

# ***PS LA 2011/12 - Administration of general interest charge (GIC) imposed for late payment or under estimation of liability***

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## Practice Statement Law Administration

**PS LA 2011/12**

*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. ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs ATO personnel must follow their business line's escalation process.*

*Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the way explained below. 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.*

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| <b>SUBJECT:</b> | <b>Administration of general interest charge (GIC) imposed for late payment or under estimation of liability</b> |
| <b>PURPOSE:</b> | <b>To provide guidance on the imposition of GIC and the circumstances in which the GIC will be remitted</b>      |

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## SCOPE

1. This practice statement explains the imposition of the GIC and provides guidance on the Commissioner's powers to remit the GIC and the circumstances when the GIC will be remitted, in particular, where the GIC is imposed as a result of late payment.
2. This practice statement also includes an annexure which provides a general outline of the deductibility and assessability of GIC.
3. The Australian Taxation Office (ATO) has released Law Administration Practice Statement PS LA 2006/8 *Remission of shortfall interest charge and general interest charge for shortfall periods* which outlines the Commissioner's remission guidelines in relation to interest charges which may arise where a tax liability is amended or revised. PS LA 2006/8 deals with interest charges that accrue in the period prior to the amendment or revision of a tax liability, including the GIC and the shortfall interest charge. The principles outlined in PS LA 2006/8 are outside the scope of this practice statement.

## TERMS USED

4. The following terms are used in this practice statement:

**Base interest rate** – this is a rate worked out under section 8AAD of the *Taxation Administration Act 1953* (TAA). Generally, the rate for each day in a particular quarter of the year equals the monthly average yield of 90 day bank accepted bills for a prescribed month. The bill rates are published by the Reserve Bank of Australia.

**Disputed debt** – is a term used for the purposes of this practice statement to describe a tax-related liability (as defined in section 255-1 of Schedule 1 to the TAA), which is the subject of an objection, a tribunal review or an appeal. In this context, 'disputed debt' also includes other related components that may arise from the making of the assessment increasing the tax-related liability. These related components include tax shortfall penalty and the GIC calculated from the date the correct amount of tax should have been paid up until the date the assessment is made.

**MAP** – is an abbreviation for the Mutual Agreement Procedure contained in Australia's double tax agreements which provide a process for resolving disputes pertaining to tax also assessed under other tax jurisdictions.

**RBA deficit debt** – means a balance of a running balance account (RBA) in favour of the Commissioner, where the total amount of primary tax debts allocated to the RBA are greater than the payments and credits allocated to that RBA.

**50/50 arrangement** – is a term used to describe an agreement between the Commissioner and a tax debtor where upon payment of a minimum of 50% of the disputed debt, the Commissioner agrees to suspend temporarily the recovery of the balance of the disputed debt and consents to a remission of 50% of the GIC (or 75% in certain cases – see paragraphs 57 to 64 of this practice statement) which would otherwise accrue in the event that the tax debtor's dispute is unsuccessful. This arrangement may be subject to certain conditions outlined in this practice statement.

## STATEMENT

5. From 1 July 1999, the GIC replaced the various existing additional charges for late payment in the taxation laws.<sup>1</sup>
6. The GIC applies to most primary tax debts as well as RBA deficit debts (see Law Administration Practice Statement PS LA 2011/22 *Refunds of running balance account surpluses and credits – Commissioner's discretion to retain amounts*).  
*(Note: GIC does not apply to excise duty debts payable under the Excise Act 1901.)*
7. The GIC applies in a wide range of circumstances which include:
  - where an amount of tax, charge, levy or penalty remains unpaid
  - where an administrative overpayment is not repaid by the due date
  - where there is an excessive shortfall in an incorrectly varied or estimated quarterly or annual income tax instalment, and/or
  - where there is an underpayment of tax following an amendment of an assessment.
8. This practice statement deals primarily with situations where a taxpayer is aware of their liability and fails to pay by the due date. There is also a general outline of the deductibility and assessability of GIC in the annexure to this practice statement.
9. GIC for late payment is imposed on the balance of a taxpayer's account (that is, the primary tax and accrued additional charges for late payment) as at 1 July 1999.

<sup>1</sup> See archived Chapter 92 of the *ATO Receivables Policy* – 'Additional charges for late payment' regarding late payment charges that were incurred prior to the introduction of the GIC.

10. Where a pay as you earn (PAYE), prescribed payment system (PPS), reportable payment system (RPS) or sales tax debt was owing prior to 1 July 1999, but has not been established and brought to account until after 1 July 1999 (for example, a PPS debt for February 1999, that was not notified or established till after 1 July 1999), then the GIC applies from the original due date of that liability.

### **Calculation of GIC**

11. The calculation of the GIC is provided for in Part IIA of the TAA. For days prior to 1 July 2001, the GIC rate for a day is worked out by adding 8 percentage points (the uplift factor) to the Treasury Note yield rate for that day, and dividing that total by the number of days in the calendar year.
12. From 1 July 2001, the GIC rate for a day is worked out by adding an uplift factor of 7 percentage points to the base interest rate for that day, and dividing that total by the number of days in the calendar year.
13. The GIC is worked out daily on a compounding basis, that is, it accrues each day on the balance of the account which will consist of any unpaid tax and any unpaid GIC.
14. From 1 July 1999 to 30 June 2000, the calculation of GIC on a compounding basis applied only to PAYE, PPS, RPS and sales tax debts (these four types of liability were the only types of tax liability able to be recorded on an RBA during that year). During that time, the Commissioner exercised his discretion to partially remit the GIC on other types of debts (for example, income tax, fringe benefits tax) to an amount equivalent to a calculation using the Treasury Note yield rate plus 8% on a simple interest basis.
15. GIC is a tax deduction in the income year that it is incurred. If that GIC is subsequently remitted, then the taxpayer is taken to have received the remitted amount as recoupment of that expenditure. The recoupment then becomes an assessable recoupment if the taxpayer has deducted an amount for the GIC in the current income year or they have deducted or can deduct an amount of the GIC for an earlier income year.

### **Imposition of GIC on judgment debts**

16. The question of whether court allowed interest, judgment interest or GIC can be claimed on debts subject to judgment depends on the court rules and practices in each jurisdiction. In general, where GIC can be claimed in court proceedings in lieu of court allowed interest, the GIC should be claimed.
17. The ATO's practice in respect of making claims for GIC is as follows:
  - (i) with one exception (see paragraph 20), the Commissioner will claim GIC for the period from the due date to the date of issue of the proceeding
  - (ii) with one exception (see paragraph 20), the Commissioner will claim GIC for the period from the date of issue of a proceeding to the date of judgment or earlier payment, and
  - (iii) if insolvency proceedings in respect of the debtor are commenced subsequent to the date of judgment, the Commissioner will claim, in the insolvency proceedings, judgment interest for the period from the date of judgment to the date of bankruptcy or liquidation, or earlier payment. In most circumstances the so-called 'top-up amount' of GIC (essentially the amount of any difference between the full amount of GIC and the relevant amount of judgment interest calculated over the relevant period) will also be claimed.

18. It should be noted that the GIC payable under taxation legislation is considered to be sufficient to compensate the Australian Government for the loss of use of the funds. In some jurisdictions, the rules of the relevant court may permit court allowed interest to accrue at the same time GIC under taxation legislation is accruing (for example, section 58 of the *Supreme Court Act 1986 (Vic.)*). The Commissioner will claim only the GIC for the period to the date of judgment. Judgment interest is usually imposed on the debt following the date of judgment. However, GIC also accrues on the unpaid amount of the judgment debt, reduced by the amount of any concurrently-accruing judgment interest: section 8AAH of the TAA.
19. The ATO's policy of claiming the 'top-up amount' of GIC in insolvency proceedings occurring after the issue of a judgment is based on the fact that judgment interest rates can vary considerably between the state jurisdictions. The ATO's practice, in insolvency proceedings, is generally to claim judgment interest and then to also claim the 'top-up amount' of GIC. This approach is considered appropriate because it means that there will be equitable treatment of judgment debtors regardless of where that judgment is obtained.
20. The exception mentioned above in subparagraphs 17(i) and 17(ii) of this practice statement concerns director penalty liabilities under Division 269 of Schedule 1 to the TAA. These liabilities are not subject to GIC under taxation law. It is therefore appropriate that interest be sought from the court when pursuing judgment for these claims.

