PS LA 2008/9 - GST 'revenue neutral' corrections

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PS LA 2008/9
GST 'revenue neutral' corrections

This Law Administration Practice Statement outlines guidelines for the remission of general interest charge on GST 'revenue neutral' corrections.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. What this practice statement is about

When an error is found in an activity statement, it must be corrected through revision or amendment of that activity statement.[1] If the correction results in an increased amount of GST being payable, or a reduction in the input tax credits claimable, general interest charge (GIC) is imposed on this amount from the original due date of the activity statement to the date the revision or amendment was made (called the shortfall period).

Because of the nature of GST, some corrections will be revenue neutral. This occurs where a correction increasing GST for one party also gives rise to an entitlement to an input tax credit equal to that increased GST, or where the correction involves equal and offsetting GST or input tax credits for the same transaction.

This practice statement sets out our policy in regard to remission of the GIC for the shortfall period where revenue neutral corrections occur.

Remission of GIC for late payment after the shortfall period is not covered by this practice statement[2], nor is the application of administrative penalties.[3]

2. GIC principles

Taxpayers have a responsibility to meet their payment obligations as and when their tax debts fall due for payment. The GIC is intended to encourage the timely payment of tax, and to deny late payers an advantage over those who pay on time. The GIC also serves to compensate the revenue for the lost 'time value' of tax amounts not paid by the due date.

However, we have a discretion to remit the GIC, in full or in part, under section 8AAG of the *Taxation Administration Act 1953* (TAA).

Where an amount remains unpaid after the due date, subsection 8AAG (2) provides that we may only remit all or part of the GIC in the circumstances set out in subsections 8AAG (3), (4) and (5) of the TAA. This practice statement is concerned with the remission of GIC under these subsections.

Subsection 8AAG(3) of the TAA requires that we be satisfied that the shortfall did not arise as a result of an act or omission of the person. Subsections 8AAG(4) and (5) of the TAA both allow remission if certain criteria are met and we are satisfied that it is fair and reasonable to do so.[4] Paragraph 8AAG(5)(b) also allows remission if we are satisfied that it is otherwise appropriate to do so.[5]

3. Examples of GST revenue neutral corrections

The following are some examples of situations where GST revenue neutral corrections occur:

- where a supplier fails to include GST in the price of a taxable supply and the recipient would have been entitled to claim a full input tax credit if they were issued with a valid tax invoice

[1] Unless the conditions in GSTE 2013/1 Goods and Services Tax: Correcting GST Errors Determination 2013 are met allowing for correction on a later activity statement.

[2] See instead PS LA 2011/12 *Remission of general interest charge*.

[3] See instead PS LA 2012/5 *Administration of penalties for making false or misleading statements that result in shortfall amounts*.

[4] You should consider the question of whether it is fair and reasonable to remit not only from the perspective of the taxpayer, but also from the perspective of the broader community. It may not be fair and reasonable to remit GIC if remission provides the taxpayer with an advantage over others who meet their responsibilities in full.

[5] This is a broader discretion than the other provisions of section 8AAG, but before you exercise the discretion to remit GIC under paragraph 8AAG(5)(b) of the TAA, see paragraphs 48 to 55 of PS LA 2011/12.

- where the wrong entity accounts for the GST or claims the input tax credit. This may occur with associated entities, under a joint venture or similar type of 'partnership' arrangement, or an agency arrangement
- where entities transact with each other as if they were members of a GST group, when they are not (for example, because one is not eligible to be a member)
- where a transaction has taken place, involving equal and offsetting GST amounts, but the Commissioner declines to exercise his discretion to treat a document as a tax invoice or adjustment note.[6]

4. Remission requests

Requests for remission of the GIC for the shortfall period should indicate that the request is in respect of a GST revenue neutral correction and set out all the relevant circumstances. This should include evidence to satisfy the guidelines for GIC remission in section 5 of this practice statement. It should also outline the action taken to remedy the error in respect of future transactions.

