


PS LA 2006/14 - Procedures for Tax Office staff engaged in superannuation guarantee compliance activities where the review identifies one or more individuals engaged under a contract that is wholly or principally for their labour

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Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2006/14

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 Tax office staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs Tax office staff must follow their business line's escalation process.

SUBJECT: Procedures for Tax Office staff engaged in superannuation guarantee compliance activities where the review identifies one or more individuals engaged under a contract that is wholly or principally for their labour

PURPOSE: To provide instruction to Tax Office staff on what procedures staff need to follow when they are undertaking superannuation guarantee compliance activities and the review has identified one or more individuals engaged under a contract that is wholly or principally for their labour

STATEMENT

1. The Tax Office engages in superannuation guarantee (SG) compliance activities and issues default SG charge assessments to employers who have not lodged a SG statement for a quarter and do not provide the minimum required SG support for their employees for that quarter.
2. Under the *Superannuation Guarantee (Administration) Act 1992* (SGAA), employers are required to make superannuation contributions into a complying superannuation fund or retirement savings account for the benefit of their employees in accordance with minimum prescribed levels and by the SG cut-off date. The SGAA defines 'employee' in section 12 to include individuals engaged under a contract which is wholly or principally for their labour (subsection 12(3)). That is, a SG obligation arises in relation to an individual engaged under a contract which is wholly or principally for the individual's labour.

3. There are some general exclusions for employers from providing superannuation support.¹ This practice statement does not change those general exclusions. An employer that engages any individual under a contract wholly or principally for their labour who also comes within those exclusions (for example, the individual is aged 70) is not required to make superannuation contributions to a complying superannuation fund or retirement savings account on behalf of the individual. This practice statement applies once it has been established that an employer has a SG obligation for individual(s) engaged under a contract that is wholly or principally for labour.
4. Where Tax Office staff, through the conduct of any sort of compliance activity, find an employer has not made the minimum required superannuation contributions for an individual engaged wholly or principally for their labour, the employer has a SG shortfall in respect of the individual and will be liable to the SG charge. If the employer has not lodged a SG statement for a quarter or year² in which they have a liability to the SG charge, default assessment(s) must be issued in respect of the employer's SG charge liability for the individual for each quarter or year in which a SG statement has not been lodged over the entire period of engagement of the individual, up to a time limit of 5 years.³ If the employer has lodged SG statement(s) for a quarter/year or quarters/years in which they have a liability to the SG charge, and that statement does not include SG shortfall amounts for the individual(s) engaged under a contract that is wholly or principally for their labour, the Tax Office staff member must issue amended assessment(s) to the employer which includes the employer's liability to the SG charge in respect of the individual(s). It is noted that where an employer has lodged a SG statement, the Commissioner has only 4 years from the time the statement was lodged to amend an assessment to increase the employer's liability to the SG charge.
5. If the employer is a Commonwealth Government employer, staff will inform the employer in writing of their obligation to make SG contributions in respect of the individual for the period of engagement (up to a time limit of 5 years).⁴

¹ The main exceptions are provided in sections 27 to 29 of the SGAA and are SG employees who are:

- paid less than \$450 in any month
- aged 70 years or over
- under 18 years of age and working for not more than 30 hours a week, or
- performing work of a private or domestic nature for not more than 30 hours a week for a non-business employer.

² From 1 July 2003 employers are required to make the minimum required superannuation contributions on at least a quarterly basis or be liable to the SG charge. From the start of SG until 1 July 2003, employers were required to make the contributions on at least an annual basis.

³ This time limit exists since employers are required to keep records for SG purposes for 5 years under section 79 of the SGAA.