#### **Remission of GIC – general considerations**

21. The Commissioner may remit part or all of the GIC for late payment (section 8AAG of the TAA) in certain circumstances.
22. Where debtors seek a remission of GIC, the debtor's request should be considered having regard to:
  - the facts of the particular case, including the debtor's own situation and individual circumstances, and
  - the guidelines contained in this practice statement.
23. It would be inappropriate to exercise the discretion to remit GIC for the following reasons:
  - as an inducement to finalise a disputed debt although, depending on the circumstances, remission may form a component of a settlement of litigation, or
  - to finalise a case where the ATO has not attempted to collect GIC.
24. Taxpayers have a responsibility to meet their payment obligations as and when their tax debts fall due for payment.
25. The GIC automatically imposed by legislation is intended to encourage the timely payment of tax. It denies late payers an advantage over those who do pay on time. The knowledge that GIC is accruing should encourage debtors to organise their affairs in such a way as to enable them to pay on time. The uplift factor is intended to make the GIC rate sufficiently high to discourage the use of tax debts as a source of business or private finance. However, the uplift factor is not intended to serve as a 'culpability penalty' that is, it is not a penalty for having engaged in blameworthy conduct.
26. The GIC also serves to compensate the Australian Government for the impact of late payments, as delays in tax receipts mean that government borrowing and interest costs are higher than otherwise need be.

27. The legislation acknowledges that situations exist where it would be fair and reasonable for the GIC to be remitted. The Commissioner has the discretion to remit the GIC in part or in full depending on the circumstances that led to the late payment (see subsections 8AAG(1) and 8AAG(2) of the TAA).
28. A debtor has a right to request a remission of general interest charges. Where the Commissioner is satisfied that a remission of the GIC is warranted, it will be remitted, either in full or in part. The onus is generally on the debtor to demonstrate remission is warranted. However, where circumstances justifying remission are readily apparent, the Commissioner may initiate remission.
29. A decision on the request for remission will be made based upon information provided by the debtor as part of the request for remission and from any other information available to the ATO, including information on any other types of tax debt owed and other amounts paid after the due date. There will be no remission of any GIC if there is insufficient relevant information to make a decision.
30. The ATO will consider a request in accordance with the relevant remission provision and the Commissioner's guiding principles which are set out below.
31. The decisions and actions taken by tax officers must also be consistent with the commitments made by the ATO in the *Taxpayers' Charter*.
32. Tax officers are also expected to follow the directions of the Corporate Management Practice Statement PS CM 2007/01 *Respecting clients' rights of review* and advise taxpayers of the relevant avenues for review. Specifically, a debtor may apply for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* of a decision by the Commissioner not to remit, or not to further remit, an amount of GIC.

## **EXPLANATION**

### **Circumstances for the remission of GIC**

33. The Commissioner may remit all or part of the GIC in the circumstances set out in subsections 8AAG(3), 8AAG(4) and 8AAG(5) of the TAA. The remission of the GIC will depend on the circumstances relevant to the late payment. All of the factors put forward by a debtor in the request for remission, their effect upon late payment and the steps taken to alleviate the delay in payment, will be considered. Any other relevant factors that are readily apparent to the Commissioner will also be considered.

### ***Partial remission***

34. Partial remission should be considered when the debtor has experienced the types of factors outlined in this practice statement and they do not otherwise qualify for full remission. It may be unfair to taxpayers who consistently do the right thing if those who choose not to comply are given the same level of remission. Partial remission may also be the appropriate response in cases where the circumstances that led to the non-payment were caused directly or indirectly by an act or omission of the debtor and the debtor meets the other criteria for remission.

### **Subsection 8AAG(3) of the TAA - circumstances not caused directly or indirectly by an act or omission by the debtor**

35. A debtor may be able to demonstrate that the difficulties they are experiencing in making payment are due to circumstances not caused directly or indirectly, by an act or omission by them. In considering any remission of GIC, it is also

necessary for ATO staff to consider what reasonable action was taken, if any, to mitigate the effects of the circumstances causing the late payment. Such circumstances may include (but are not limited to) natural disasters such as fire, flood or drought; industrial action; the unforeseen collapse of a major debtor or the sudden ill health of the debtor or key personnel in sole trader or small business situations.

36. General statements such as adverse business conditions affecting an industry, general economic downturn or fluctuations of currency exchange rates would not be an acceptable basis for remission under subsection 8AAG(3) of the TAA as these circumstances are more likely to prevail across the whole community. Debtors would need to demonstrate that such circumstances had specific impacts on their ability to pay before they could be considered as reasons for remission.

#### ***Acts or omissions of the debtor***

37. Acts or omissions of the debtor which prevent payment by the due date will vary.
38. Debtors who have an extended credit policy to maintain business, which will adversely affect their cash flow and impact their ability to pay on time, will not qualify for remission. To remit the GIC in these situations would, in effect, be financing the business at the expense of revenue.
39. A soundly advised or well considered decision by a debtor which results in unforeseen severe consequences affecting their ability to pay may be relevant in deciding whether to remit any part of the GIC. This would assume that the debtor could demonstrate that plans were in place to ensure the payment of tax on time, but that as a result of the unforeseen circumstances, payment on time was not possible.
40. In contrast, debtors who choose not to pay a tax liability or use available funds to acquire assets or to pay other creditors, basically delay payment of the tax debt by their own action. Steps a debtor has, or could have, taken to realise assets, seek finance to meet tax debts or to direct funds from income or cash flow, are all relevant considerations in deciding whether a debtor deserves remission of GIC.

#### ***Relieving the circumstances or effects of circumstances***

41. The Commissioner must consider the debtor's reasonable action to mitigate the circumstances that led to late payment or the effect of those circumstances causing the delay, irrespective of whether the circumstances were circumstances not caused directly or indirectly by an act or omission by the debtor. To be eligible for remission, the debtor 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 pay by the due date and beyond.<sup>2</sup>

#### **Subsection 8AAG(4) of the TAA - fair and reasonable**

42. Subsection 8AAG(4) of the TAA allows for the remission of GIC even where the circumstances that contributed to the delay in payment *were* due to, or caused directly or indirectly by, the act or omission of the debtor, provided that:

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<sup>2</sup> See paragraphs 8AAG(3)(b) and 8AAG(4)(b) of the TAA.

