PS LA 2004/5 (GA) (Withdrawn) - CGT treatment of an amount received by former GIO shareholders in settlement of a class action brought against GIO (Australia Holdings Ltd), its former Board of Directors and advisers

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This practice statement is withdrawn as at 16 May 2007.

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Practice Statement Law Administration

(General Administration)

PS LA 2004/5 (GA)

This practice statement is withdrawn as at 16 May 2007.

FOI status: may be released

This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

SUBJECT: **CGT treatment of an amount received by former GIO shareholders in settlement of a class action brought against GIO (Australia Holdings Ltd), its former Board of Directors and advisers**

PURPOSE: **To outline approaches that the Commissioner will accept for the treatment of a compensation payment received in the 2003–04 income year**

STATEMENT

1. This practice statement sets out the approaches that the Commissioner will accept for the capital gains tax (CGT) treatment of compensation received in the 2003–04 income year by former GIO shareholders as a result of the settlement of a class action taken against GIO Australia Holdings Ltd (now AG Australia Holdings Ltd), its former Board of Directors and advisers.

2. The compensation should be treated as additional capital proceeds for the disposal by the former shareholders, of their GIO shares. As such, the compensation should be taken into account in determining each shareholder's net capital gain or net capital loss for the 1999–2000 income year (or in some cases the 1998–99 income year). However, for the purposes of sensible administration the Commissioner will in this matter allow a former shareholder to treat the compensation as capital proceeds for the disposal of their right to seek compensation if they prefer to do that. On this approach the compensation is taken into account in determining a shareholder's net capital gain or net capital loss for the 2003–04 year.

3. This approach is being adopted to facilitate practical compliance recognising that the treatment which a former GIO shareholder adopts will have little impact on the revenue and that for many, the costs of compliance in seeking amendments for earlier years will exceed the additional revenue from the inclusion of the amount in those years.

4. For some former GIO shareholders, the period for amendment of the assessment for the income year in which the shares were disposed of will have expired. If this is the case, the shareholder will not be required to seek an amendment for that year or to return the amount in the 2003–04 year (see paragraph 26).

5. Those former GIO shareholders who treat the compensation as additional capital proceeds for the disposal of their GIO shares in the 1999–2000 income year (or in some cases the 1998–99 income year) can recalculate their capital gains using either the indexation or the discount method, even if they originally used the indexation method to work out their capital gains from the shares.

6. Those former GIO shareholders who treat the compensation as capital proceeds for the ending of their right to seek compensation in the 2003–04 income year should work out their capital gains using the discount method, even if they originally chose the indexation method in working out their capital gains from the disposal of their shares. Those former GIO shareholders who have already lodged their 2003–04 income tax return should request an amendment.

7. Penalties will not apply in relation to amended assessments that are made as a result of adopting either of the approaches outlined in paragraph 2. To qualify for full remission of the general interest charge (GIC), former GIO shareholders should seek to amend any affected assessments on or before 30 June 2005.

8. This practice statement applies in relation to former GIO shareholders who received compensation under the GIO class action and:

   - are Australian residents;
   - did not acquire shares under an employee share scheme;
   - held their GIO shares as investments; and
   - on disposal of their GIO shares, any gain or loss made is a capital gain or capital loss.

EXPLANATION

9. In 1998, the GIO Board advised their shareholders to reject a takeover offer by AMP of $5.35 per share, stating that the shares were worth more.

10. However, the takeover went ahead after institutional shareholders sold their shares to AMP. GIO shareholders who did not accept AMP's offer were required to accept AMP income securities under a scheme of arrangement. The GIO shareholders received less for their shares than they would have received if the first AMP takeover offer was accepted.

11. In August 1999, former GIO shareholders who held shares continuously between 25 August 1998 and 4 January 1999 and who did not accept AMP's offer due to their reliance on the announcements made by GIO during the takeover bid, initiated a class action against GIO Australia Holdings Ltd (now AG Australia Holdings Ltd), its former Board of Directors and its advisers. The main issue was whether the former GIO Board acted in a misleading or deceptive way and in breach of the *Trade Practices Act 1974* in issuing advice to the GIO shareholders.