If an entity does not meet the conditions for GIC remission in section 5 of this practice statement, the request should be considered in accordance with the GIC remission guidelines set out in PS LA 2006/8, taking into account all the relevant circumstances.

If you refuse the request for remission of the GIC (in whole or in part), you must notify the entity of your decision in writing, and include the reasons for refusal.

5. When remission of GIC for the shortfall period is appropriate

Where the following conditions are met, full or partial remission of GIC for the shortfall period in relation to GST revenue neutral corrections can be considered, and these are illustrated by the examples which follow.

Condition for partial remission

Partial remission to the base rate of GIC can be considered when another entity is entitled to an equal and corresponding reduction in their net amount.

Conditions for full remission

Full remission can be considered for an entity when another entity is entitled to an equal and corresponding reduction in their net amount **and**

- the entity can demonstrate that they received no comparative advantage over other entities which correctly accounted for GST, **or**
- the entity can demonstrate that the correct amount of GST was accounted for in the correct period, but by the wrong entity, **or**
- the entity who incorrectly claimed the input tax credit demonstrates that the recipient has not included the input tax credit in a previous activity statement.

These conditions are not intended to limit the circumstances in which you can exercise the discretion for GIC remission if you are satisfied that it is fair and reasonable, or otherwise appropriate, to do so, in accordance with section 8AAG of the TAA. That is, exercise of the discretion must not be approached in a rigid or inflexible way. Each case must be considered on its merits in accordance with administrative law principles.

Note that the following should not factor into your decision:

- the taxpayer's compliance history. However, compliance history may be relevant in the consideration of shortfall penalties[7] and if there was repeated non-compliance, to the consideration of penalties for failure to keep or retain records.[8]
- the effect of differing lodgment cycles or accounting methods (cash or accrual). The resulting timing differences can work either way and could balance each other out over time.

No comparative advantage

Not including GST in the price of a supply may provide an advantage to a supplier by effectively reducing the price by 1/11th. On the other hand, it is recognised that in some contexts, businesses deal with each other by reference to GST-exclusive prices and therefore purchasing decisions are not influenced by whether the supply is regarded as a taxable supply. Further, there can be factors other than price that influence a purchasing decision.

When considering whether a benefit has been obtained, you should consider the situation at the time the error was made, not the situation that results from the correction. You should not consider factors such as an inability by the supplier to recover an increased amount for the GST, resulting from the correction.

[6] Under subsections 29-70(1B) and 29-75(1) of the *A New Tax System (Goods and Services) Act 1999*

[7] PS LA 2012/5 *Administration of penalties for making false or misleading statements that result in shortfall amounts*.

[8] See PS LA 2005/2 *Penalty for failure to keep or retain records*

Accounted for by the wrong entity

If the wrong entity has otherwise correctly accounted for the GST in a transaction and in the correct period, the revenue has not suffered a 'time value' loss related to the amount. We have been in receipt of the correct GST payable from the correct due date.

Input tax credit has been claimed by the wrong entity

If the wrong entity has otherwise correctly claimed the input tax credit for a transaction and the recipient has not, then the revenue has not suffered a 'time value' loss in relation to the amount.

EXAMPLES

The examples below are illustrative of some situations in which full or partial remission of GIC in relation to GST revenue neutral corrections is appropriate. Other circumstances will arise for which full or partial remission is also appropriate.

(a) Partial remission

Example 1 – GST not included on tax invoice, recipient would have been able to claim a full input tax credit

Amity (annual turnover of $36M) makes a supply to an arm's length party, Bunya, for the price of $100,000 for the monthly period ending 31 March 2009. The supply should have been subject to GST, however Amity misinterpreted the legislation and treated the supply as 'non-taxable'. As a consequence, the invoice issued by Amity for the supply does not show an amount of GST, nor does it state that the supply is 'GST-inclusive'.

Amity realises in October 2009 that it has made an error and re-invoices Bunya for $110,000, including $10,000 on account of GST. Bunya pays Amity the additional $10,000. Bunya is then able to claim an input tax credit for $10,000 in their October 2009 activity statement. Amity lodges a revised March 2009 activity statement on 27 November 2009.