- the debtor took reasonable action to mitigate, or mitigate the effects of, those circumstances (paragraph 8AAG(4)(b) of the TAA). For a discussion of 'reasonable action to mitigate', see paragraph 41 of this practice statement, and
  - having regard to the nature of the circumstances, it would be 'fair and reasonable' to remit all or part of the GIC (paragraph 8AAG(4)(c) of the TAA).
43. The words 'fair and reasonable' are to be given their ordinary meaning in deciding whether it is fair and reasonable to remit the GIC. However, in considering what is fair and reasonable under subsection 8AAG(4) of the TAA (or paragraph 8AAG(5)(a) of the TAA), the following factors need to be taken into account:
- (i) the GIC is intended to encourage payment of taxes on time and to discourage the use of tax debts as a source of business or private finance, as well as compensating the Australian Government for the delay in receipt of payment. It is therefore legislative policy that debtors should be liable to additional charges if they pay late, and
  - (ii) not only must the exercise of the power to remit be fair to the debtor concerned, it must be fair to the whole community. In other words, a debtor who pays late should not be given any advantage over those taxpayers who organise their affairs to ensure they can pay on time. Debtors will need to demonstrate that it is fair and reasonable to remit the GIC, having regard to the nature of the specific event or decision.
44. Therefore, in considering whether it is fair and reasonable to remit the GIC in any particular case, it is valid to ask whether ordinary and reasonable members of the community who pay their taxes on time would see the circumstances as ones where it is fair and reasonable to remit.
45. There are a wide range of circumstances that taxpayers may put forward for consideration. The specific examples of remission discussed in paragraphs 57 to 112 of this practice statement are ones in which we may consider whether it would be fair and reasonable to remit.
46. For example, it may be fair and reasonable to grant a partial or full remission of GIC in cases where payment of that amount would cause the taxpayer serious hardship. If a taxpayer meets their primary tax liability, but is unable to pay the full amount of GIC without incurring serious hardship, the community may view it as fair and reasonable that partial or full remission be granted. See later discussion at paragraph 50 of this practice statement.
47. However, if a taxpayer in business was unable to pay on time simply because of generally adverse economic conditions, and required time to pay by instalments, then the community would generally perceive it to be fair and reasonable that the GIC was paid, especially considering that many other businesses will take steps to ensure that they pay their taxes on time.

#### **Subsection 8AAG(5) of the TAA - special circumstances and other appropriate circumstances**

48. Subsection 8AAG(5) of the TAA allows the Commissioner to remit GIC if:
- there are special circumstances because of which it would be fair and reasonable to remit all or part of a charge (paragraph 8AAG(5)(a) of the TAA), or
  - it is otherwise appropriate to do so (paragraph 8AAG(5)(b) of the TAA).

49. The question of what the Commissioner considers 'fair and reasonable' is discussed in paragraphs 42 to 47 of this practice statement.
50. Taxpayers may present a wide variety of 'special circumstances' by reason of which it is fair and reasonable to partly or fully remit GIC. Each case must be considered on its own merits. Some examples of such situations include:
- *Hardship*: Where the recovery of GIC would cause serious hardship, remission may be granted. This would include payment proposals that approximate the limit of the financial capacity to which the debtor controls or has access to. Debtors who may satisfy these criteria could include social security recipients who have no recourse to assets and who do not have the means to pay the GIC by way of instalments over time.
  - *Good payment history*: A debtor with a consistently good payment record may be late in making a payment on an isolated occasion. In deciding whether to remit the GIC in whole or in part, the good payment history and any other relevant factors of the debtor will be taken into account.
51. The other basis upon which the discretion to remit the GIC may be made is that it is 'otherwise appropriate to do so': paragraph 8AAG(5)(b) of the TAA. This is a broad discretion and it is not possible to lay down an exhaustive list of those circumstances which might warrant remission under this provision. However, this provision gives the Commissioner a degree of flexibility for the remission of the GIC. It means that the Commissioner can respond to changing circumstances, and consider unusual factors or future issues on their merits and make decisions accordingly.
52. Such decisions may be concerned with the circumstances of a particular debtor. In practice, however, they are more likely to extend to a particular group of tax debtors, or to the general body of tax debtors, and may involve consideration of issues of administrative efficiency and fairness.
53. An example of this type of decision is the announcement by the Commissioner on 30 June 2004 of a small business debt assistance initiative. Under this initiative, individuals and small business taxpayers, with income tax and activity statement debts of less than \$25,000, could enter into extended repayment arrangements. Provided they agreed to pay their debts by direct debit, these eligible taxpayers could also receive partial or full GIC remission for the period of the payment arrangement.
54. The decision to remit the GIC under this provision is restricted to senior tax officers.
55. Note that while a decision may be made to allow a remission of GIC for a particular category of tax debtors, this does not necessarily mean that *all* tax debtors falling within that category will be granted a remission, or given a remission to the same extent. The Commissioner reserves the right not to grant a remission if the particular circumstances of a case are such that it would be inappropriate for such a concession to be given, taking into account the legislation and the factors considered in this policy.

## **SOME SPECIFIC SITUATIONS**

56. The following paragraphs outline specific situations involving the application of the remission policy in the context of the 'fair and reasonable' condition. Note that they are not intended to be prescriptive and each case must be examined on its own merits.

## Disputed debt and 50/50 arrangements

57. The legislative regime provides that tax is both payable and recoverable notwithstanding that there is a formal review under Part IVC of the TAA. Accordingly, as a general rule, if the review does not result in a reduction of a liability, any GIC that applies will accrue from the original due date until payment. Where a liability is reduced by way of amendment, any GIC that applies will be calculated on the amended balance from the original due date of the liability until the date of payment. However, in certain circumstances where a dispute exists, part of the GIC may be remitted under what is referred to as a '50/50 arrangement'.
58. If the debtor pays all undisputed tax and a minimum of 50% of the disputed tax and where the Commissioner validly issues two or more assessments relating to the same transaction against different taxpayers, or against the same taxpayer under different taxing provisions as described in a later paragraph under this heading, relevant GIC will be partially remitted so the debtor will be liable for the GIC as follows:
- (i) on any debts not in dispute, GIC will accrue at the full rate from the due date(s) until the date of payment
  - (ii) on the full amount of the debts in dispute, GIC will accrue at the full rate from the due date(s) for payment until, but not including, the date the debtor pays a minimum of 50% of the tax in dispute
  - (iii) on the remaining balance of the debts in dispute, the debtor will be liable for 50% of the applicable GIC calculated from the date of payment of a minimum of 50% of the tax in dispute until fourteen days after the date of the decision (that is, 50% of the GIC accrued during this period will be remitted), and
  - (iv) from fourteen days after the decision, the full amount of GIC will be applied on the remaining balance finally found to be payable until that balance is paid in full.

See Law Administration Practice Statement PS LA 2011/4 *Recovering disputed debts* for a detailed discussion of 50/50 arrangements.

59. However, such remission may not be available, even where the above conditions are met, in a case where the objection is determined to be frivolous, or where the ATO considers that there is a significant risk to the revenue. In such cases, the ATO may proceed to recover all tax outstanding, including GIC, notwithstanding the presence of a dispute. The circumstances in which the ATO may take such action are set out in more detail in PS LA 2011/4.
60. The Test Case Litigation Program (TCLP) is a public interest litigation program which provides financial assistance to selected taxpayers involved in litigation that will likely clarify the operation of the laws administered by the Commissioner. As an incentive to agreeing to be a participant in the TCLP, the Commissioner is prepared to offer an additional GIC concession where a 50/50 arrangement is accepted. Details of this additional concession are outlined in PS LA 2011/4.
61. In a particular income year, two or more assessments relating to the same transaction against different taxpayers, or against the same taxpayer under different taxing provisions, may be validly issued. In those cases, the payment by one of these entities of 50% of their disputed liability relating to that transaction, may provide benefits to all entities which have been assessed in relation to that transaction.

62. The benefits available to the other entity/entities would be a remission of the GIC imposed on its disputed debt relating to that transaction. The amount of the benefit would be limited to a maximum of:
- the amount of GIC that would be remitted as a result of the payment if the payment had been made by the entity itself and not the paying entity, plus
  - an amount equal to the GIC remitted on the paying entity's debt as a result of its 50/50 arrangement.
63. The income of a discretionary trust or similar entity could be adjusted as one of the adjustments or assessments resulting from the transaction. The benefits outlined in the previous paragraph are only available to the other entities assessed (excluding the other beneficiaries) if all of the beneficiaries of the trust pay 50% of the disputed debt relating to the transaction. Despite any non-payment by other beneficiaries, any beneficiary that pays 50% of their disputed debt will be entitled to the benefits normally available other than those outlined in this and the previous paragraph.
64. The prospect of remission of the GIC is not to be used as an inducement to achieve finalisation of a dispute although, depending on the circumstances, remission may form a component of a settlement.