12. On 26 August 2003, the Federal Court approved the class action settlement scheme. The shareholders in the class action received a proportionate share of $97 million, the net settlement amount.

13. Each shareholder who participated in the class action received two compensation payments in February and March 2004. The total compensation received was $1,262.60 per 1,000 GIO shares held.

Choice of year in which to return the capital gain

14. Taxation Ruling TR 95/35 deals with the CGT consequences of the receipt of compensation. It provides that if an amount of compensation is received by a taxpayer wholly in respect of the disposal of an 'underlying' asset, or part of an underlying asset, the compensation represents consideration received on the disposal of that asset.

15. However, the Commissioner recognises that there is an alternative view to the one taken in TR 95/35. This view is that the compensation may be seen as capital proceeds for the disposal of the right to seek compensation, a different asset from the 'underlying' asset in relation to which the right arose.

16. As the appropriate treatment has not been concluded by the courts, the Commissioner has decided that for the purposes of practical compliance former GIO shareholders may choose whether to treat the compensation as additional capital proceeds for the disposal of their GIO shares on 30 December 1999 or as capital proceeds for the ending of their right to seek compensation in the 2003–04 income year.

17. Although TR 95/35 normally produces a favourable outcome for taxpayers, the alternative approach in this case reduces the compliance costs involved for former GIO shareholders in treating the compensation as additional capital proceeds for the disposal of their shares.

18. A small number of tax agents were contacted for their views. They indicated that there would be significant compliance costs in seeking the necessary amendments, which will outweigh the amount of the additional revenue involved. This is particularly so where the GIO shares were owned by the trustee of a trust or where the disposal of the taxpayer's shares resulted in a net capital loss. For these latter taxpayers the compensation, when added to the amount received from AMP for the disposal of their shares, will result in a reduced capital loss carried forward to a subsequent year. This means that for these taxpayers amendments for a later year assessment are likely to be required.

19. Another relevant consideration is that in most instances there will be little gain or loss to the revenue whether the compensation is returned in the year of the disposal of the GIO shares or whether it is returned in the 2003–04 year.

Example

Family trust X, a discretionary trust, invested in GIO shares. The shares were disposed of to AMP on 30 December 1999 at a loss. As the trustee, had no other capital gains or losses in the 1999–00 income year, the trustee had a net capital loss to carry forward. In the 2000–01 income year, the net capital loss was used to reduce a capital gain from the disposal of another trust asset. In that year, the trust income and gains were distributed to beneficiaries A, B and C in equal shares. The beneficiaries each included their share of the trust's net income in their 2000–01 income tax return.

The trustee of the trust joined in the GIO class action. Both beneficiary A and B died in 2002. In 2004 their estates are fully administered.

The compensation amount, if treated as additional capital proceeds for the disposal of the trust's GIO shares, will result in a smaller net capital loss being carried forward to the 2000–01 year. This will increase the net capital gain distributed to beneficiaries in the 2000–01 year and will result in amendments being required for the beneficiaries' assessments.

The trustee may choose to include the compensation amount as the proceeds for the disposal of the right to seek compensation in the 2003–04 year. The capital gain from this event may be distributed to the trust's beneficiaries in accordance with the trustee's resolution.

Indexation or discount

20. Former GIO shareholders who acquired their GIO shares on or before 21 September 1999 and owned them for at least 12 months before they disposed of them to AMP could choose to work out their capital gains by using the indexation method (that is, they could index or increase the cost base of the shares by reference to the Consumer Price Index). If this choice was not made, the discount method may have applied in working out their capital gain. The discount method allows individuals to reduce a capital gain by 50% after they have applied relevant capital losses. Taxpayers are able to select the method that produces most advantageous outcome, based on their knowledge of the acquisition cost and disposal proceeds and other relevant factors.