Once the revision is made, GIC is imposed for the period from 21 April 2009 (the due date for the March activity statement) until the outstanding GST amount is paid. Amity requests that you partially remit the GIC based upon the transaction being a GST 'revenue neutral' correction. [9] Amity informs you that it has taken steps to correct its error for future taxable supplies. It would be appropriate for you to remit the GIC in this case to the base rate for the shortfall period (that is, 21 April 2009 until 26 November 2009).

[9] Amity may wish to seek full remission of GIC if it can demonstrate that it has not received an advantage over other entities which correctly accounted for GST.

Example 2 – a comparative advantage may have been derived from the error

Carina (annual turnover of $3M) makes a supply to an arm's length party, Darra, for the price of $60,000 for the monthly period ending 30 April 2010. GST should have been charged on the supply, however, the invoice issued by Carina for the supply does not show an amount of GST, nor does it state that the supply is 'GST-inclusive'. When this error is detected in September 2010 Carina revises the April 2010 activity statement and pays GST of $5,454 on the same day, 24 September 2010. Carina had failed to secure an increased price from Darra. Carina re-invoices Darra to show a GST-inclusive price of $60,000. Darra then claims an ITC for $5,454 in the September 2010 period.

Once the revision is made, GIC is imposed for the period from 21 May 2010 (the due date for the April activity statement) to 23 September 2010. Carina requests that you remit the GIC based upon the transaction being a GST 'revenue neutral' correction and that no comparative advantage was derived from the error, contending it was disadvantaged by the correction.

In this instance, it would be appropriate for you not to grant full remission of GIC for the shortfall period, as the 'no comparative advantage' test is not satisfied. When the transaction was entered into, not charging GST might have allowed Carina to charge a lower price than competitors and this may have been a factor in Carina securing the supply. However, you could remit the GIC to the base rate for the shortfall period, that is, 21 May to 23 September 2010.

(b) Full remission

Example 3 – no comparative advantage derived from the error

Ekibin (annual turnover of $650M) makes a supply to a wholly owned subsidiary, Forestdale, for the price of $700,000 for the monthly period ending 28 February 2009. Ekibin had incorrectly assumed that it and Forestdale were grouped for GST purposes. GST should have been charged on the supply, however, the invoice issued by Ekibin for the supply does not show an amount of GST, nor does it state that the supply is 'GST-inclusive'. Ekibin discovers the error and revises its February 2009 activity statement on 25 June 2009. On 9 July 2009, Ekibin pays the GST of $70,000 resulting from the revision. Ekibin re-invoices Forestdale for the full $770,000 and Forestdale pays Ekibin the increased price amount. Forestdale then claims an ITC for $70,000 in the June 2009 period.

GIC is imposed on Ekibin for the period from 23 March 2009 (the due date for the February activity statement) to 8 July 2009. Ekibin requests that you remit the GIC based upon the transaction being a GST 'revenue neutral' correction and no comparative benefit being derived from the error. Ekibin and Forestdale have since notified you of the formation of a GST group.

In considering the remission request, you determine that the entities were non-arm's length and that, in practice, Ekibin was not competing with other parties for the provision of services to Forestdale. Consequently, it would be appropriate for you to accept that 'no comparative advantage' was obtained by Ekibin at the time of the original transaction and grant full remission of the GIC for the shortfall period, that is, 23 March 2009 to 24 June 2009.

Example 4 – no comparative advantage derived from the error

Camille wishes to provide motivational training to her employees to assist with her business. She puts the training services out for tender. The tenderer is required to specify the GST-exclusive price they will charge for the training. Rohin specifies a GST-exclusive price of $100,000 and is the successful tenderer.

When Rohin invoices for the work in August 2008 he does not charge GST, because he mistakenly concludes that his services are a GST-free educational supply.

Camille later queries the GST-free treatment. Rohin seeks advice and finds out in October 2008 that the supply of training was in fact a taxable supply.