### **Bankruptcy / liquidation**

65. The ATO will generally include claims for the GIC in proofs of debt. Requests may be received from a trustee or liquidator for remission of GIC on the basis that these charges ought to be directed at debtors who fail to pay their tax debts on time, and not to adversely affect other creditors in insolvency situations. In this situation, the GIC will not be remitted as a general rule. However, if all other creditors, secured and unsecured, are prepared to forego all their claims to interest on amounts owed to them (for the same length of time the tax debts have been outstanding, if applicable), consideration will be given to remitting the GIC.

### **Estimates of remittance provisions**

66. The GIC is imposed both on estimates of pay as you go withholding liabilities made under Division 268 of Schedule 1 to the TAA and the underlying liabilities arising under the remittance provisions. Prior to 1 July 2010, the Commissioner had the power to make estimates under Division 8 of Part VI of the *Income Tax Assessment Act 1936* (ITAA 1936). That provision has been repealed and from 1 July 2010, any estimates must be made under Division 268 of Schedule 1 to the TAA regardless of when the underlying liability arose. However, GIC continues to accrue on estimates made under the old provisions as if those estimates were made under the new law.
67. Should the estimate be adjusted or revoked, the GIC will be calculated on the adjusted amount, if any, from the due date of the underlying liability. Any request for remission made by the debtor will be considered on the same basis as requests for remission of other additional charges. If GIC on an estimate is paid or remitted, then GIC on the parallel underlying liability is discharged or remitted to the same extent.

### **Superannuation guarantee charge**

68. The provisions that give the Commissioner discretion to remit the GIC also include where the GIC is imposed for the late payment of a superannuation

guarantee charge (SGC).<sup>3</sup> The administration and nominal interest components of SGC are not included in the GIC calculation.

69. SGC is an amount collected by the ATO on behalf of employees. It is payable by employers who have failed to provide the prescribed minimum level of superannuation support for their employees.
70. GIC imposed on unpaid SGC forms part of the amount collected by the ATO and with the nominal interest component of the SGC, effectively compensates the employee for the loss of earnings that results when superannuation or SGC is unpaid.
71. In considering any application for remission of the GIC in relation to SGC, the ATO will bear in mind the particular nature of SGC, being an amount collected on behalf of employees. The ATO will also have regard to the fact that SGC is payable by employers who have failed to provide the prescribed minimum level of superannuation support.
72. As previously discussed, under subsection 8AAG(3) of the TAA the Commissioner may grant remission of GIC in circumstances where:
- the late payment arose from factors beyond the debtor's control, and
  - the debtor has taken reasonable action to relieve, or relieve the effects of, those circumstances.
73. However, in cases where the late payment was caused directly or indirectly by an act or omission of the debtor, or by special circumstances, the Commissioner would have to believe that it is fair and reasonable to remit in light of the circumstances of the particular case: subsections 8AAG(4) and 8AAG(5) of the TAA. Debtors may still request remission in these circumstances but, given the considerations already mentioned under this heading, the Commissioner is generally unlikely to consider that it would be fair and reasonable to remit the GIC in such cases.
74. One situation where remission may be granted is where an employer has not made the minimum required superannuation contributions for an individual who is engaged under a contract that is wholly or principally for their labour, and both parties reasonably believed that an employment relationship did not exist and the employer faces a SGC assessment as a result. The specific policy relating to this situation is provided in Law Administration Practice Statement PS LA 2006/14 *Procedures for tax officers 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*.

### **Excess contributions tax**

75. There is an annual limit to superannuation contributions that receive a concessional tax treatment. If in a financial year a taxpayer's concessional contributions or non-concessional contributions exceed the taxpayer's relevant superannuation contributions cap, the individual concerned is taxed on the excess.
76. Excess contributions tax (ECT) is due for payment 21 days after the assessment is given. If the individual fails to pay the liability within 21 days, they will incur GIC for late payment.

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<sup>3</sup> Prior to the introduction of GIC, the Commissioner had no discretion to remit additional charges for late payment of SGC.

77. As soon as practicable after making an ECT assessment, the Commissioner must give the taxpayer a release authority for the amount of the excess concessional contributions tax and/or a release authority for the amount of the excess non-concessional contributions tax. A fund receiving a valid release authority can pay the amount authorised as a benefit to the taxpayer or the ATO. The amount released can be used to pay the ECT debt.
78. The superannuation fund must release the required amount within 30 days after receiving the release authority or they are liable for a penalty.
79. Where a taxpayer gives the release authority to their superannuation fund within the time allowed for payment, and the fund pays the amount to the ATO within the 30 days allowed for release, the ATO will remit the GIC accrued. Where possible, the ATO will remit this amount without requiring the taxpayer to formally request the remission.
80. The ATO will consider whether remission is appropriate in other circumstances. Remission will generally not be appropriate to the extent the taxpayer's actions (whether as member or trustee) contributed to the delay.

### **PAYG instalments**

#### ***Late payment of PAYG instalments (2000–01 income years and later)***

81. The GIC for late payment of PAYG instalments is calculated from the due date of the instalment until the date that the instalment is paid, regardless of the issue of the income tax assessment for the year in question.
82. Tax officers may receive requests for remission of the GIC because the income tax subsequently assessed is less than the instalments that are payable. Such requests should be declined. In these circumstances, the GIC should be raised on the amount of the instalment until the date the instalment is paid. This approach acknowledges that the GIC is payable where the instalment is not paid by the specified date, and that the legislation specifically authorises the Commissioner to recover that tax in any court of competent jurisdiction. The lodgment of the return disclosing a lower than expected taxable income does not constitute a special circumstance.
83. The same principle regarding remission will also apply to those taxpayers who are eligible to pay an annual instalment. The GIC will accrue if the instalment is paid late, and lodgment of the return, showing a lower than expected income, will not of itself justify remission of the GIC.

#### ***Where a taxpayer chooses a varied PAYG instalment rate***

84. When a quarterly payer who pays on the basis of instalment income believes that the instalment rate notified by the ATO, or an instalment rate that it has chosen for an earlier quarter, is not appropriate it may choose a different instalment rate for the current quarter. Where this occurs, the amount of the instalment for the current quarter is calculated accordingly.
85. An entity that chooses a varied instalment rate that is lower than the rate previously used may be eligible for a credit in respect of earlier instalments. Any such credit is applied to the entity's RBA. However, subsection 45-215(3) of Schedule 1 to the TAA provides that any credit entitlement does not affect the liability to pay an instalment. This means that if an earlier instalment is left unpaid, GIC will be imposed on the unpaid amount of that instalment, even if a credit subsequently arises because the taxpayer chooses a different instalment rate for a later quarter.

86. Any remission of GIC in these circumstances will only be granted if it is justified on other grounds mentioned in this practice statement. The same principle will apply to taxpayers who pay instalments on the basis of GDP-adjusted notional tax, (whether 2 or 4 instalments) and who leave an earlier instalment unpaid and then claim a credit for a later instalment on the basis of their estimate of their benchmark tax.

### **FBT or GST instalments**

87. Subdivision 162-D of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) imposes a penalty where an entity varies their notified GST instalment amount and the varied amount is too low. (The penalty is based on the GIC rate but does not have the effect of creating a liability to GIC – section 162-205 of the GST Act). GIC is imposed under section 298-25 of Schedule 1 to the TAA if any amount of this penalty remains unpaid after it is due.
88. Similarly, where an entity chooses to vary the amount of an FBT instalment amount by making an estimate of the tax that will be payable for the year and this estimate is less than 90% of the tax assessed for the year, section 112B of the *Fringe Benefits Tax Assessment Act 1986* prescribes that the employer will be liable to pay GIC on the amount worked out under that section.
89. Any remission of GIC in these circumstances will only be granted if it is justified on the grounds mentioned in this practice statement. The Commissioner will consider all the factors put forward by an entity, their effect upon the variations or estimates provided and the steps taken to rectify the late payment of the penalty imposed by Subdivision 162-D of the GST Act or underpayment of the FBT or GST liability.
90. Remission of the GIC would not be considered if inaccurate estimations of instalment rates or benchmark tax arose due to acts or omissions within the control of the entity. Inadequate record keeping or delays in updating records or consulting advisors would not be considered sufficient reason for remission unless such delays were caused by circumstances outside the entity's control.

