PS LA 2011/12 - Remission of General Interest Charge

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Australian Government
Australian Taxation Office

PS LA 2011/12
Remission of General Interest Charge

This Law Administration Practice Statement provides guidance on the remission of general interest charge.

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. Overarching principles

Fully complying with taxation obligations is an important community responsibility. Taxpayers are expected to pay their tax debts as and when they fall due. Various taxation laws provide for the automatic imposition of interest (including the general interest charge (GIC)) on unpaid tax debts, which the ATO will take steps to recover. However, the law recognises there are situations where remission of interest may be appropriate.

Any decision you make in relation to the remission of GIC must be consistent with both the law and the policy in this practice statement. Your decisions must also be consistent with the commitments made by the ATO in the *Taxpayers' Charter* and Chief Executive Instruction CEI 2014/06/04 *Respecting Client's Rights of Review.*

2. What is GIC?

GIC is imposed by law where an amount owing to us remains unpaid or where there is an underpayment of tax following an amendment to an assessment.

Very generally, GIC is intended to:

- encourage the timely payment of tax
- deny late payers an unfair financial advantage over those who pay on time, and
- compensate the Australian Government for the impact of late payments.

This practice statement primarily concerns the remission of GIC that is imposed when an amount is unpaid by its due date.

3. Can you remit GIC?

We have the discretion to remit GIC under the *Taxation Administration Act 1953* (TAA).[1]

A client may request a remission of GIC at any time. The onus is generally on the client to satisfy us that remission is warranted must provide us with sufficient information to allow us to make a decision.

However, we may initiate remission ourselves if we are aware of circumstances justifying remission in a particular case or group of cases.

We can remit all or part of the GIC payable by the client. You should consider partial remission when the circumstances of the case do not warrant full remission.

4. When should GIC be remitted?

GIC may be remitted on various grounds prescribed under the legislation. These are outlined in further detail below.

When considering whether to remit GIC you must have regard to all the facts and circumstances of the particular case.

Where the delay was not caused by the client

We may remit GIC where we are satisfied that:

- the circumstances contributing to the delayed payment are not the client's fault, and
- the client has taken reasonable steps to mitigate, or mitigate the effects of, those circumstances.[2]

The client needs to show how an event which was beyond their control affected their ability to pay. They also need to show that they would, but for that event, have paid on time.

Examples of circumstances not caused by the client include natural disasters (such as fire, flood or drought), industrial action, an unforeseen collapse of a major debtor of the client, or the sudden ill health of the key personnel in sole trader or small business situations.

[1] Section 8AAG of the TAA.

[2] Subsection 8AAG(3) of the TAA.

However, circumstances such as general adverse business conditions facing an industry, general economic downturn or fluctuations of currency exchange rates would not usually justify remission.

Similarly, a client whose ability to pay on time is affected by an extended credit policy to maintain business which adversely affects their cash flow, or who uses available funds to buy assets or to pay other creditors, will not usually qualify for remission.

You should also consider what reasonable steps the client has, or could have, taken (for example, realise assets or seek finance) to lessen the severity of the circumstances causing the payment delay.

Where the delay was caused by the client and it is fair and reasonable to remit

We may remit GIC:

- where the circumstances contributing to the delay are due to the client's acts or omissions, and
- the client has taken reasonable steps to mitigate, or mitigate the effects of, those circumstances, and
- having regard to the nature of those circumstances, it would be fair and reasonable to remit.[3]

If the delay was caused by the client, you must consider their actions to reduce the severity and impact of the circumstances causing the delayed payment. You must also consider whether it is '*fair and reasonable*' to remit.

The words *'fair and reasonable*' are given their ordinary meaning. You should consider the following:

- the intent of the GIC as described above and the legislative policy that clients should be liable to additional charges if they pay late, and
- not only must the exercise of the power to remit be fair to the client concerned, it must be fair to the whole community. In other words, a client who pays late should not be given any unfair financial advantage over those taxpayers who organise their affairs to ensure they can pay on time. Clients will need to demonstrate that it is fair and reasonable to remit the GIC, having regard to the nature of the specific event.

Therefore, you should ask whether ordinary and reasonable members of the community who pay their taxes on time would see the circumstances as fair and reasonable to remit.

For example, the community may view it as fair and reasonable that a partial or full remission be granted where the client may have made a soundly advised or well-considered decision which results in unforseen severe consequences affecting their ability to pay. In this instance, the client would need to demonstrate that plans were in place to pay their tax on time.