⁴ Under section 5 of the SGAA, the Commonwealth, Commonwealth Departments and untaxable Commonwealth authorities are not liable to pay the SG charge. However the SGAA applies in all other respects as if the Commonwealth were liable to pay the SG charge. The Finance Minister may give directions in writing as necessary for the transfer of money within an account, or between accounts, operated by the Commonwealth. Consequently if a Commonwealth Department does not comply with a Tax Office request to make superannuation contributions for their SG employees, the Tax Office would request the Finance Minister issue directions in writing as necessary for the transfer of money within an account, or between accounts, operated by the Commonwealth so that these contributions are made. Note that if the Finance Minister issues directions allowing the Commissioner to issue assessments on Commonwealth Government employers, this paragraph should be read as staff informing the employer in writing through the issuance of an assessment.

6. For all other employers, staff will issue default SG assessment(s) or amended SG assessment(s) to the employer for the period of engagement of the individual (up to a time limit of 5 years for default assessments, or 4 years for amended assessments).
7. Paragraphs 4 to 6 do not remove a Tax Office staff member's discretion to issue an employer with a SG statement to complete. The time limit outlined in paragraphs 4 to 6 will not apply where the avoidance of the SG charge is due to fraud or evasion. In these circumstances, default or amended assessments should be issued for the entire period of the individual's engagement. If the employer is a Commonwealth Government employer, the staff member should inform the employer in writing of their obligation to make SG contributions in respect of the entire period of engagement of the individual.
8. Under section 49 of the SGAA, if any of the SG shortfall component of the SG charge remains unpaid after the time by which it is due to be paid, the employer is liable to pay the general interest charge (GIC) on the unpaid amount. The Commissioner has the discretion to remit all or part of an employer's GIC liability in accordance with chapter 93 of the *ATO Receivables Policy* and this practice statement. One situation where the Commissioner may grant remission is where an employer has not made the minimum required superannuation contributions for an individual contractor because both the employer and the individual, who is employed under the contract that is wholly or principally for their labour, believed that no employment relationship existed. In such cases, any GIC the employer is liable to in respect of the SG charge default assessment liability will be remitted in full where the employer pays the SG charge liability within 30 days of being notified. In the cases of amended assessments, if the employer pays their SG charge liability within 30 days of being notified the GIC applicable from the date of issue of the amended assessment to the date of payment will be remitted in full. The employer will remain liable to GIC applicable up to the date of issue of the amended assessment.
9. Any penalties under Part 7 of the SGAA and tax shortfall penalties under Schedule 1 to the *Taxation Administration Act 1953* (TAA) should also be remitted in full where:
 - the penalties are directly related to the non-lodgment of a SG statement or a tax shortfall resulting from the employer acting under the belief that the individual was not engaged as an employee for SG purposes, and
 - that belief was shared by the individual engaged.
10. Where it is found that the individual engaged under a contract, that is wholly or principally for their labour, has claimed non-employer sponsored superannuation contribution deduction(s) they have made to their complying superannuation fund or retirement savings account during the period of their contract, and the Tax Office has determined that the individual is not entitled to such a deduction, the case will be referred to Micro Enterprises and Individuals, Active Compliance. Taxation Ruling TR 2005/24 gives further guidance on whether an individual is entitled to a non-employer sponsored superannuation deduction.

