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

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This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs ATO officers 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.

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

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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[1] .

2. 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.

STATEMENT

3. From 1 July 1999, the GIC replaced the various existing additional charges for late payment in the taxation laws[2].

4. The GIC applies to most primary tax debts as well as running balance account (RBA) deficit debts[3] (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.)

[1] That is, where a taxpayer has been notified of their original or amended tax liability and failed to pay by the due date

[2] (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).

[3] RBA deficit debt – means a balance on an RBA in favour of the Commissioner, where the total amount of due and payable primary tax debts allocated to the RBA are greater than the payments and credits allocated to that RBA.

5. 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
   - where there is an underpayment of tax following an amendment of an assessment.

6. As mentioned, this practice statement deals primarily with situations where a taxpayer is aware of their liability and fails to pay by the due date.

7. 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.

8. 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

9. The calculation of the GIC is provided for in Part IIA of the *Taxation Administration Act 1953* (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.

10. 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[4] for that day, and dividing that total by the number of days in the calendar year.

11. 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.

12. 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.

13. GIC is a tax deduction in the year that it is incurred. If the GIC is subsequently remitted then the taxpayer is taken to have received the remitted amount as recoupment of that expenditure and that recoupment then becomes assessable.

[4] The base interest rate for each day in a particular quarter of the year equals the monthly average yield of 90 day bank accepted bills for the prescribed previous month. The bill rates are published by the Reserve Bank of Australia.

Imposition of GIC on judgment debts

14. 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 lieu of court allowed interest, the GIC should be claimed.

15. The ATO's practice in this regard is as follows:

    (i) With one exception (see paragraph 18), 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 18), the Commissioner will claim GIC for the period from the date of issue of a proceeding to the date of judgment or earlier payment.

    (iii) The Commissioner will claim 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.

16. It should be noted that the general interest charges payable under taxation legislation are 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 such periods.

17. The ATO's policy of claiming the 'top-up amount' of GIC is based on the fact that judgment interest rates can vary considerably between the state jurisdictions. The ATO's practice is generally to seek 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.

18. The exception mentioned above in paragraphs 15(i) and (ii) concerns director penalty liabilities under Division 269 in 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 – general considerations

19. The Commissioner may remit part or all of the GIC for late payment (section 8AAG of the TAA) in certain circumstances.

20. 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
    - the guidelines contained in this practice statement

21. 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.

22. Taxpayers have a responsibility to meet their payment obligations as and when their tax debts fall due for payment. The various taxation laws provide for the automatic imposition of GIC when a debt is paid late. The GIC is calculated daily from the beginning of the day by which tax is due to be paid, until the end of the last day on which, at the end of the day, any tax and accrued GIC remains unpaid.

23. The GIC automatically imposed by legislation is intended to encourage the 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.

24. 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.

25. 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 (2) of the TAA).

26. 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.

27. 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.

28. The ATO will consider a request in accordance with the relevant remission provision and the Commissioner's guiding principles which are set out below.

Reasons for remission of GIC

29. Subsections 8AAG(3) to 8AAG(5) of the TAA provide that remission of the GIC will depend on the factors 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.

Factors beyond the control of the debtor

30. A debtor may be able to demonstrate that the difficulties they are experiencing in making payment are due to factors beyond their control and clearly could not be predicted. In considering any remission of GIC, it is also necessary for ATO staff to consider what steps were taken, if any, to relieve 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.

31. 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 this heading as these factors are more likely to prevail across the whole community. Debtors would need to demonstrate that such factors had specific impacts on their ability to pay before they could be considered as reasons for remission.

Acts or omissions of the debtor

32. Acts or omissions of the debtor which prevent payment by the due date will vary. In considering remission of the GIC, it is necessary to determine whether the delay in payment was caused by the debtor's direct or indirect involvement and what steps were taken, if any, to relieve the effects of the circumstances causing the late payment (see paragraphs 8AAG(3)(a) and (4)(a) of the TAA).

33. Debtors who have an extended credit policy to maintain business, which will adversely affect their cash flow and impact the 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.

34. A soundly advised or well considered decision which results in unforeseen severe consequences affecting a debtor's 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.

35. In contrast, debtors who choose not to pay a taxation 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

36. The Commissioner must consider the debtor's efforts to relieve all of the circumstances that led to late payment or the effect of those circumstances causing the delay, irrespective of whether the circumstances were subject to, or beyond, the debtor's control. 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[5].

Fair and reasonable

37. 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 section 8AAG(4) or subsection 8AAG(5)(a) of the TAA, the following factors need to 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.

[5] see paragraphs 8AAG(3)(b) and (4)(b) of the TAA.

(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.

38. 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.

39. There are a wide range of circumstances that taxpayers may put forward for consideration. The specific examples of remission discussed in paragraphs 48 to 106 of this practice statement are ones where it would be considered fair and reasonable to remit.