Conversely, the community would not generally perceive it to be fair and reasonable where a client in business was unable to pay on time simply because of generally adverse economic conditions. This is because many other businesses are also experiencing these conditions, but have taken appropriate steps to ensure that they pay their taxes on time.

Where there are special circumstances

We may remit GIC if:

- there are special circumstances relating to the client's case, and
- because of those special circumstances, it would be fair and reasonable to remit.[4]

What constitutes 'special circumstances' will depend on the facts in the particular case. You must consider each case on its own merits.

An example of a special circumstance would be where a client with a consistently good payment record is late 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 client will be taken into account.

It must also be '*fair and reasonable*' to remit because of those special circumstances. The meaning of '*fair and reasonable*' is considered in previous paragraphs.

Where it is 'otherwise appropriate' to remit

We may remit GIC if it is *'otherwise appropriate to do so'*.[5] The decision to remit the GIC on this ground is restricted to senior tax officers.[6]

This is a broad discretion and there is no exhaustive list of those circumstances which might warrant remission under this provision. However, it gives us a degree of flexibility for the remission of the GIC. It means that we can respond to changing circumstances, and consider unusual factors or future issues on their merits and make decisions accordingly.

[3] Subsection 8AAG(4) of the TAA.

[4] Paragraph 8AAG(5)(a) of the TAA.
[5] Paragraph 8AAG(5)(b) of the TAA.
[6] See *Taxation authorisation guidelines*, paragraph 1.16.8 Remit general interest: 'otherwise appropriate to do so'.

Such decisions may be concerned with the circumstances of a particular client. In practice, however, they are more likely to extend to a particular group of tax clients, or to the general body of tax clients, and may involve consideration of issues of administrative efficiency and fairness.

An example of this type of decision is where the ATO introduced certain debt assistance initiatives. These allowed for extended repayment programs that considered partial or full GIC remission for the period of the payment arrangements.

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.[7]

5. Specific situations

Specific policies apply to the remission of GIC in the following situations, and these are based on one or more of the above mentioned legislative provisions:

Disputed debt and 50/50 arrangements

You may offer a client a 50/50 arrangement which minimises their exposure to the GIC. Very generally, if the client pays all undisputed debts and a minimum of 50% of the principal disputed tax debt, we will remit 50% of the applicable GIC on the remaining balance of the debts in dispute, subject to various other conditions.

Refer to Law Administration Practice Statement PS LA 2011/4 *Collection and recovery of disputed debts* for a more detailed discussion of 50/50 arrangements and the GIC implications of these.

Bankruptcy/liquidation

The ATO will generally include claims for GIC in a proof of debt. You should not remit GIC in these cases as a general rule.

Superannuation guarantee charge

We have the discretion to remit GIC for the late payment of superannuation guarantee charge (SGC). It is however important to note that:

- SGC is an amount collected on behalf of employees, and
- SGC is payable by employers who have failed to provide the prescribed minimum level of superannuation support.

Given these considerations it may often be difficult to regard remission in these cases as 'fair and reasonable'.

Each case must however be examined on its merits taking into account the particular facts of the case in question.

One situation where remission may be granted is where an audit area has determined that an employer has not made the minimum required superannuation contributions for an individual engaged under a contract for their labour as both parties reasonably believed that an employment relationship did not exist, resulting in an SGC assessment to the employer.

Excess contributions tax and the Division 293 tax[8]

There are caps on the amount that can be contributed to superannuation each financial year that are taxed at lower rates. If the client contributes more than these caps, they may have to pay extra tax. In some cases, the client can choose to pay the excess contributions tax from their Superannuation fund. This requires a release authority from the ATO, which the client forwards to the superannuation fund, directing them to release an amount to pay the tax.

For excess contributions tax for 2012-13 and prior years, and excess non-concessional contributions tax for the 2013-14 and following income years:

Excess contributions tax is due for payment 21 days after the assessment is given. GIC applies after this date if any of the tax is unpaid.

As soon as practicable after making the excess non-concessional contributions tax assessment, the ATO must give the client a release authority,[9] authorising the client's superannuation fund to release an amount to pay the tax.

Where the client gives the release authority to their superannuation fund before the due and payable date of the assessment, and the fund pays an amount to the ATO within the 30 days from when the superannuation fund receives the release authority,[10] you should remit any GIC on the assessment up to the date the amount is paid to the ATO.

[7] 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.

[8] Division 293 of the *Income Tax Assessment Act 1997* (ITAA 1997).
[9] Section 292-405 of the ITAA 1997.
[10] Subsection 292-415(1) of the ITAA 1997.

For excess concessional contributions in the 2013-14 and following income years:

A client can make an election within 21 days from the receipt of an excess concessional contributions determination to issue a release authority to their superannuation fund.[11]

Where the superannuation fund pays an amount to the ATO within the 7 days from the issue of the release authority, you should consider whether to remit any GIC accrued on the client's related income tax liability. You should also consider the extent of such a remission, on a case-by-case basis, taking into account the general guidelines contained in this practice statement.[12]

For Division 293 tax

A client may be liable for additional tax where an individual's income and certain superannuation contributions are in excess of the high income threshold. GIC accrues on an assessed Division 293 tax for an income year[13] and a debt account discharge liability for a superannuation interest,[14] if they are not paid by their due and payable date.

Where a client gives a release authority to their superannuation fund before the due and payable date of those liabilities, and the superannuation fund pays the amount to the ATO within the 30 days of the superannuation fund receiving the release, you should remit any relevant GIC accrued up to the date of payment from the superannuation fund.

PAYG instalments

You should not remit GIC on unpaid PAYG instalments solely because the income tax subsequently assessed for a client is less than the PAYG instalments that are payable for that year.

Similarly, where the client chooses a varied instalment rate that is lower than the rate previously used and is eligible for a credit in respect of earlier instalments, you should not remit GIC on the unpaid amount of that instalment for that reason alone. Any remission of GIC in these cases will only be granted if it is fair and reasonable to do so because of special circumstances.[15]

[11] Section 96-5 of Schedule 1 to the TAA.
[12] This is because for the 2013-14 and later income years, excess concessional contributions are included in assessable income. It may therefore only be part of the reason for the debtor's total income tax debt.
[13] Section 293-75 of the ITAA 1997.
[14] Section 133-115 of Schedule 1 to the TAA.
[15] Note that the basis for a GIC remission in cases involving a variation of the PAYG instalment rate is contained separately in section 45-240 of Schedule 1 to the TAA.

Deceased estates

Where payment cannot be made because probate has not been granted, the ATO recognises that this is often outside the control of the trustee of the deceased estate. In these situations, you should 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.

For GIC accrued during the period of administration, remission may be granted if the trustee of a deceased estate under administration can show that assets were realised promptly and funds were not available at an earlier date to enable payment.

Competent authority issues/mutual agreement procedures

There are specific rules governing GIC remission in cases involving double-taxation with another tax jurisdiction, where the Mutual Agreement Procedure (MAP) article in Australia's double tax agreements applies.

Remission of GIC generally depends on the amount of tax actually paid in the foreign jurisdiction where that tax is directly related to the particular amount of profits that are the subject of the MAP.

See TR 2000/16 *Income tax: international transfer pricing – transfer pricing and profit reallocation adjustments, relief from double taxation and the Mutual Agreement Procedure*

Foreign revenue claims

If we are collecting a foreign revenue claim on behalf of another country under Division 263 of Schedule 1 to the TAA:

- You should remit GIC on the unpaid amount of the claim where the claim is reduced due to a reduction in the client's liability in that country. This may occur from a successful objection or appeal in that country where the client is considered to never have been liable for the amount of the reduction. You should remit the GIC incurred on the amount of the reduction.
- You should generally not remit GIC solely because the client has made a part payment of the liability in the other country.

In some cases we may remove details of a foreign revenue claim from the foreign claims register under Division 263. In such cases the client will be entitled to a credit equal to the amount of the GIC that may have accrued in relation to the claim.

Refer to Law Administration Practice Statement PS LA 2011/13 *Cross-border recovery of taxation debts* for a more detailed discussion of foreign revenue claims.

6. More information

For more information, see:

- Chief Executive Instruction CEI 2014/06/04 *Respecting Client's Rights of Review*
- PS LA 2011/4 *Collection and recovery of disputed debts,* for a more detailed discussion of 50/50 arrangements and the GIC implications of these
- PS LA 2011/13 *Cross-border recovery of taxation debts,* for a more detailed discussion of foreign revenue claims
- *Taxpayers' Charter*, sets out the way the ATO conducts itself when dealing with our clients

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ATTACHMENT A: DEDUCTIBILITY AND ASSESSABILITY OF GIC AND OTHER INTEREST CHARGES

Deductibility of GIC on income tax debts

GIC can be claimed as a tax deduction as expenditure incurred in the year of income.[16]

'Accrue' and 'incur'

The terms 'accrue' and 'incur' are used frequently in these paragraphs.

> 'Accrue': GIC for late payment *accrues* on a daily basis; that is, it accumulates daily.[17]
>
> 'Incur': For GIC to be deductible, it must have been *incurred* by the client in the year of income. You 'incur' GIC only if and when you actually become liable for it.

GIC is not incurred on unpaid income tax debts until the client is served (or, in the case of a full self assessment taxpayer, is taken to have been served) with a notice of assessment (NOA) triggering the liability to pay the income tax.[18] Before this point, they are not liable for that income tax or associated GIC, however the GIC may be accruing should the assessment be due and payable. For example: A client lodges their individual 2013 income tax return, which was due and payable on the 21 November 2013, on 1 July 2014 and a NOA was issued on the 21 July 2014. The client will liable for the GIC from the 22 November 2013, as it has been accruing since the due date, but the GIC was incurred in the 2015 financial year.

A client is entitled to claim a deduction for the GIC it incurred even though the GIC may not have in fact been paid. This is so whether a client accounts for expenses on a 'cash basis' or 'accruals basis'.

Amended assessments

Taxpayers are entitled to claim a tax deduction for the GIC imposed in respect of an amended assessment during the year in which the notice of amended assessment was served.[19]

- For the 2000-01 to 2003-04 income years inclusive, where an assessment of income tax is amended increasing the liability, 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.
- 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).This means that the GIC will be incurred and accrue only from the issue date of the amended assessment.

Late lodgment

In relation to GIC imposed for late lodgment of an income tax return,[20] 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.

With regard to the late lodgment of an income tax return for the 2000-01 or later years of income, the GIC which accrues[21] 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.[22] GIC accruing after the issue date of the assessment is incurred on a daily basis.

Deductibility of GIC on other revenue types

Fringe Benefits Tax (FBT)

FBT liabilities are not dependent on or affected by an assessment.[23] 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.

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[16] 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. The former penalty by way of interest imposed under sections 163C, 170AA and 207A of the ITAA 1936 may also be claimed as a deduction. 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.

[17] See section 8AAC of the TAA.

[18] *FC of T v. Nash* [2013] FCA 336.

[19] That is, when the client 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).

[20] Under section 163B or former section 163C of the ITAA 1936.

[21] Under former section 204 of the ITAA 1936 and section 5-5 of the ITAA 1997.

[22] See *FC of T v. Nash* [2013] FCA 336.

[23] See Taxation Determination TD 2004/20.

Goods and services tax (GST)

Tax periods commencing prior to 1 July 2012

The liability for GST becomes due and payable on the dates prescribed in *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)[24]. Indirect tax liabilities, which include GST, do not depend on a making of an assessment.[25]

GIC on an unpaid GST liability for tax periods commencing prior to 1 July 2012 therefore accrues from the dates prescribed in the GST Act and is *incurred*[26] as and when it accrues.

Tax periods commencing from 1 July 2012 onwards

The liability to pay an assessed net amount of GST under the GST Act depends upon the making of an assessment. The Commissioner is treated as having made an assessment when a GST return is lodged for the tax period.[27]

GIC on an unpaid GST liability for tax periods commencing from 1 July 2012 onwards *accrues* from the dates prescribed in the GST Act,[28] but will only be *incurred* if an assessment has been made (or is taken to have been made) for the tax period.

Assessability of GIC remitted

Taxpayers who have claimed (or can claim) a deduction for GIC must include as income any GIC that is subsequently remitted. Amounts remitted should be included as income in the financial year that the remission occurs.[29]

In summary:

- If a client incurs GIC in a year of income, they can claim a deduction for that GIC in that year.
- If that GIC is later remitted, they must include the amount remitted as assessable income in the year in which the remission occurred.
    - This applies even if they had not actually claimed a deduction for the remitted GIC. It applies so long as they *can claim* a deduction for that amount.
    - If they *cannot* claim a deduction for that amount (for example, if the period for amending the return to claim the deduction has expired), the amount should not be included as assessable income.

Examples

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 22 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 22 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 resulted in 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 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 on a daily basis from 31 July 2011 to 30 June 2012, regardless of whether the amount was actually paid.

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 resulting in a debt that 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 January 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.

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[24] Sections 33-3 and 33-5 of the GST Act.
[25] Subsection 105-15(1) of Schedule 1 to the TAA.
[26] For the purposes of section 8-1 of the ITAA 1997.
[27] Section 155-15 of Schedule 1 to the TAA.
[28] Sections 33-3 and 33-5 of the GST Act.
[29] 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 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.

GIC was incurred on a daily basis 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 resulting in a debt that was due to be paid on 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.