### **Deceased estates**

91. The remission of any GIC that has accrued during the period prior to the date of death of the debtor will need to be reviewed in accordance with the general guidelines detailed in this practice statement.
92. Where payment cannot be made until probate is granted we recognise the situation as being beyond the control of the trustee of a deceased estate. Thus, we generally remit the GIC that has accrued on the account for the period from the date of death until 28 days after probate is granted.
93. The trustee of a deceased estate under administration would need to demonstrate that assets were realised promptly and funds were not available at an earlier date to enable payment, when making a request for remission of the GIC that accrued during the period of the administration.

### **Competent authority issues / Mutual agreement procedures**

94. In cases where the ATO makes a transfer pricing or profit re-allocation adjustment, the debtor may seek Competent Authority assistance, under the Mutual Agreement Procedure (MAP) article contained in Australia's double tax agreements, to attempt to have the matter resolved with the other tax jurisdiction involved. It is recognised that the collection of tax during MAP

cases will, in some instances, impose temporary double taxation on the taxpayer whilst the MAP is in progress because the same profits have been subject to tax in both jurisdictions. Where the possibility of such double taxation arises, the ATO will agree to defer recovery action under section 255-5 of Schedule 1 to the TAA, including the recovery of any GIC, until an agreed future date (which will usually be the date that the MAP process is concluded), unless:

- there is a risk to the revenue
- the taxpayer has other liabilities unpaid after the due date, or
- the taxpayer has failed to meet other tax obligations when required.

95. This policy applies to cases where:

- the decision on the remission of the GIC incurred for non-payment of a tax debt that is subject to the MAP adjustment was not made, or
- an ATO view in relation to remission or non-remission (for example, in a position paper) was not provided to the taxpayer,

at 4 July 2006 (the date of effect of the relevant previous version of the *ATO Receivables Policy*). Decisions in respect of individual adjustments and in respect of individual years of income are separate decisions.

96. This policy relates to any interest under former section 170AA of the ITAA 1936 or any GIC incurred in relation to tax that is the subject of a MAP, whether the interest was incurred prior to, or after the taxpayer is served with the notice of assessment or amended assessment.
97. The taxpayer may be entitled to a limited remission of the GIC incurred prior to the MAP.
98. The amount of remission depends on the Australian-dollar equivalent of the tax actually paid (net of any entitlements to refunds or offsets) in the foreign jurisdiction where that tax is directly related to the particular amount of profits that are the subject of the MAP. The 'Australian-dollar equivalent' would be determined by the prevailing exchange rates at the date/s of payment/s of tax in the foreign jurisdiction.
99. A reduction in losses brought forward or incurred (as shown on the foreign jurisdiction tax documents) would not be grounds for remission. In order to be eligible for remission, the taxpayer must have made an actual payment of tax directly in respect of the year to which the particular amount of profits that are the subject of the MAP relates.
100. Generally, and subject to other considerations in this practice statement, the maximum remission allowable would be to the base interest rate.
101. The remission of GIC is limited so that the remission does not result in a windfall gain to the taxpayer or any associated entity in the treaty partner country. An example of a windfall gain would be where any interest paid by a foreign revenue authority in cases where correlative relief is granted, would exceed the base interest rate in Australia.
102. Tax officers should refer to Taxation Ruling TR 2000/16 *Income tax: international transfer pricing - transfer pricing and profit reallocation adjustments, relief from double taxation and the Mutual Agreement Procedure* (see Addendum to TR 2000/16) for the remission policy in respect of the GIC incurred during the MAP. (Note: The policy in TR 2000/16 differs from this policy relating to remission of interest or GIC incurred before the case has been formally accepted into MAP).

103. The decision on any remission is to be made after the MAP is completed and is dependent on the taxpayer providing evidence to the ATO of the taxes paid in the foreign jurisdiction that are directly related to the particular amount of profits that are the subject of the MAP, plus detail of any interest or gain paid to it or its associated entities by the foreign jurisdiction in respect of those taxes paid.
104. Normal GIC remission policy as outlined in this practice statement would apply from the date the MAP is finalised.

### **Foreign revenue claims**

105. A foreign state may formally request the Commissioner to collect an amount (in Australian dollars) on behalf of that foreign state, from a debtor that owes a tax debt to that foreign state (a 'foreign country debtor'). Refer to Law Administration Practice Statement PS LA 2011/13 *Cross border recovery of taxation debts* for further details of when and how this can occur.
106. To be accepted as a 'foreign revenue claim', the request must comply with the various requirements prescribed in section 263-15 of Schedule 1 to the TAA.
107. If the Commissioner is satisfied that the claim has been made in accordance with section 263-15 of Schedule 1 to the TAA, he must register the claim on the Foreign Revenue Claims Register ('the Register') within 90 days of receiving the request for assistance.
108. When the Commissioner registers a foreign revenue claim on the Register, the debt becomes a pecuniary liability to the Commonwealth: section 263-30 of Schedule 1 to the TAA.
109. If the taxpayer fails to pay the amount after it becomes due and payable, the GIC applies on any unpaid amounts under subsection 263-30(3) of Schedule 1 to the TAA. Refer to Law Administration Practice Statement PS LA 2011/14 *General debt collection powers and principles* for further details of when the amount becomes due and payable.
110. The Commissioner has a power to remit the GIC (section 8AAG of the TAA). The Commissioner will generally remit where there is a reduction in the foreign revenue claim due to a reduction in the taxpayer's liability in the foreign country. This may occur, for example, due to successful litigation by the taxpayer (or another process similar to the Australian objection and appeal process) with the result that the taxpayer is considered never to have been liable for the amount of the reduction. The Commissioner will however, generally not remit where the reduction is due to a part payment made by that taxpayer in the foreign country to satisfy that liability. This approach mirrors the general position for Australian tax debts; a credit amendment of a taxpayer's liability also removes any associated GIC that had accrued on the amount reduced, but a mere payment by the taxpayer of the outstanding liability does not.
111. The Commissioner may also remove details of a foreign revenue claim from the register in certain circumstances (see section 263-35 of Schedule 1 to the TAA).
112. If the Commissioner removes the details of a debtor from the Register, the debtor will be entitled to a credit equal to the amount of the GIC that may have accrued in relation to the claim.

## ANNEXURE: DEDUCTIBILITY AND ASSESSABILITY OF GIC AND OTHER INTEREST CHARGES

### Deductibility of GIC on income tax debts

113. The GIC as well as some of its predecessors – namely, penalty by way of interest imposed under sections 163C, 170AA and 207A of the ITAA 1936 - can be claimed as a tax deduction by the debtor as expenditure incurred in the year of income.
114. The deductibility of interest imposed under sections 163C, 170AA or 207A for income years 1992–93 to 1996–97 inclusive is provided for under subsection 51(5) of the ITAA 1936. For income years 1997–98 to 1998–99 inclusive, deductions can be claimed under section 25-5 of the ITAA 1997.
115. The deductibility of the GIC is also provided for in section 25-5 of the ITAA 1997. A tax deduction for GIC incurred can be claimed in income tax returns for the years ended 30 June 2000 onwards.
116. The word 'incurred' in the relevant legislation has the same meaning given by the Courts in decided cases. A summary of the principles established in those cases is provided in Woeller Barkoczy Murphy, 2013, *Australian Taxation Law* 23rd Edition, CCH Australia Limited, Sydney at p 682 as follows:

In summary, the authorities establish that a loss or outgoing is incurred where the taxpayer has 'completely subjected itself ' to the loss or outgoing ' (*FC of T v. James Flood Pty Ltd* (1953) 88 CLR 492) in the sense that the taxpayer has a 'presently existing liability' in respect of it (*Nilsen Development Laboratories Pty Ltd & ors v. FC of T* (1981) 144 CLR 616), as distinct from a mere 'impending, threatened or expected liability' (*New Zealand Flax Investments Ltd v. FC of T* (1938) 61 CLR 179). This is the case, even though the loss or outgoing might not be able to be precisely determined at that time (*RACV Insurance Pty Ltd v. FC of T* [1975] VR , 74 ATC 4169; *Commercial Union Assurance Co of Australia Ltd v. FC of T* 77 ATC 4186; *Australia & New Zealand Banking Group Limited v. FC of T* (1994) 48 FCR 268) and even though payment of the loss or outgoing may not have yet been made (*W Nevill & Co Ltd v. FC of T* (1937) 56 CLR 290) and the creditor might not yet have a right to demand payment (*FC of T v. Australian Guarantee Corporation Ltd* (1984) 2 FCR 483)
117. GIC for late payment accrues on a daily basis. Hence, the relevant expense is incurred daily. What this means in practice is that a debtor is entitled to claim a deduction for the total amount of the GIC for late payment accrued during any particular financial year from the 1999–2000 year onwards, notwithstanding that the GIC may not have in fact been paid. This is so whether a taxpayer accounts for expenses on a 'cash basis' or 'accruals basis'.
118. However, GIC is not incurred on unpaid income tax debts until the taxpayer is served (or, in the case of a full self-assessment taxpayer, is taken to have been served) with a notice of assessment triggering the liability to pay the income tax: *FC of T v. Nash* [2013] FCA 336.
119. With regard to interest accrued under section 207A of the ITAA 1936, the same principle applies. A taxpayer is entitled to claim a tax deduction in respect of the total amount accrued during any particular income year from 1992–93 to 1998–99 inclusive. This is so, notwithstanding that the interest may not have in fact been paid.
120. It should be noted that additional tax for late payment imposed under the former section 207 of the ITAA 1936 was not deductible. Similarly, additional tax for late lodgement imposed prior to 1 July 1999 under section 163B of the ITAA 1936 was also not deductible.

121. There are some qualifications to the rule about when expenses for GIC are said to be incurred. Different rules apply for taxpayers who enter the simplified tax system (STS) and these rules are discussed in the section commencing at paragraph 133 of this practice statement.
122. In relation to the GIC or interest imposed under section 170AA of the ITAA 1936 in a notice of amended assessment, taxpayers are entitled to claim a tax deduction for the amount imposed during the year in which the notice of amended assessment was served, that is, when the taxpayer became 'definitively committed' to the payment or 'has completely subjected itself to the liability' (*FCT v. James Flood Pty Ltd* (1953) 88 CLR 492 at p 506). This is so, notwithstanding that the liability may not have in fact been paid.
123. For the 2000–01 to 2003–04 income years inclusive, changes were made to the way that the due date for payment of an assessment is determined. Where an assessment of income tax is amended, the amended assessment carries the same due date for payment as the original assessment. GIC for late payment of the amended assessment applies from the due date for payment of the original assessment. In these circumstances, the GIC which accrues from the due date for payment of the original assessment to the issue date of the amended assessment is incurred on the day that the amended assessment is issued. GIC accruing after the issue date of the amended assessment is incurred on a daily basis.
124. From the 2004–05 income year onwards, amended assessments of income tax carry a prospective due date, and the shortfall interest charge (SIC) applies between the due date of the original assessment and the day before the issue date of the amended assessment (replacing the GIC in this period).<sup>4</sup> The SIC is imposed at a lower rate and is also tax deductible. The SIC would be incurred on the day the notice of amended assessment is served upon the taxpayer.<sup>5</sup>
125. In relation to GIC or interest imposed for late lodgment of an income tax return (under section 163B or former section 163C of the ITAA 1936), taxpayers are entitled to claim a tax deduction for the GIC or interest amount imposed during the year in which the notice of late lodgment penalty was served.
126. With regard to the late lodgment of an income tax return for the 2000–01 or later year of income, the GIC which accrues under former section 204 of the ITAA 1936 and section 5-5 of the ITAA 1997, from the statutory due date of the original assessment to the issue date of the assessment, is incurred on the day that the assessment is issued.<sup>6</sup> GIC accruing after the issue date of the assessment is incurred on a daily basis.

### **Deductibility of GIC on other revenue types**

127. FBT liabilities are not dependent on or affected by an assessment. As stated in Taxation Determination TD 2004/20:

A fringe benefits tax liability for a fringe benefits tax year, assessed under an assessment made by the Commissioner, is incurred for the purposes of section 8-1 ... at the end of that fringe benefits tax year. This recognises that the conclusions drawn in paragraphs 5 and 20 to 28 of Taxation Ruling TR 95/24 ... about when fringe benefits tax is incurred for the purposes of

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<sup>4</sup> See Law Administration Practice Statement PS LA 2006/8 *Remission of shortfall interest charge and general interest charge for shortfall periods*.

<sup>5</sup> See Taxation Determination TD 2012/2 *Income tax: when is the shortfall interest charge incurred for the purposes of paragraph 25(5)(1)(c) of the Income Tax Assessment Act 1997?*

<sup>6</sup> See *FC of T v. Nash* [2013] FCA 336.

subsection 51(1) of the Income Tax Assessment Act 1936 (ITAA 1936) apply regardless of how fringe benefits tax is assessed.

128. GIC on an unpaid fringe benefits tax liability accrues from the date prescribed in subsection 90(1) of the *Fringe Benefits Tax Assessment Act 1986* and is incurred for the purposes of section 8-1 of the ITAA 1997 as and when it accrues
129. For GST liabilities relating to tax periods commencing prior to 1 July 2012, subsection 105-15(1) of Schedule 1 to the TAA has the effect that liability for GST becomes due and payable on the dates prescribed in sections 33-3 and 33-5 of the GST Act, independently of any assessment being made.
130. GIC on an unpaid GST liability for tax periods commencing prior to 1 July 2012 therefore accrues from the dates prescribed in sections 33-3 and 33-5 of the GST Act and is incurred for the purposes of section 8-1 of the ITAA 1997 as and when it accrues.
131. For tax periods commencing from 1 July 2012 onwards, the liability to pay an assessed net amount of GST under section 33-3 or section 33-5 of the GST Act does depend upon the making of an assessment. An assessment may be made of the Commissioner's own volition, but the Commissioner is treated as having made an assessment when a GST return is lodged for the tax period<sup>7</sup>.
132. GIC on an unpaid GST liability for tax periods commencing from 1 July 2012 onwards therefore accrues from the dates prescribed in sections 33-3 and 33-5 of the GST Act, but will only be incurred for the purposes of section 8-1 of the ITAA 1997 if an assessment has been made (or is taken to have been made) for the tax period. For example, if a taxpayer fails to lodge a GST return for the tax period ending 31 March 2013 until 1 August 2013, GIC accrued between the due date for payment and the date the GST return is lodged would be incurred on 1 August 2013. If the GST liability remains unpaid after the GST return is lodged, any further GIC accruing would be incurred on a daily basis as and when it accrued.

### **Deductibility – STS taxpayers**

133. As previously discussed, a loss or outgoing must have been incurred in a particular year in order to be deductible in that year. However, there was an exception to this rule for small business taxpayers which had chosen to enter the former simplified tax system (STS).
134. For the years commencing 1 July 2001 to 1 July 2006, eligible small business taxpayers could choose to enter the STS (note that the STS system has now been abolished and from the year commencing 1 July 2007, new rules under a new system apply to small business entities).
135. The STS introduced new accounting arrangements for STS taxpayers, a simplified trading stock regime and a simplified depreciation regime.
136. For years of income up to and including the year ended 30 June 2005, paragraph 328-105(1)(b) of the ITAA 1997 provides that, for STS taxpayers, an amount that can be deducted under section 8-1 (general deductions), section 25-5 (tax-related expenses, including the GIC) or section 25-10 (about repairs) of the ITAA 1997, is to be treated as if it were incurred only when paid. Hence, for these years of income, STS taxpayers are taken to have incurred the GIC only when they have actually paid it. Thus, the GIC is deductible in the year in which it is paid.