40. 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 49 of this practice statement.

41. 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 charge was paid, especially considering that many other businesses will take steps to ensure that they pay their taxes on time.

Partial remission

42. 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.

Other appropriate circumstances

43. As stated previously, GIC is imposed in all cases of late payment and is only to be remitted where the circumstances of the case warrant such remission. However, in addition to the circumstances set out above, paragraph 8AAG(5)(b) of the TAA gives the Commissioner a discretion to remit the GIC for late payment in circumstances where 'it is otherwise appropriate to do so'.

44. Paragraph 8AAG(5)(b) gives the Commissioner a much broader discretion to remit the GIC for late payment than the preceding subsections in section 8AAG of the TAA. 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.

45. 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.

46. 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.

47. The decision to remit the GIC under this provision is restricted to senior tax officers.

CIRCUMSTANCES WHERE REMISSION MAY BE GRANTED

Introduction

48. 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. The following paragraphs are in no way restrictive – they merely describe some particular examples of such situations.

Hardship

49. 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

50. 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.

Disputed debt and 50/50 arrangements

51. 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'.

52. 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.

53. 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.

54. 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.

55. 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.

56. 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.

57. 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.

58. 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

59. 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

60. The GIC is imposed both on estimates of pay as you go withholding liabilities made under Division 268 in 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 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.

61. 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 (SGC)

62. The provisions that give the Commissioner discretion to remit the GIC also include where the GIC is imposed for the late payment of a SGC[6]. The administration and nominal interest components of SGC are not included in the GIC calculation.

[6] Prior to the introduction of GIC, the Commissioner had no discretion to remit additional charges for late payment of SGC

63. 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.

64. 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.

65. 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.

66. The Commissioner may grant remission of GIC on the SGC 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.

67. 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. 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.

68. 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.

Excess contributions tax (ECT)

69. If in a financial year a taxpayer's concessional contributions or non-concessional contributions exceed the taxpayer's relevant contributions cap, the individual concerned is taxed on the excess.

70. 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.

71. As soon as practicable after making an excess contributions tax 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 excess contributions tax debt.

72. The superannuation fund/s must release the required amount within 30 days after receiving the release authority or they are liable for a penalty.

73. Where a taxpayer gives the release authority to their superannuation fund/s 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.

74. 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 (2000-01 income years and later)

75. 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.

76. 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, as mentioned earlier in this practice statement.

77. 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

78. 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.

79. 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) in 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.

80. 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

81. 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 in Schedule 1 to the TAA if any amount of this penalty remains unpaid after it is due.

82. 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.

83. 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 or underpayment of the FBT or GST liability.

84. 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

85. 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.

86. 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.

87. 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

88. 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 in 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.

89. This revised 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.

90. This policy relates to any section 170AA (ITAA 1936) interest 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.

91. The taxpayer may be entitled to a limited remission of the GIC incurred prior to the MAP.

92. 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.

93. 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.

94. Generally, and subject to other considerations in this practice statement, the maximum remission allowable would be to the base interest rate.

95. 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.

96. Tax officers should refer to Taxation Ruling TR 2000/16 (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).

97. 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.

98. Normal GIC remission policy as outlined in this practice statement would apply from the date the MAP is finalised.

Foreign revenue claims

99. 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.

100. To be accepted as a 'foreign revenue claim', the request must comply with the various requirements prescribed in section 263-15 in Schedule 1 to the TAA.

101. If the Commissioner is satisfied that the claim has been made in accordance with section 263-15 in 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.

102. When the Commissioner registers a foreign revenue claim on the Register, the debt becomes a pecuniary liability to the Commonwealth.

103. 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) in 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.

104. 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.

105. The Commissioner may also remove details of a foreign revenue claim from the register in certain circumstances (see section 263-35 in Schedule 1 to the TAA).

106. 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.

Subject references	General interest charge Late payment penalty Penalties Remission of late payment penalties SGC general interest charge Superannuation Superannuation guarantee charge Superannuation guarantee scheme Superannuation guarantee shortfalls Tax administration
Legislative references	Income Tax Assessment Act 1936 Taxation Administration Act 1953 Excise Act 1901
Related public rulings	TR 2000/16 Income tax: international transfer pricing transfer pricing and profit reallocation adjustments, relief from double taxation and the Mutual Agreement Procedure
Related practice statements	PS LA 2006/8 Remission of shortfall interest charge and general interest charge for shortfall periods 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 PS LA 2011/4 Recovering disputed debts PS LA 2011/13 Cross border recovery of taxation debts PS LA 2011/22 Refunds of running balance account surpluses and credits – Commissioner's discretion to retain amounts
Other references	Decision Impact Statement 2093/2005 Decision Impact Statement 148/2007
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Section	Operational Policy, Assurance and Law