Rohin issues a tax invoice to Camille for $110,000, including $10,000 for GST. He submits a revised August 2008 activity statement and pays $10,000 of GST on 31 October 2008.

Rohin has received no comparative advantage. Because the potential suppliers of the motivational training quoted their prices on a GST-exclusive basis, and Rohin was selected as the successful tenderer on the basis of his GST-exclusive price, Rohin did not obtain a comparative advantage. Accordingly, it would be appropriate for you to remit the GIC in full for the shortfall period.

Example 5 – no comparative advantage derived from the error

Stretton, a monthly remitter, has a licensing agreement granting it the exclusive Australian rights for the importation, sale and servicing of specialised equipment manufactured overseas. Stretton imports equipment and sells some of it to Tennyson in September 2007. Tennyson uses the equipment in its operations. GST should have been charged on the supply but was not. This error is detected in November 2009. On 4 December 2009, Stretton revises its September 2007 activity statement and pays the additional amount of GST to the Commissioner.

Tennyson pays the additional GST when Stretton issues a valid tax invoice for the supply in November 2009. Tennyson claims an ITC for this amount on its November 2009 activity statement (Tennyson had not claimed the ITC at the time of the original transaction).

GIC is imposed on Stretton for the period from 22 October 2007 (the due date for the September activity statement) to 3 December 2009. Stretton requests that you remit the GIC based on the transaction being a GST 'revenue neutral' correction and that no comparative benefit was derived from the error.

In the circumstances of the particular case, you accept that there was no comparative advantage. Stretton was the only supplier from whom Tennyson could make the acquisition. Stretton's misclassification of the supply as non-taxable did not influence the purchasing decision. Therefore, it would be appropriate for you to remit the GIC for the shortfall period in full on the basis that Stretton received no comparative advantage at the time of the original error.

Example 6 – GST has been accounted for in the correct period albeit by the wrong entity

Grange and Hendra engage in a GST joint venture. Grange, a monthly remitter, is both the joint venture operator and a participant, Hendra is a participant. Grange makes a taxable supply on behalf of Hendra under the joint venture to Ithaca in the monthly period ending 31 March 2007. An error occurs and Hendra includes the GST related to the supply on its activity statement for that period and pays the GST. When the error is detected in August 2009, Grange (as the joint venture operator) revises the March 2007 activity statement for the joint venture operations to include the GST associated with the supply.

Once the revision is made, GIC is imposed on Grange in its role as joint venture operator, for the period from 23 April 2007 (the due date of its March activity statement) until the day before the outstanding GST amount was paid. Grange requests that you remit the GIC based on the transaction being a GST 'revenue neutral' correction. Grange states that internal control processes for both itself and Hendra have been strengthened to prevent the error reoccurring. Grange explains that the GST relating to the original transaction was included in the March 2007 activity statement for Hendra. Evidence of this is included in the remission request.

You accept that the correct amount of GST was paid in relation to the transaction in the correct period, but by the wrong entity. Therefore, it is appropriate for you to allow full remission of the GIC for the shortfall period.

Example 7 – Input tax credit claimed by the wrong entity and the recipient has not included the ITC in a previous activity statement

Kedron, a monthly remitter makes a $55,000 creditable acquisition from an unrelated party in November 2006. In June 2009, an ATO audit of Kedron's GST affairs reveals that the $5,000 ITC in relation to this supply was claimed by Kedron Services Trust, rather than by Kedron. The audit establishes that Kedron has not made any claim for ITCs in relation to the same supply.

A notice of assessment for $5,000 issues to Kedron Services Trust on 2 July 2009. This amount is paid on 10 July 2009. GIC is imposed for the period 21 December 2006 until 9 July 2009.

Kedron Services Trust requests that you remit the GIC based upon the transaction being a GST 'revenue neutral' correction. Kedron Services Trust informs you of the steps it has taken to ensure the correct identification of the recipient for future ITC claims. You remit the GIC in full for the shortfall period (21 December 2006 to 1 July 2009). GIC that has accrued on the shortfall amount from 2 July 2009 to 9 July 2009 is not remitted under this practice statement.

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