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<sup>7</sup> See section 155-15 of Schedule 1 to the TAA

137. There are also entry and exit adjustment rules governing the assessability of income and the availability of deductions in the year when an entity enters or leaves the STS. Broadly, these rules ensure that when a business enters or leaves the STS, business income and expenses affected by the new accounting arrangements are not recognised twice or omitted (that is, there is no double counting of income or deductions).
138. The *Tax Laws Amendment (2004 Measures No. 7) Act 2005* introduced changes to the STS which took effect from the first income year commencing on or after 1 July 2005 to the abolishment of the STS in 2007.
139. This amending Act removed the requirement for small businesses to use the 'STS accounting method' in order to be eligible to enter the STS. The new provisions enabled businesses to utilise the most appropriate method of determining taxable income for them and still qualify for the simplified tax system. Removing the requirement to use the STS accounting method extended the concession to a broader range of small businesses.
140. Specifically, the amending Act allowed businesses to calculate their taxable income using an accruals system. Assessable income is recognised when it is derived and allowable deductions are recognised when they are incurred. Subdivision 328-C of the ITAA 1997 (including paragraph 328-105(1)(b) of the ITAA 1997 referred to in paragraph 136 of this practice statement), was repealed with effect from the income year commencing 1 July 2005.
141. This means that, for income years commencing 1 July 2005 and later years, deductions for the GIC were incurred on an accruals basis under the STS system, regardless of whether they had been paid.
142. However, it should also be noted that transitional provisions enable a business that was an STS taxpayer for the most recent income year that started before 1 July 2005, to continue to recognise most business income and deductions only when they are received or paid.<sup>8</sup> This allowed businesses who were calculating their taxable income under the cash accounting method contained in the STS to continue to use that method, if they wished to do so.
143. Transitional provisions also allowed STS taxpayers to cease to use the cash accounting method.<sup>9</sup> These provisions ensured that business income and expenses (that had not been recognised under the cash accounting method because they had not been received or paid) were recognised in the first year that a business, which was in the STS, ceased to use the cash accounting method.

### **Assessability of GIC**

144. To preserve the equity of the deductibility provisions outlined above, the law requires taxpayers who have claimed a deduction for GIC, or amounts of interest under former sections 163C, 170AA or 207A of the ITAA 1936, to include as income any part thereof which is subsequently remitted. Amounts remitted should be included as income in the financial year that the remission occurs.
145. Division 20 of the ITAA 1997 includes amounts in assessable income that reverse the effect of certain kinds of deductions. Section 20-20 of the ITAA 1997 sets out the circumstances in which an amount received by a taxpayer as 'recoupment' of a loss or outgoing qualifies as an 'assessable recoupment.' Section 20-25 of the ITAA 1997 states that remission of the GIC is a recoupment. Where a deduction has been allowed, or is allowable, under

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<sup>8</sup> Section 328-120 of the *Income Tax (Transitional Provisions) Act 1997*.

<sup>9</sup> Section 328-115 of the *Income Tax (Transitional Provisions) Act 1997*.

section 25-5 of the ITAA 1997 for tax-related expenditure, any recoupment of the expenditure is assessable under sections 20-35 or 20-40 of Subdivision 20-A of the ITAA 1997. This means that:

- where a taxpayer has claimed a deduction (or can claim a deduction)<sup>10</sup> in respect of an amount of GIC accrued in a particular financial year, and
- that amount or any part thereof is subsequently remitted,

the taxpayer would be required to include the amount of the GIC remitted as assessable income in their income tax return for the financial year in which the GIC was remitted.

146. The rules relating to assessability apply equally to STS taxpayers. If an STS taxpayer has claimed a deduction in respect of GIC which has been incurred, and that GIC is subsequently remitted, then the STS taxpayer is required to include the amount of the GIC remitted as assessable income in his/her income tax return for the financial year in which the GIC was remitted.
147. The effect of Subdivision 20-A of the ITAA 1997 is that a recoupment received in circumstances in which the taxpayer can amend their prior assessment to claim a deduction will be an assessable recoupment. This is because a taxpayer can deduct an amount in an earlier income year even if the taxpayer has not yet claimed the deduction so long as the amendment period has not expired.
148. Where, upon expiration of the amendment period, the taxpayer can no longer deduct the amount, an amount that would otherwise be an assessable recoupment will not be assessable (as the taxpayer cannot deduct an amount in the earlier income year).

### Examples

149. *Example 1: When GIC can be deducted*

Sam lodged his 2009-10 income tax return on 20 October 2010. A debit notice of assessment issued on 1 November 2010 with a payment due date of 24 November 2010.

Sam failed to pay this amount by the due date and GIC was imposed until the total amounts owing were paid in full on 31 March 2011.

The GIC that accrued from 24 November 2010 to 31 March 2011 was incurred in the 2011 income tax year.

Sam is entitled to claim the GIC as a deduction in the 2010-11 income tax return.

*Example 2: When GIC can be deducted*

Tally Pty Ltd's 2009-10 income tax return was due to be lodged on or before 1 December 2010. However, it did not lodge its return until 31 July 2011. The return gave rise to an income tax debt, which had also been due for payment on 1 December 2010.

The GIC imposed from 1 December 2010 to 30 July 2011 was incurred on 31 July 2011, being the date the notice of assessment is deemed to have issued

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<sup>10</sup> If the taxpayer is able to request an amendment of their income tax return to claim a deduction for the GIC incurred in that income tax year, then the associated remitted GIC must be returned as an assessable recoupment in the relevant income tax return.

upon lodgment by Tally Pty Ltd of its income tax return. Tally Pty Ltd may claim a deduction for that GIC in its 2011-12 income tax return.

A deduction may also be claimed for the GIC that was incurred in a daily basis from 31 July 2011 to 30 June 2012.

*Example 3: When remission of GIC must be included as assessable income*

Tina lodged her 2009-10 income tax return on 20 October 2010. The notice of assessment issued on 31 October 2010 from which a debt was due to be paid on or before 24 November 2010.

Due to financial difficulties Tina was unable to pay her debt by the due date. She approached the ATO in May 2011 for assistance. The ATO assessed Tina's individual circumstances and granted a payment arrangement and partial remission of the GIC. Tina paid out her total debt in full on 30 June 2011.

GIC was incurred on a daily basis in the period from 24 November 2010 to 30 June 2011; that is, in the 2010-11 income year. The remission also occurred in the 2011 income year.

In her 2010-11 income tax return, Tina may declare the GIC as a deduction at label D10 and must declare the remitted GIC at label 24 in the supplementary return.

*Example 4: When remission of GIC must be included as assessable income*

Owen lodged his 2011-12 income tax return on 20 October 2012. He was issued a notice of assessment on 31 October 2012 which gave rise to a debt. The due date of the debt was 24 November 2012.

Owen paid the primary amount of the tax debt on 23 December 2013, not including GIC which had been accruing on the liability from 24 November 2012. Owen approached the ATO for a remission of the GIC and was granted a partial remission on 23 December 2013.

This GIC remission amount must be declared in his 2013-14 income tax return, being the year in which the remission was granted. This is irrespective of whether Owen amends his 2012-13 income tax return to claim a deduction for the GIC incurred in the 2012-13 year. This is because the legislation deems the remission amount as an assessable recoupment for the current year if you have deducted or *can deduct* the amount of the outgoing in an earlier income year. As Owen can still amend his 2012-13 income tax return to claim a deduction for GIC incurred in that year, he must declare the remission amount in his 2013-14 income year.