21. For many former GIO shareholders, the indexation method would have produced the most favourable outcome at the time of lodging their return for the year in which they disposed of their GIO shares. At that time they had no knowledge of the amount of compensation (if any) that they might receive from the class action initiated in August 1999.

22. Those taxpayers now find themselves in a situation where there has been a fundamental change in their circumstances as a result of the settlement of the class action. That is, they have received more capital proceeds than anticipated. Their choice of the indexation method may not now give them the most advantageous outcome.

23. Because of this fundamental change in circumstances, a former GIO shareholder who treats the compensation as additional capital proceeds for the disposal of their GIO shares can choose to apply either indexation or discount when recalculating their capital gain even if they previously chose indexation.

24. As a matter of principle, the irrevocability of choices made under the tax legislation is designed to give certainty and finality to tax affairs for both taxpayers and the Tax Office. However, in this special case there is no material disadvantage to either the taxpayer or the Tax Office or a risk to the revenue in allowing former GIO shareholders to base a choice for indexation on their current knowledge of the actual amount of capital proceeds received for the disposal of their GIO shares.

25. A former GIO shareholder who chooses to treat the compensation as consideration for the disposal of their right to seek compensation should work out their capital

gain using the discount method. This is so even if the former GIO shareholder chose the indexation method in working out the capital gain on the disposal of their GIO shares.

Amendment period

26. Section 170 of the *Income Tax Assessment Act 1936* sets out when the Commissioner can amend an income tax assessment. Generally, an amendment must be made within four years after the day on which tax became due and payable under the assessment. Given the time that has elapsed since the disposal of the GIO shares, the Commissioner may no longer have the power to amend an assessment for the year in which they were disposed of.

Example

X lodged his 1999–2000 year income tax return in July 2000. The return included a net capital gain resulting from the disposal of his GIO shares in December 1999. X received an assessment with a due and payable date of 30 September 2000. The 4 year period for amendment expired on 30 September 2004 and the Commissioner has no power to amend the assessment after that date.

27. There will be instances where a former GIO shareholder made a net capital loss for the income year in which their shares were disposed of which will be reduced because of the shareholder's decision to treat the compensation as additional capital proceeds for the disposal of their shares. For the purposes of deciding whether the Commissioner has the power to amend, the relevant assessment is the one where a net capital gain (or an increased net capital gain) is made as a result of the reduction in the amount of the net capital loss for the income year in which the GIO shares were disposed of.

Example

On the disposal of his GIO shares in December 1999, Y made a capital loss (which was also the amount of his net capital loss for the year). Y does not have any capital gains for the 2000–01 income year. As a result the capital loss was carried forward to the 2001–2002 income year and was fully offset against a capital gain made on the disposal of another asset in the 2001–02 income year.

Y participated in the GIO class action and as a result of the inclusion of the compensation as additional capital proceeds for the disposal of his GIO shares, Y's loss forward from the 1999–2000 income year is reduced. The capital gain returned for the 2001–2002 year needs to be adjusted to reflect the reduced carry forward loss. Y lodged his 2001–2002 return in August 2002 and received an assessment with a due and payable date of 21 November 2002. The 4 year amendment period for this assessment will expire on 21 November 2006.

28. A fact sheet, available on the ATO website, www.ato.gov.au at Compensation received under the GIO class action provides advice to former GIO shareholders on the approaches outlined in this practice statement and sets out the arrangements for requesting amendments to ensure that the requests are dealt with in accordance with this practice statement. For phone advice please ring 13 28 61.

subject references	Capital gains tax, period for amendment
legislative references	Sections 103-25; 110-25; 115-25 of the ITAA 1997; Section 170 of the ITAA 1936
related public rulings	TR 95/35
related practice statements	
case references	
file references	

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Other Business Lines consulted	**OCTC – Losses & Capital Gains Tax Centre of Expertise**