11. Micro Enterprises and Individuals, Active Compliance will review the risk and where necessary, amend the relevant income tax assessments to deny the non-employer sponsored superannuation contribution deduction(s) and issue amended assessments to the individual for all the years in which the individual was not entitled to a non-employer sponsored superannuation contribution deduction within the individual's period of review.
12. In issuing amended assessments to the relevant SG employees, the pre-amendment GIC or shortfall interest charge (SIC) applicable to the assessments will be remitted in full where:
 - The individual did not receive superannuation support from their contracting employer, and did not believe that they were entitled to such support.
 - The individual did not receive superannuation support and they made their own superannuation contribution to their fund.
 - The Commissioner is satisfied that the individual believed the non-employer sponsored superannuation contributions to be income tax deductible to them as they believed they were not engaged in an employment relationship with the contracting entity.
 - The Commissioner is satisfied that had the individual known they would receive, or were entitled to receive employer superannuation support it is likely that they would not have made their own non-employer sponsored superannuation contributions to their fund as these amounts would not be deductible to them.
13. If the unexpected tax liability causes an individual who meets the criteria outlined in paragraph 12 any payment difficulties, the Tax Office will initially enter into an arrangement for payment that suits the individual's circumstances. An individual who wishes to apply to the Tax Office to enter into payment arrangements should phone the Tax Office on 13 11 42 or email the Tax Office at debtpayment@ato.gov.au and refer to this practice statement. Note that any GIC accrued during the course of this initial payment arrangement will be remitted at the conclusion of the payment arrangement provided that the individual adheres to all the terms and conditions of the arrangement.
14. Further information can be found in the following Tax Office documents:
 - Superannuation Guarantee Ruling SGR 2005/1 and Superannuation Guarantee Ruling SGR 2005/2 (information on when an individual is engaged wholly or principally for their labour)
 - Taxation Ruling TR 2005/24 (information on when a deduction can be claimed for personal superannuation contributions)
 - Law Administration Practice Statement PS LA 2006/1 (for instructions on the application of the penalty imposed under Part 7 of the SGAA)
 - Chapter 10 of the *ATO Receivables Policy* – Arrangements to pay tax-related liabilities by instalments, and
 - Chapter 93 of the *ATO Receivables Policy* – General interest charge.

15. Further information on the effect on employers, individuals engaged under a contract wholly or principally for their labour and the individuals' fund is included in the flowcharts at Attachment A of this practice statement.

EXPLANATION

16. Under the SGAA, employers are required to make superannuation contributions into a complying superannuation fund or retirement savings account for the benefit of their eligible employees in accordance with minimum prescribed levels and by the SG cut off date. If an employer does not make the required superannuation contributions by the required time, they will be subject to the SG charge. The SG charge includes the SG shortfall for the employee, nominal interest and an administration fee. The Commissioner has no discretion to remit any of the components of the SG charge and the whole amount is non-deductible for income tax purposes. If an individual is not an employee as defined in the SGAA or is an employee but is otherwise exempted from the application of the SGAA by a specific provision, no liability for the SG charge will arise.
17. The Commissioner has obligations under section 36 of the SGAA to issue default assessments where the employer has not lodged a SG statement in respect of a quarter and is liable to the SG charge for that quarter. The Commissioner also has obligations under that section to pursue recovery of any amounts owing to the Commonwealth.
18. If an individual has not received, and is not entitled to receive any employer superannuation support for the year of income, the individual may be entitled to claim a deduction for their non-employer sponsored superannuation contributions under section 26-80 of the *Income Tax Assessment Act 1997*, where the individual meets the conditions outlined in section 82AAT of the *Income Tax Assessment Act 1936* (ITAA 1936). Deductions for non-employer sponsored superannuation contributions cannot be claimed where an individual is eligible for employer superannuation support (unless the individual comes within the 10% rule outlined in subsection 82AAS(3) of the ITAA 1936).
19. If an individual claims a deduction for contributions and all, or part of, that claim is subsequently disallowed, the individual can notify their fund which can adjust its taxable contributions accordingly⁵. No adjustment can be made once an individual leaves a fund because once benefits have been paid out it is too late for the fund to make the necessary adjustments.

⁵ This notification is known as a subsection 82AAT(1C) notice.

20. If an amount has been included as taxable contributions of a complying superannuation fund and an individual member subsequently lodges a subsection 82AAT(1C) notice⁶ with the fund, reducing the amount covered by their previous notice,⁷ the fund is able to claim a deduction for the amount covered in the later subsection 82AAT(1C) notice. The deduction to the fund can be claimed in the year the subsection 82AAT(1C) notice is received by the fund by virtue of subsection 276(1) of the ITAA 1936. If the fund is unable to fully utilise the deduction because, for example, it has no assessable income, the fund can seek to have the assessment for the year in which the contribution was included in its assessable income amended (see subsections 276(3) and 276(4) of the ITAA 1936).
21. Remitting the GIC in full for the period from the original due date to the day before the amended assessment is issued under paragraphs 8 and 12 of this practice statement is within the Commissioner's powers under the TAA, specifically, section 8AAG of the TAA (most appropriately subsections 8AAG(3) and 8AAG(5)). For 2004-05 and later income years, shortfall interest charge (SIC) is applicable to amended income tax assessments for employees as discussed in paragraph 12. The Commissioner has a broad discretion to remit the SIC where the circumstances make it fair and reasonable to do so.
22. Exercise of the remission powers for employers who pay their SG charge liability within 30 days of being notified is allowable under subsection 8AAG(3) of the TAA. This is because the circumstances that have given rise to the late payment and thus imposition of the GIC, are not due to the employer alone, but because both the employer and the employee (that is, the individual engaged by the employer wholly or principally for their labour) believed they were not in an employment relationship. The idea that such a remission is inappropriate because it deprives the employee of interest payable to their superannuation fund does not carry weight in these circumstances, as the employee had the opportunity of separately making superannuation contributions on their own behalf.
23. Where the circumstances outlined in paragraph 12 are found to exist, full remission of interest incurred during the shortfall period for employees engaged wholly or principally for their labour is considered to be fair to the individual concerned as well as being fair to the whole community. In these circumstances, the individual and the employer have entered into arrangements in good faith, with the result that the individual did not receive employer superannuation support from their contracting employer. Instead they made their own superannuation contribution to their fund. Had the individual known they would receive, or were entitled to receive employer superannuation support it is likely that they would not have made their own non-employer sponsored superannuation contributions to their fund as these amounts would not be deductible to them. The individual believed they were entitled to a deduction for non-employer sponsored superannuation contributions as they believed they were not engaged in an employment relationship with the contracting entity. These circumstances are felt to be special circumstances by reason of which it is fair and reasonable to remit the interest incurred during the shortfall period.

⁶ The notice is under subsection 82AAT(1C) of the ITAA 1936.

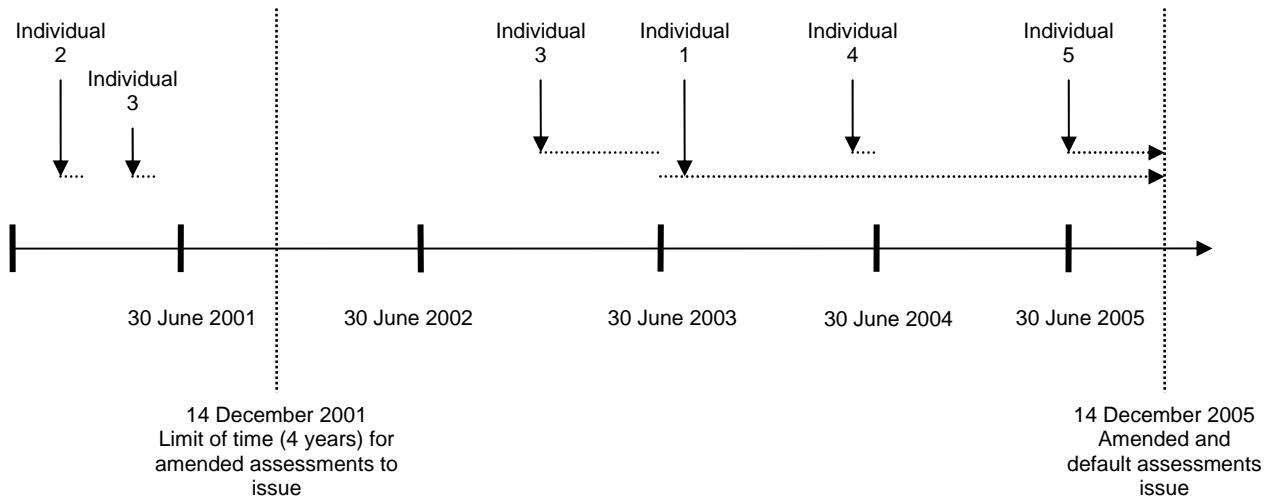
⁷ The previous notice is known as a subsection 82AAT(1A) notice.

24. Partial remission of the GIC is not appropriate in these circumstances taking into account the special circumstances outlined above and the overall aim of the superannuation guarantee regime. The individual has tried to do the right thing in making non-employer sponsored superannuation contributions to provide for their retirement. The individual believed they were ineligible for employer superannuation support and entitled to an income tax deduction for contributions made.
25. This practice statement does not address the Pay As You Go (PAYG) Withholding or the Goods and Services Tax (GST) effects on the employer or individual. Such effects must be determined on a case by case basis due to the differences in the SG law and the PAYG withholding and GST laws.
26. There may be exceptional cases where the procedures included in this practice statement should not be followed. For example, it may be appropriate to not issue default assessments for past years (refer paragraph 4) because of earlier advice from the Tax Office that there was no SG obligation in relation to an individual. Approval in these cases to not follow this practice statement can only be given by the Deputy Commissioner (Superannuation).

Example

27. The Tax Office conducts SG compliance activities on Employer X. During the course of the compliance activities, it is found that Employer X has engaged five individuals under contracts wholly or principally for their labour within the last five years. Employer X has not made any SG contributions on behalf of any of the individuals. Each of the contractors are paid on the last day of the month and details of the contracts are as follows:
 - Individual 1 – engaged 1 July 2003 to present. Paid \$8,000 per month (\$24,000 per quarter).
 - Individual 2 – engaged 1 November 2000 to 31 December 2000. Paid \$12,000 for the period of the contract.
 - Individual 3 – engaged 1 April 2001 to 31 May 2001 and 1 January 2003 to 30 June 2003. Paid \$5,000 per month.
 - Individual 4 – engaged 1 June 2004 to 30 June 2004. Paid \$4,000 for that month.
 - Individual 5 – engaged 1 July 2005 to present. Paid \$8,000 per month (\$24,000 per quarter).

Periods of employment:



28. Employer X has lodged SG statements for the year ending 30 June 2001 and the quarter ending 31 December 2004 on 14 August 2001 and 14 February 2005 respectively. Individuals 1 to 5 above (where relevant) were not included in any of the SG statements lodged by the Employer X.

Tax Office's obligations

29. The Tax Office completes its review on 14 December 2005 and issues the following amended assessment and default assessments to Employer X:

Period ending	Assessment type	SG shortfall
30 June 2003	Default	\$2,700 in respect of Individual 3
30 Sept 2003	Default	\$2,160 in respect of Individual 1
31 Dec 2003	Default	\$2,160 in respect of Individual 1
31 March 2004	Default	\$2,160 in respect of Individual 1
30 June 2004	Default	\$2,520 (\$2,160 in respect of Individual 1 and \$360 in respect of Individual 4)
30 Sept 2004	Default	\$2,160 in respect of Individual 1
31 Dec 2004	Amended	\$2,160 in respect of Individual 1
31 March 2005	Default	\$2,160 in respect of Individual 1
30 June 2005	Default	\$2,160 in respect of Individual 1
30 Sept 2005	Default	\$4,320 (\$2,160 each for Individuals 1 & 5)

30. The assessments include details of Employer X's full SG charge liability (which also includes the nominal interest and administration components). Employer X has no SG charge liability in respect of Individual 2 and only a part SGC liability for individual 3 due to the time limits to amend assessments. Employer X lodged a SG statement for the year ending 30 June 2001. The first SG statement an employer lodges in respect of a quarter is an assessment of the employer's SG shortfall for the period and of the SG charge payable on the shortfall under section 35 of the SGAA. As such the Tax Office is only able to amend an assessment to increase an employer's SG charge liability within 4 years from the date the assessment is made. The Tax Office cannot issue an amended assessment for the year ending 30 June 2001 as it is more than 4 years from the date Employer X lodged the SG statement.

Effect on Employer X

31. Employer X must pay the full amount of SG charge (which includes the SG shortfall for each individual, nominal interest and an administration component) for each period owing to the Tax Office. If Employer X makes this payment within 30 days of the date the default or amended assessments were issued by the Tax Office (that is by 13 January 2006 which is 30 days from 14 December 2005), Employer X will receive full remission of GIC in respect of the default assessments, and remission of GIC from 14 December 2005 until the date of payment for the amended assessment. GIC will still be applicable for the amended assessment from 14 February 2005 until the end of 13 December 2005 even when the employer pays within 30 days of 14 December 2005.
32. If Employer X does not pay the full amount of SG charge owing (which includes the nominal interest and administration component) to the Tax Office by 13 January 2006, Employer X will be liable to GIC from the date the SG charge was due to be paid. For default assessments, that date is 14 December 2005. For the amended assessment, GIC is applicable from 14 February 2005.

Effect on the individuals engaged wholly or principally for their labour

33. The Tax Office reviews each of the Individuals income tax returns. None of the individuals are entitled to a shorter period of review. Details of each individuals tax return relating to eligible employment income and non-employer sponsored superannuation contribution deductions are as follows:

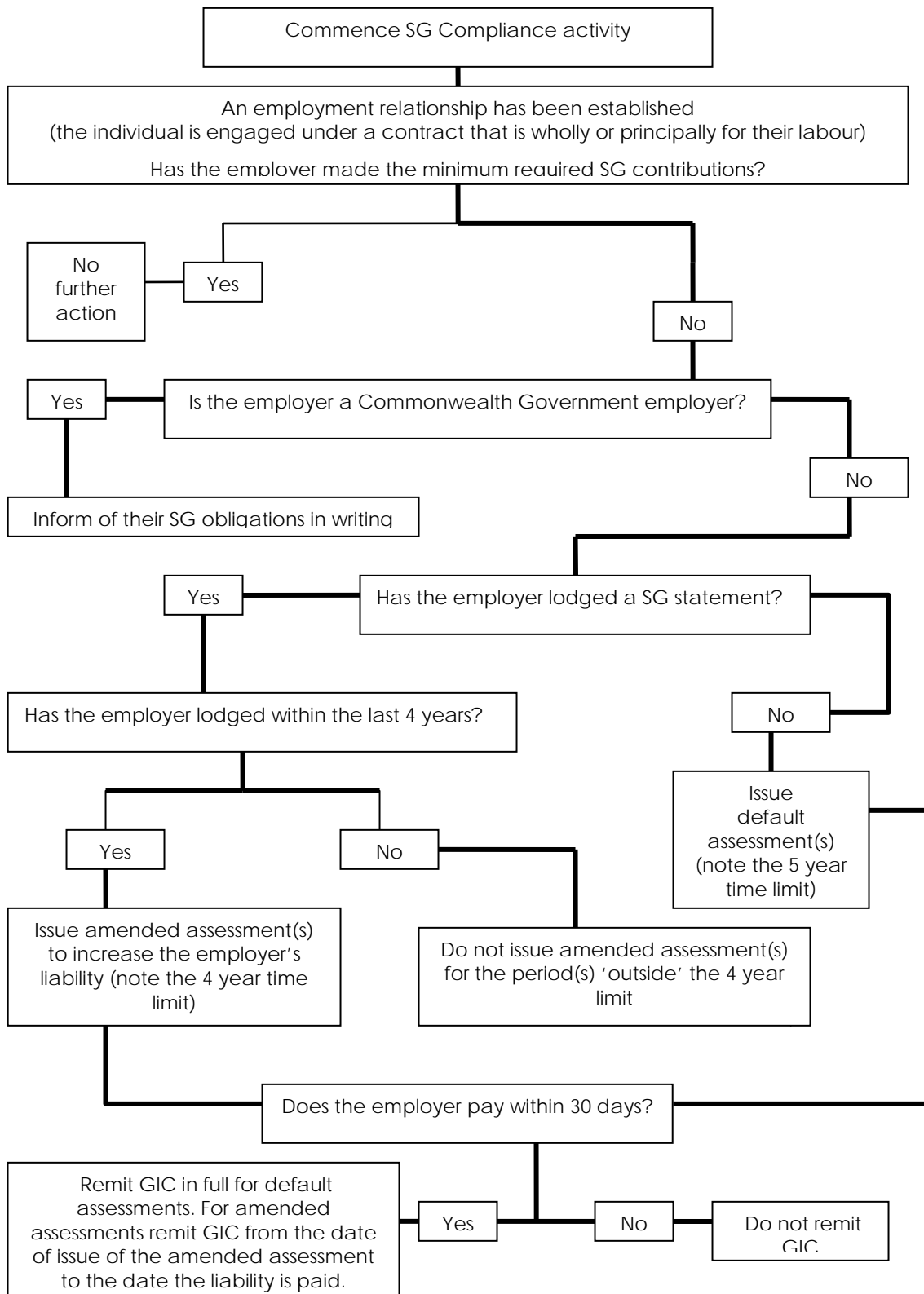
Individual	Income year	Eligible employment income (includes income received from Employer X)	Other income	Amount of the deduction for non-employer sponsored superannuation contributions	Is the individual eligible for a deduction?	Applicable tax shortfall
1	2003/04	\$96,000	\$0	\$10,000	No	\$4,850
1	2004/05	\$96,000	\$0	\$10,000	No	\$4,850
2	2000/01	\$12,000	\$150,000	\$10,000	Yes	N/A
3	2000/01	\$10,000	\$105,000	\$12,000	Yes	N/A
3	2002/03	\$30,000	\$100,000	\$12,000	No	\$5,820
4	2004/05	\$96,000	\$0	\$0	N/A	N/A
5	N/A – relates to 2005/06 which is not yet due to be lodged.	N/A	N/A	N/A	N/A	N/A