## Amendment history

| Date of amendment | Part                          | Comment                                                                                                                                                                                                                                                  |
|-------------------|-------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| December 2013     | Various                       | Minor revisions to styling and content to improve readability.                                                                                                                                                                                           |
|                   | New paragraph 2               | Introduces the information included in the Annexure.                                                                                                                                                                                                     |
|                   | New paragraph 4               | Introduces definitions of certain terms used in this practice statement.                                                                                                                                                                                 |
|                   | New paragraphs 31-32          | Additional information covering the requirement for tax officers to follow the <i>Taxpayers' Charter</i> , and review rights                                                                                                                             |
|                   | New paragraph 34              | Additional information on the circumstances when partial remission should be considered.                                                                                                                                                                 |
|                   | New paragraph 42              | Introduces the legislative provision that allows the Commissioner to remit GIC where it is fair and reasonable to do so.                                                                                                                                 |
|                   | New paragraph 48-50           | Introduces the legislative provision that allows the Commissioner to remit GIC where there are special circumstances to do so, or there are 'otherwise appropriate' circumstances.                                                                       |
|                   | New paragraph 55              | Qualifies that the Commissioner may exclude specific taxpayers from a body of tax debtors when GIC remission is granted.                                                                                                                                 |
|                   | New paragraph 56              | Introduces specific examples where the Commissioner will remit GIC where it is fair and reasonable to do so.                                                                                                                                             |
|                   | Annexure - Paragraphs 113-148 | The information on deductibility and assessability of GIC that was previously included in Chapter 93, has been revised and re-inserted into the Annexure of this LAPS. Examples have also been included to illustrate the application of the provisions. |
|                   | Annexure – paragraph 149      | Examples of how the provisions determining deductibility and assessability of GIC are applied in particular circumstances.                                                                                                                               |

## References

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| Legislative references | <p>Administrative Decisions (Judicial Review) Act 1977</p> <p>ANTS(GST)A Subdiv 162-D</p> <p>ANTS(GST)A 162-205</p> <p>ANTS(GST)A 33-3</p> <p>ANTS(GST)A 33-5</p> <p>Excise Act 1901</p> <p>FBTAA 1986 90(1)</p> <p>FBTAA 1986 112B</p> <p>ITAA 1936 51(5)</p> <p>ITAA 1936 163B</p> <p>ITAA 1936 163C former</p> <p>ITAA 1936 170AA former</p> <p>ITAA 1936 204 former</p> <p>ITAA 1936 207 former</p> <p>ITAA 1936 207A former</p> <p>ITAA 1936 Pt VI Div 8</p> <p>ITAA 1997 5-5</p> <p>ITAA 1997 8-1</p> <p>ITAA 1997 Div 20</p> <p>ITAA 1997 Subdiv 20-A</p> <p>ITAA 1997 20-20</p> <p>ITAA 1997 20-25</p> <p>ITAA 1997 25-5</p> <p>ITAA 1997 25-5(1)(c)</p> <p>ITAA 1997 25-10</p> <p>ITAA 1997 20-35</p> <p>ITAA 1997 20-40</p> <p>ITAA 1997 Subdiv 328-C</p> <p>ITAA 1997 328-105(1)(b)</p> <p>Supreme Court Act 1986 (Vic) 58</p> <p>TAA 1953 Part IIA</p> <p>TAA 1953 Part IVC</p> <p>TAA 1953 8AAD</p> <p>TAA 1953 8AAG</p> <p>TAA 1953 8AAG(1)</p> <p>TAA 1953 8AAG(2)</p> <p>TAA 1953 8AAG(3)</p> <p>TAA 1953 8AAG(3)(b)</p> <p>TAA 1953 8AAG(4)</p> <p>TAA 1953 8AAG(4)(b)</p> <p>TAA 1953 8AAG(4)(c)</p> <p>TAA 1953 8AAG(5)</p> <p>TAA 1953 8AAG(5)(a)</p> <p>TAA 1953 8AAG(5)(b)</p> <p>TAA 1953 8AAH</p> <p>TAA 1953 Sch 1 45-215(3)</p> <p>TAA 1953 Sch 1 105-15(1)</p> <p>TAA 1953 Sch 1 155-15</p> <p>TAA 1953 Sch 1 255-1</p> <p>TAA 1953 Sch 1 255-5</p> <p>TAA 1953 Sch 1 263-15</p> <p>TAA 1953 Sch 1 263-30</p> |
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|                             | <p>TAA 1953 Sch 1 263-30(3)</p> <p>TAA 1953 Sch 1 263-35</p> <p>TAA 1953 Sch 1 Div 268</p> <p>TAA 1953 Sch 1 Div 269</p> <p>TAA 1953 Sch 1 298-25</p> <p>Income Tax (Transitional Provisions) Act 1997 328-115</p> <p>Income Tax (Transitional Provisions) Act 1997 328-120</p> <p>Tax Laws Amendment (2004 Measures No. 7) Act 2005</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Related public rulings      | <p><u>TR 95/24</u> Income tax: deductibility of fringe benefits tax</p> <p><u>TR 2000/16</u> Income tax: international transfer pricing - transfer pricing and profit reallocation adjustments, relief from double taxation and the Mutual Agreement Procedure</p> <p><u>TD 2004/20</u> Income tax: where the Commissioner makes or amends a fringe benefits tax assessment for a fringe benefits tax year, when does the taxpayer incur an outgoing for the purposes of section 8-1 of the Income Tax Assessment Act 1997 for the fringe benefits tax assessed?</p> <p><u>TD 2012/2</u> Income tax: when is the shortfall interest charge incurred for the purposes of paragraph 25-5(1)(c) of the Income Tax Assessment Act 1997</p>                                                        |
| Related practice statements | <p><u>PS LA 2006/8</u> Remission of shortfall interest charge and general interest charge for shortfall periods</p> <p><u>PS LA 2006/14</u> Procedures for tax officers 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</p> <p><u>PS LA 2011/4</u> Recovering disputed debts</p> <p><u>PS LA 2011/13</u> Cross border recovery of taxation debts</p> <p><u>PS LA 2011/14</u> General debt collection powers and principles</p> <p><u>PS LA 2011/22</u> Refunds of running balance account surpluses and credits – Commissioner's discretion to retain amounts</p> <p><u>PS CM 2007/01</u> Respecting clients' rights of review (internal link only)</p> |
| Case references             | <p><i>FC of T v. James Flood Pty Ltd</i> (1953) 88 CLR 492</p> <p><i>Nilsen Development Laboratories Pty Ltd &amp; ors v. FC of T</i> (1981) 144 CLR 616</p> <p><i>New Zealand Flax Investments Ltd v. FC of T</i> (1938) 61 CLR 179</p> <p><i>RACV Insurance Pty Ltd v. FC of T</i> [1975] VR , 74 ATC 4169</p> <p><i>Commercial Union Assurance Co of Australia Ltd v. FC of T</i> 77 ATC 4186</p> <p><i>Australia &amp; New Zealand Banking Group Limited v. FC of T</i> (1994) 48 FCR 268</p> <p><i>W Nevill &amp; Co Ltd v. FC of T</i> (1937) 56 CLR 290</p> <p><i>FC of T v. Australian Guarantee Corporation Ltd</i> (1984) 2 FCR 483</p> <p><i>FC of T v. Nash</i> [2013] FCA 336</p>                                                                                                |
| Other references            | <p><u>ATO Receivables Policy</u></p> <p><u>Overview of the Taxpayers' Charter</u></p> <p>Woeller Barkoczy Murphy, 2013, <i>Australian Taxation Law</i> 23<sup>rd</sup> Edition, CCH Australia Limited</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
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| Section                     | Operational Policy, Assurance and Law                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |