situations exist where it would be fair and reasonable for the additional amounts to be remitted. The Commissioner has the discretion to remit the additional taxes in part or in full depending on the circumstances that led to the late or non-lodgment.

98.7.3 Where the Commissioner is required to make an assessment of additional amounts, a taxpayer has a right to object against late lodgment penalty imposed under the various sections. Generally, taxpayers who are charged late lodgment penalty interest have no right to object against the interest but may request a remission (Refer to Appendix). Objection requests received outside the set time period or in respect of late lodgment penalty interest will be treated as a remission request. Where the Commissioner is satisfied that a remission of the additional taxes is warranted, they will be remitted, either in full or in part. It is up to the taxpayer to demonstrate that remission is warranted.

98.7.4 The Commissioner will consider a request in accordance with the relevant remission provision.

### **A Penalty Interest**

98.7.5 Penalty interest is by its nature a compensatory amount and it is imposed where the Commonwealth has been denied the use of funds because returns and statements were not lodged by the due date.

98.7.6 Any interest charge is deductible to the taxpayer in the return for the year of income in which the interest is incurred. Any remission of interest charges that have been claimed as a tax deduction will form part of assessable income of the taxpayer for the year in which the remission is granted.

98.7.7 Penalty interest may be remitted, but will only be remitted in limited and exceptional circumstances (eg natural disasters such as fire, flood, or

drought which directly caused difficulty in lodging the return). Each request for remission of the penalty interest will be considered on its merits and a decision made in light of the particular circumstances of the case. The taxpayer will need to demonstrate that exceptional circumstances apply for remission of this component of the additional taxes.

### **B Penalty Tax**

98.7.8 Penalty tax is imposed to reflect culpability on the part of the taxpayer in lodging a return, statement or document late. There is an automatic remission of additional tax (culpability component) when certain criteria are met. Where any of the criteria are not met, the Commissioner has the power to consider remission. Remission will be granted where the taxpayer is able to demonstrate to the Commissioner that the circumstances that resulted in late lodgment were ones over which the taxpayer had no control. These circumstances generally would encompass flood, fire or other natural disaster, serious ill health of the taxpayer where no other person was available to ensure lodgment was made, etc. The Commissioner has the power to remit, in the case of tax returns, all or part of the additional tax or penalty units, in the case of individuals; the flat rate penalty in the case of relevant entities.

### **C General Interest Charge**

98.7.9 The GIC reflects the time value of money deferred by late lodgment of an income tax return or by late payment of any penalty imposed. The Commissioner expects that the interest will be payable in most situations and full remission will only be granted in limited and exceptional circumstances (eg natural disasters such as fire, flood, or drought which directly caused difficulty in lodging the return by the due date).

98.7.10 While the reasons may not meet the requirements for full remission, in some circumstances it will be appropriate to remit part of the additional amount.

98.7.11 The GIC legislation specifically refers to when the Commissioner may exercise a discretion to remit the GIC for late payment, but guidance should be taken in relation to remission of the charge for late lodgment.

98.7.12 Any interest charge is deductible to the taxpayer in the return for the year of income in which the charge was incurred. Any remission of interest claimed as a tax deduction will form part of assessable income of the taxpayer for the year in which the remission is granted.

### **D Reasons for Remission**

98.7.13 The Commissioner will consider all of the factors put forward by a taxpayer in the request for remission, their effect upon late or non-lodgment and the steps taken to alleviate the delay in lodgment. Remission would not be considered if the taxpayer were to rely on general grounds for the request, nor would it be considered if the taxpayer were to rely on factors that could only be remotely linked to the late or non-lodgment.

98.7.14 Where the Commissioner is satisfied that a remission of the additional amount is warranted, it will be remitted, either in full or in part. A decision on the request for remission will be made based upon information provided by the taxpayer as part of the request for remission and from

any other information available to the Commissioner. The Commissioner will not remit any additional amount if there is insufficient relevant information to make a decision.

98.7.15 It is expected that full remission would be granted only in circumstances that were outside the control of the taxpayer and where all reasonable mitigating steps were taken. The Commissioner will take into account any contact with the Tax Office, regarding the late or non-lodgment of the return, prior to the due date. Therefore, requests for remission should seek to demonstrate that circumstances were such that timely lodgment of the tax return(s), was not possible, and that the tax agent and/or taxpayer was not in a position to seek further time to lodge the return.

98.7.16 While the reasons may not meet the requirements for full remission, in some circumstances it will be appropriate to remit part of the additional amount. The length of time the return was overdue, the taxpayer's circumstances, the taxpayer's lodgment and payment history and any contact with the Tax Office, prior to the due date, regarding the late lodgment would be factors to consider.

#### **factors beyond the control of the taxpayer**

98.7.17 A taxpayer may be able to demonstrate that the difficulties they are experiencing were due to factors beyond their control and clearly could not be predicted, and the tax agent and/or taxpayer was not in a position to seek further time to lodge the return. In considering any remission, it is also necessary to consider what steps were taken, if any, to relieve the effects of the circumstances causing the late or non-lodgment.

98.7.18 General statements such as adverse business conditions affecting an industry, general economic downturn would not be an acceptable basis for remission under this heading as these factors are more likely to prevail across the whole community. Taxpayers would need to demonstrate that such factors had specific impacts on their ability to lodge before they could be considered as reasons for remission.

#### **acts or omissions of the taxpayer**

98.7.19 Acts or omissions of the taxpayer which prevent lodgment by the due date will vary. In considering remission, it is necessary to determine whether the delay in lodgment was caused by the taxpayer's direct involvement or otherwise and what steps were taken, if any, to relieve the effects of the circumstances causing the late or non-lodgment.

98.7.20 A soundly advised or well considered decision which results in unforeseen severe consequences affecting a taxpayer's ability to lodge might otherwise gain some remission. This would assume that the taxpayer could demonstrate that plans were in place to ensure the lodgment of the return, statement or other document on time, but that as a result of the unforeseen circumstances, lodgment on time was not possible.

#### **relieving the circumstances or effects of circumstances**

98.7.21 The Commissioner must consider the taxpayer's efforts to relieve all of the circumstances that led to late lodgment or the effect of those circumstances causing the delay, irrespective of whether the circumstances were subject to, or beyond, the taxpayer's control. To be eligible for remission, the taxpayer would be expected to have taken all

reasonable action possible, promptly, in an attempt to lessen the severity of the circumstances as they affected the inability to lodge by the due date and beyond.

#### **fair and reasonable**

98.7.22 A decision by the Commissioner to remit penalty because it is fair and reasonable must be considered in view of the legislative policy that taxpayers should be liable to additional amounts if they lodge late. Not only must the exercise of the power to remit be fair to the taxpayer concerned, it must be fair to the whole community. In other words a taxpayer who lodges late or fails to lodge should not be given any advantage over those taxpayers who organise their affairs to ensure they can lodge on time. Taxpayers will need to demonstrate that it is fair and reasonable to remit the additional amounts, having regard to the nature of the specific event or decision.

#### **deceased estates**

98.7.23 The trustee of a deceased estate under administration would need to demonstrate that information was not available at an earlier date to enable lodgment when making a request for remission of the additional charges that accrued during the period of the administration.

98.7.24 Remission of any additional charges that accrued during the period prior to the date of death of the taxpayer would be considered in accordance with the general guidelines.

### **E      Objection and Appeal Provisions**

98.7.25 Under Part IVC of the TAA, objections may be lodged against the calculation of additional tax for late lodgment. In so far as the objection relates to the severity of the additional tax for late lodgment, the Commissioner's decision on the objection will be determined on the merits of the particular case and in accordance with the guidelines discussed in this Policy.

98.7.26 The powers of the Administrative Appeals Tribunal to review decisions of the Commissioner relating to remission of additional tax payable under section 222 of the ITAA 1936 are limited to additional tax that exceeds:

- (i) an amount calculated at the rate of 20% per annum of tax payable for the period commencing on the last day allowed for furnishing the return and ending on the day on which the return is furnished or the day on which the assessment of additional tax is made, whichever happens first; or
- (ii) if the amount calculated in (a) above is less than \$20. If additional tax exceeds the amounts calculated in (a) or (b), the Administrative Appeals Tribunal has power to review the whole of the amount imposed.

### **Section 163A(1) – Relevant Entities and Instalment Taxpayers (Companies etc.)**

98.7.27 A relevant entity or instalment taxpayer who is dissatisfied with a notice of penalty or a decision of the Commissioner not to remit the penalty under subsection 163A(5) of the ITAA 1936 may object against the notice or the decision in accordance with Part IVC of the TAA.

98.7.28 Where the relevant entity or instalment taxpayer is dissatisfied with the Commissioner's objection decision they may, under section 14ZZ of Part IVC of the TAA, either apply to the Administrative Appeals Tribunal for a review of the decision or appeal to the Federal Court against the decision.

### **Section 163B(1) and Section 163C(1) – Individual Taxpayers**

98.7.29 The definition of assessment in subsection 6(1) of ITAA 1936 has been amended to incorporate an assessment of additional tax (culpability component). This allows a taxpayer to object against the assessment under section 175A of the ITAA 1936.

98.7.30 An amendment has been made to subsection 14ZS(2) of the TAA to exclude objection decisions in respect of assessments of additional tax made under section 163B of the ITAA 1936 from the definition of ineligible income tax remission decisions. Taxpayers who are dissatisfied with the objection decision can apply to the Administrative Appeals Tribunal for a review of the decision, or appeal to the Federal Court against the decision.

98.7.31 There are no rights of objection, review or appeal under Part IVC of the TAA against a notice of interest (section 163C of the ITAA 1936). A decision not to remit all or any part of the interest component of late lodgment penalty may be reviewed under the AD(JR) Act or by the Federal Court.

### **Section 163(B) – General Interest Charge**

98.7.32 From 1 July 1999, GIC is imposed under section 163B of ITAA 1936. Section 8AAG of TAA provides for the Commissioner to remit all or part of the GIC imposed. There are no objection rights against a decision of the Commissioner not to remit the amount. Therefore, a decision by the Commissioner not to remit GIC on LLP imposed under section 163B of the ITAA 1936 cannot be reviewed by the Administrative Appeals Tribunal (AAT), nor can it be appealed to the Federal Court. The taxpayer may seek review under the AD(JR) Act. Note that subsection 163B(5) of the ITAA 1936, which required the Commissioner to raise an assessment of the amount payable under this section and thus conferred rights of objection, has been repealed.

## **F Prosecution Penalties**

98.7.33 Any person who fails or refuses to furnish a return, statement or other document or any other information under the relevant Act commits an offence and is liable, on conviction, to a penalty not exceeding \$2,200 if it is the first offence. If convicted of a second offence, that person becomes liable to a penalty not exceeding \$4,400. If convicted of a third or subsequent offence, that person (not being a company) becomes liable to a penalty not exceeding \$5,500 or imprisonment for a period of not more than 12 months, or both. A company may be fined \$27,500.

98.7.34 However, where a person is liable to pay a penalty for late or non-lodgment and a prosecution for non lodgment is instituted, the person is not liable to pay the penalty even if the prosecution is later withdrawn (section 8ZE of the TAA).

## **98.8 TERMS USED**

98.8.1 'Activity Statement (AS)'. See 'Business activity statement' and 'Instalment activity statement' for further details.

98.8.2 'Additional tax for late lodgment', 'administrative penalty', 'late lodgment penalty interest,' 'late lodgment penalty', 'lodgment penalty', 'General Interest Charge' (GIC) and 'Failure to Lodge on Time Penalty' all refer to the specific additional amounts imposed by the various acts administered by the Commissioner. Additional Taxes or penalties may be applied whenever a return, statement, document or other approved form is not lodged by the due date for lodgment, where payment of these amounts occurs after the due date for payment GIC may apply to late paid amounts.

98.8.3 'Approved form' takes the meaning set out in subsection 388-50(1) of Schedule 1 to the TAA. The Commissioner may combine in the same approved form more than one return, notice, statement or other document (for example, an 'Activity Statement').

98.8.4 'Base Penalty Amount' takes the meaning set out in subsection 286-80(2) of Schedule 1 to the TAA. It is imposed for each period of 28 days or part thereof that an approved form remains outstanding after its due date for lodgment (up to a maximum of 5 penalty units).

98.8.5 'Business activity statement' means an approved form to be lodged by those taxpayers who have an Australian Business Number and lodged by taxpayers who have a range of obligations including GST.

98.8.6 'Current annual turnover' takes the meaning set out in section 195-1 to the *A New Tax System (Goods and Services Tax) Act 1999* and is the sum of the values of all supplies made during the year, other than certain exclusions. This term is contained in one of the tests used to determine if the base penalty amount is to be multiplied by a factor of 2 or 5.

98.8.7 'Due date for lodgment' means the latest date by which a taxation return, statement or other approved form must be lodged with the Commissioner.

98.8.8 'Fringe benefit tax' means the tax system related to the assessment and collection of tax imposed by the *Fringe Benefits Tax Act 1986*.

98.8.9 'Head Company' of a consolidated group must be an Australian resident and beneficially owns all of the membership interests in at least one other company. It is further defined in sec 703-15 of ITAA 1997.

98.8.10 'Instalment activity statement (IAS)' – an 'approved form' lodged by taxpayers who have a range of obligations other than GST.

98.8.11 'Large entities' a description of these clients may be found in the current Tax Agent Lodgment Program.

98.8.12 'Large withholder' takes the meaning set out in sections 16-95 and 16-125 of Schedule 1 to the TAA, and is an entity whose amounts withheld during a financial year exceed \$1 million, or who are part of a wholly-owned group whose amounts withheld exceed \$1 million annually.

98.8.13 'Medium withholder' takes the meaning set out in sections 16-100 and 16-135 of Schedule 1 to the TAA, and is an entity whose amounts withheld during a financial year exceed \$25,000, and who is not a large withholder.

98.8.14 'Pay as you go Withholding' describes the system of collecting and reporting amounts as outlined in Part 2-5 of the TAA. It applies to the

relationships which results in payers makes withholding payments to payees as defined in section 10-5 of Schedule 1 to the TAA.

98.8.15 'Penalty unit' means the unit upon which base penalty amount is calculated in accordance with Subdivision 286-C of Schedule 1 to the TAA. The value of a penalty unit can be determined by reference to section 4AA of the *Crimes Act 1914*.

98.8.16 'Relevant Entity' in relation to a year of income, includes

- (i) a company, or
- (ii) any person in the capacity of a trustee of:

- a) a fund that is an eligible ADF in relation to that year of income: or
- b) a fund that is an eligible superannuation fund in relation to that year of income; or
- c) a unit trust that is a pooled superannuation trust in relation to that year of income.

98.8.17 'Taxation Law' takes the meaning set out in subsection 995-1(1) of the *Income Tax Assessment Act 1997*, and is an Act of which the Commissioner has general administration, or regulations under such an Act.

## Appendix

### Application of Penalty and/or Penalty Interest for Late Lodgment – Income Tax returns for the year ended 30 June 2000 and earlier years

Year of Income	1995 & earlier years	1996 & 1997	1998	1999 & 2000	Remitted by	Review Rights
s222(1) ITAA 1936 All taxpayers	Day after gazetted due date (31/10) to date lodged	Not Applicable	Not Applicable	Not Applicable	s227(3) ITAA 1936	Objection: Part IVC TAA. Limited review rights by AAT/STCT (must exceed 20% pa) and full appeal rights to the Federal Court.
s163A ITAA 1936 Companies & Superannuation funds	Not Applicable	Penalty commences the day after gazetted due date to date lodged	Penalty commences the day after gazetted due date to date lodged	Penalty commences the day after gazetted due date to date lodged	s163A(5) ITAA 1936	May request an internal review and then if not satisfied may lodge an objection: Part IVC TAA. Full review rights by AAT/STCT and full appeal rights to the Federal Court
Former s163B ITAA 1936 Individuals & trusts	Not Applicable	Penalty commences the day after gazetted due date (31/10) to 30/6/1999	Penalty commences the day after gazetted due date or deferred due date (eg.	Not Applicable	former s163B(7) ITAA 1936	Objection: section 175A ITAA 1936. Full review rights by AAT/STCT and full appeal rights to the Federal

			Tax agent Lodgment Program end date) to 30/6/1999			Court
Former s163C ITAA 1936  Individuals & trusts	Not Applicable	Penalty commences the day after gazetted due date (31/10) to 30/6/1999	Penalty commences the day after the gazetted due date or deferred due date to 30/6/99	Not Applicable	former s163C(4) ITAA 1936	Objection: not applicable. Decision not to remit is reviewable under the AD(JR)A
s163B ITAA 1936 (GIC)  Individuals & trusts	Not Applicable	Penalty commences 1/7/1999 to the day prior to the date return(s) lodged	Penalty commences 1/7/1999 to the day prior to the date return(s) lodged	Penalty commences the day after the gazetted due date or deferred due date (eg. Tax Agent Lodgment Program end date) to the day prior to the date return(s) lodged	s8AAG(1) TAA	Objection: not applicable. Decision not to remit is reviewable under the AD(JR)A.

## Calculation of Penalty and/or Penalty Interest

Imposed by:	Statutory Rate:	Rate Actually Applied	Calculation of Period Late	Limits	Rate if Voluntarily Lodged
S222(1) ITAA 1936 All taxpayers	200% of tax payable or \$20, whichever is greater	From IT2475 – 20%pa of the lesser of tax payable or net amount payable <ul style="list-style-type: none"> <li>• Plus 5%pa for 'recurring offence'</li> <li>• Plus 5%pa for 'delayed instalment'</li> <li>• Plus 10% flat for 'detected non-lodger'</li> </ul>	<b>From:</b> 31 October following the end of the year of income <b>To:</b> the date of lodgment	Max: 200% Min: \$20 or equal to the net amount payable if between \$20 & \$2 or \$0 if \$2 or less	10% on the lesser of tax payable or net amount payable to a maximum of 50% of the tax payable
S163A(1) ITAA 1936 Companies & superannuation funds	\$10 per week or part thereof	Statutory Rate	<b>From:</b> the day following the last day for lodgment <b>To:</b> the date the return was lodged	Max: \$200 Min: \$10	No concession applies
Former s163B(1) Individuals & trusts	8% pa on the lesser of income tax payable on assessment or net tax payable	Statutory Rate	<b>From:</b> the day following the last day for lodgment 1996 & 1997 – 31 October 1998 – 31 October for self preparers or the end date of a Tax Agent Lodgment Program <b>To:</b> the date the return was lodged or 30 June 1999, whichever is earlier	Max: no limit applies Min: \$20 or if < \$10 then \$0	Remitted in full

### Calculation of Penalty and/or Penalty Interest

Imposed by:	Statutory Rate:	Rate Actually Applied	Calculation of Period Late	Limits	Rate if Voluntarily Lodged
Former s163C(1) Individuals & trusts	Rate under s214A ITAA 1936	Statutory Rate	<p><b>From:</b> the day following the last day for lodgment ie. 1996 &amp; 1997 years – 31 October 1998 year – 31 October for self preparers or the end date of a Tax Agent's Lodgment Program or other deferred due date</p> <p><b>To:</b> the date the return was lodged or 30 June 1999, whichever is earlier</p>	Max: no limit applies Min: \$0.50 or if <\$0.50 then \$0.00	No concession applies
s163B ITAA 1936 (GIC) Individuals & trusts	Rate under s8AAD TAA	Statutory Rate	<p><b>From:</b> 1996 – 1998 years: 1 July 1999; 1999 &amp; 2000 - gazetted due date or deferred due date (eg. Tax agent Lodgment Program end date)</p> <p><b>To:</b> the day prior to the date lodged</p>	Max: no limit applies Min: \$20 or if < \$10 then \$0	No concession applies