34. The Tax Office (Micro Enterprises and Individuals, Active Compliance) issues an amended income tax assessment to Individual 1 for the 2003-04 and 2004-05 income years and Individual 3 for the 2002-03 income year. GIC or SIC on the tax shortfall amount is remitted for the shortfall period, that is from the original due date of the assessment until the day before the amended assessment issues.

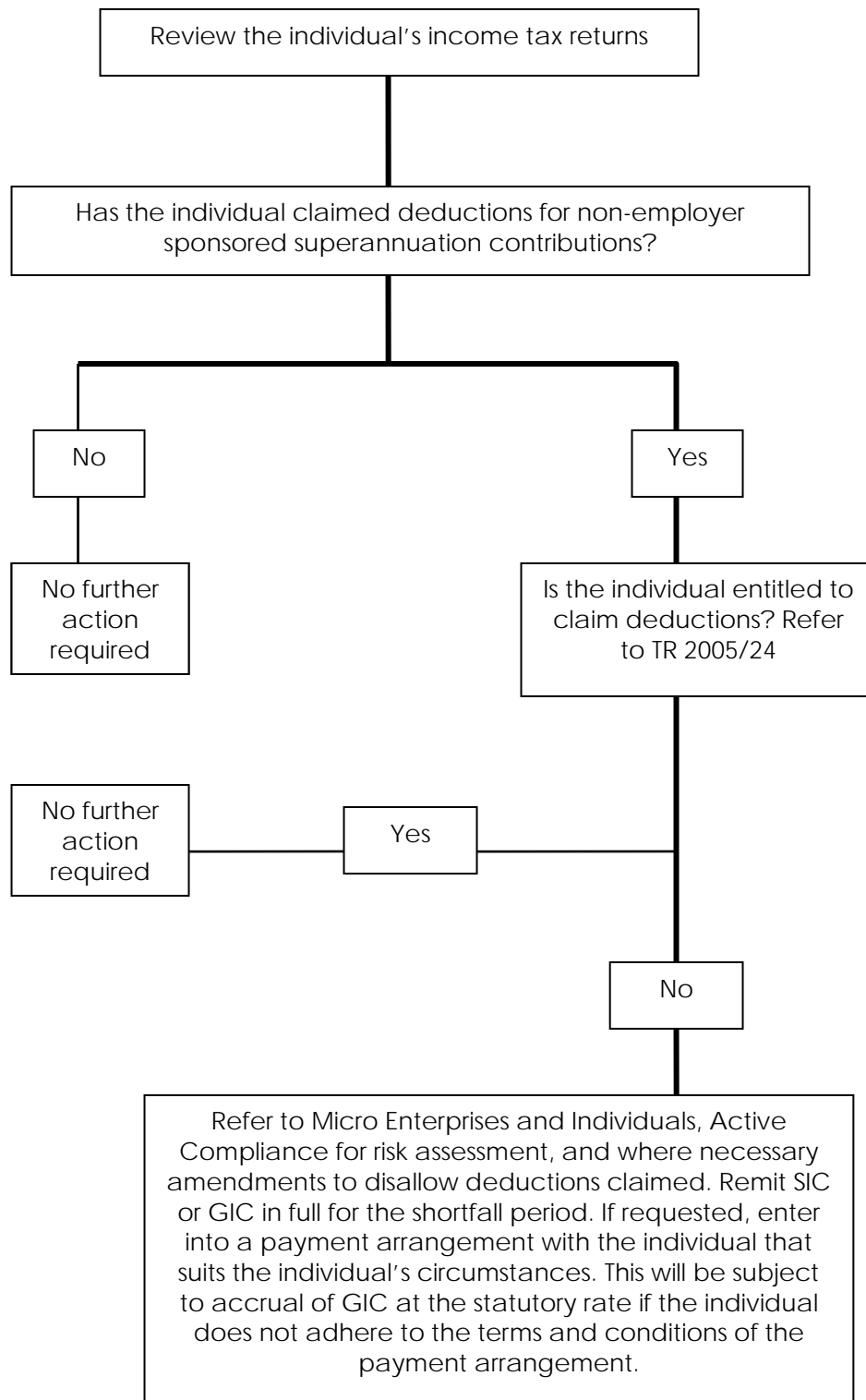
35. Individual 1 requests that the Tax Office enter into a payment arrangement with him so that his income tax debt owing can be paid over 12 months. The Tax Office agrees to enter into such an arrangement with Individual 1 so that the income tax debt owing can be paid over the next 12 months. The payment arrangement is not subject to the accrual of GIC unless individual 1 defaults on the arrangement.

Subject references	Individuals engaged wholly or principally for their labour Remission of General Interest Charge Superannuation contributions Superannuation Guarantee Superannuation Guarantee audits
Legislative references	SGAA 1992 12(3) SGAA 1992 36 SGAA 1992 43 ITAA 1936 82AAT ITAA 1936 82AAS ITAA 1936 276 ITAA 1997 26-80 TAA 1953 8AAG TAA 1953 Sch 1
Related public rulings	SGR 2005/1; SGR 2005/2; TR 2005/24
Related practice statements	PS LA 2006/1
Other references	ATO Receivables Policy
File references	05/10174
Date issued	18 October 2006
Date of effect	18 October 2006
Other Business Lines consulted	Operations; Micro Enterprises and Individuals; Small and Medium Enterprises; Debt
Amendment history	11 February 2008 Contact officer details updated 15 April 2008 Contact officer details updated 2 September 2009 Contact officer details updated

Stage 1 – Effect on an employer.



Stage 2 – Effect on an individual engaged under a contract that is wholly or principally for labour.



Stage 3 – Effect on a fund.

