


# ***TR 1999/D10 - Income tax: remission of penalty and General Interest Charge for failure to make deductions from RPS, PAYE and PPS payments***

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This document has been finalised by TR 2000/3.



## Draft Taxation Ruling

# Income tax: remission of penalty and General Interest Charge for failure to make deductions from RPS, PAYE and PPS payments

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Contents	Para
<b>What this Ruling is about</b>	<b>1</b>
<b>Definitions</b>	<b>4</b>
<b>Date of effect</b>	<b>32</b>
<b>Previous Rulings</b>	<b>33</b>
<b>Ruling and explanations</b>	<b>34</b>
<b>Examples</b>	<b>85</b>
<b>Detailed contents list</b>	<b>115</b>
<b>Your comments</b>	<b>116</b>

### *Preamble*

*Draft Taxation Rulings (DTRs) represent the preliminary, though considered views of the Australian Taxation Office. DTRs should not be relied on. Only final Taxation Rulings represent authoritative statements by the Australian Taxation Office.*

## What this Ruling is about

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1. Persons making payments (payers) that fall within the ambit of the Reportable Payments System (RPS), the Pay As You Earn system (PAYE) or the Prescribed Payments System (PPS) have a number of obligations under income tax law. The principal obligations are to deduct tax from the payments and to pay these deductions to the Commissioner of Taxation (the Commissioner).

### **Class of person/arrangement**

2. This Ruling explains the circumstances under which payers may become liable for **statutory penalties** and the **General Interest Charge** (GIC) for failing to deduct amounts as required by the law and sets out guidelines for the remission of the amount of penalty and GIC imposed. It applies to all payers.

3. In this Ruling:

- some terms have specific meanings which are explained in the Definition section. These terms will appear in **bold text** when they are first mentioned;
- ‘income tax law’ refers to the *Income Tax Assessment Act 1936* (the Act), Regulations under the Act and includes the *Taxation Administration Act 1953* (the TAA); and
- references to sections and subsections relate to the Act unless otherwise specified.

## Definitions

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4. Terms used in this Ruling are intended to have the same meaning that they have in other areas of income tax law. The meanings of commonly used terms are summarised as follows:

### **Authorised representative**

5. An authorised representative is any representative appointed or having the implied authority of the payer for RPS, PAYE or PPS purposes and may include an accountant, tax agent, director or employee.

### **Culpability penalty**

6. Culpability penalty is the level of penalty imposed for a breach of the law that best reflects the accountability of the payer. The culpability penalty is the sum of the typical culpability rate component, the mitigating or aggravating factors component and the repeat offence component.

### **Due date**

7. The due date is the day on which the payer should have paid the amount of the deduction (had it been made as required) to the Commissioner.

### **General Interest Charge (GIC)**

8. The GIC is a tax deductible interest charge calculated daily on outstanding amounts. The rate of interest is calculated by adding 8% to the Treasury Note yield rate for that day and dividing that total by the number of days in that calendar year.

### **Government body**

9. Government body means the Commonwealth, a State, a Territory or an authority of the Commonwealth or a State or a Territory but does not include corporations wholly owned by government or other autonomous organisations funded by government.

### **Intentional disregard**

10. Intentional disregard occurs when a payer decides to ignore known correct treatment of a particular payment or chooses to ignore advice received from the Commissioner or other relevant authority.

For a payer to intentionally disregard obligations under income tax law the payer must know what those obligations are and choose to disregard them. Where a payer has genuine doubt regarding an obligation to deduct tax, and the payer chooses not to deduct, this would not amount to intentional disregard.

**Offence**

11. An offence occurs where a payer is liable to penalty for failing to deduct or for under-deducting from an RPS, PAYE or PPS payment.

**Payee(s)**

12. Payee refers to any person entitled to receive a payment affected by RPS, PAYE or PPS legislation.

**Payer(s)**

13. Payer refers to an employer under the PAYE system as well as to a payer under the PPS or the RPS system and includes an individual, a company, a partnership, a government body or a trustee.

**Penalty decision**

14. A penalty decision relating to an offence or a series of offences for failure to deduct occurs when the Commissioner imposes a penalty on the payer. (For a penalty decision to be subject to a 'repeat offence' component it must relate to a similar offence within the same tax collection system as a penalty decision made within the previous 36 months.)

**Period of examination**

15. Period of examination means the period of time during which an ATO officer will examine the books of a payer to establish whether there has been compliance with the laws relating to the deduction and payment of RPS, PAYE and PPS.

**Positive co-operation**

16. Positive co-operation occurs when a payer voluntarily and fully discloses non-compliance after being informed by the Commissioner that an examination has commenced or will commence (see also 'Reasonable co-operation' at paragraph 21).

# TR 1999/D10

## Reasonable care

17. Reasonable care requires that a payer exercises the care that a reasonable, ordinary payer would exercise to fulfil that payer's tax obligations. This would normally include a payer ascertaining before they are made whether payments are liable to deduction.

18. A payer exercising reasonable care may still make an honest mistake based on reasonable grounds. This may include occasions where a payer:

- holds an honest but incorrect belief based on reasonable grounds that an obligation to deduct has not arisen; and
- upon discovering the error takes immediate steps to rectify the failure to deduct and avoid a recurrence.

19. By its nature, an honest mistake may at times involve a large or a small non-deduction or under-deduction.

20. Minor carelessness in respect of an amount that the Commissioner considers not to be significant in percentage and dollar terms would also be regarded as reasonable care.

## Reasonable co-operation

21. In general terms, reasonable co-operation requires a payer to provide relevant and reasonable information, whether orally or in writing, truthfully and to the best of his or her ability; and to provide in a timely manner books and records having regard to the particular payer's circumstances. A payer is allowed sufficient time in which to seek professional advice in relation to the issues being examined. Reasonable co-operation does not require that a payer agree with a tax officer's views. What it requires is the timely provision of information; not necessarily acceptance of a particular interpretation of that information (see also 'Positive co-operation' at paragraph 16).

22. Factors indicating less than reasonable co-operation include:

- failure to provide records within a reasonable period of time; or
- failure to keep appointments with ATO officers without due excuse.

23. Factors indicating greater than reasonable co-operation include:

- the payer assists in extracting information from the accounts during the examination;
- the payer provides staff to assist in extracting information during the examination; or

- the payer volunteers general areas where non-compliance may have occurred without fully disclosing the detail of the non-compliance.

**Reasonable possessions**

24. Reasonable possessions are assets of a modest value which would not be expected to be sold to pay outstanding penalties, and may include:

- ownership of or equity in the family home;
- a motor vehicle;
- furniture or household goods; and
- tools of trade.

25. Holiday homes, investment properties, shares, boats or luxury motor vehicles, are not considered by the Commissioner to be reasonable possessions.

**Recklessness**

26. Recklessness may occur when a payer acts with utter carelessness showing disregard of, or indifference to, his or her obligations. It is a state of mind stopping short of deliberate intention and going beyond mere inadvertence or carelessness.

27. This could occur, for example, where the payer does not take steps to clarify the correct treatment of a payment despite having reasonable grounds to believe a liability to deduct may exist.

**Repeat offence**

28. A repeat offence occurs where a payer has been penalised for a failure to deduct or for under-deducting from a payment within 36 months of the offence under review. To determine if the offence detected is a repeat offence each separate examination is treated as involving a single offence. The offence should be similar in nature to the previous offence and relate to the same tax collection system as the previous offence.

**Statutory penalty**

29. The statutory penalty is the rate of culpability penalty imposed by the law before any remissions are granted by the Commissioner.

# TR 1999/D10

## Under-deduct

30. A payer may under-deduct when the payer deducts a tax instalment at less than the rate required by the Act. This may occur, for example, when a payer deducts a tax instalment based on an expired variation certificate.

## Voluntary disclosure

31. A disclosure is generally treated as having been made voluntarily if it is made by that payer before the start of ATO activity relating to an RPS, PAYE, or PPS liability.

## Date of effect

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32. This Ruling applies to all decisions involving the exercise of a discretion to remit penalty and GIC for failure to deduct **offences** that occurred on or after 1 July 1999. The Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

## Previous Rulings

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33. Taxation Ruling TR 97/8 continues to apply, but provides remission policy only in relation to offences that occurred prior to 1 July 1999.

## Ruling and explanations

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34. A payer may fail to deduct tax or may deduct insufficient tax (**under-deduct**) from a payment, either inadvertently or by design. This may occur, for example, when the payer is unaware of the status of a worker for PAYE purposes, or incorrectly treats a salary or wage payment as a prescribed payment or a reportable payment.

35. A tax deduction is held to have been made from a payment to a worker where the records of a payer indicate this to be the case, irrespective of whether a provision for the required amount has been made in the accounts or books of the payer.

36. Failure to deduct at the prescribed rate or to pay deductions to the Commissioner may result in prosecution and court imposed penalties. Alternatively, penalties may be imposed directly by the Act

and are subject to GIC. Penalties imposed by the Act are often referred to as 'statutory penalties'.

37. The provisions dealing with penalties and GIC recognise there are circumstances where it is fair that these be remitted in whole or in part. The Act and the TAA, therefore, give the Commissioner a discretion to remit amounts imposed.

38. The ATO is required to collect taxation revenues properly payable, and a major strategy in performing this role is to encourage payers to comply voluntarily with the Act. When penalties for a 'failure to deduct' offence are considered for remission, regard is given to the payer's past compliance behaviour and to indicators of future compliance behaviour.

39. The Commissioner encourages payers to seek guidance, either from the ATO or from qualified taxation practitioners, in determining the correct treatment of payments. Payers who exercise **reasonable care**, but make an honest mistake in fulfilling their obligations are treated more leniently when remission of penalties is being considered. Conversely, payers who exercise less than reasonable care or who intentionally disregard their obligations under the law receive less favourable treatment when the extent of remission of penalties is being considered.

### **Changes to previous guidelines**

40. This Ruling replaces the guidelines set out in Taxation Ruling TR 97/8 for offences that occurred on or after 1 July 1999. However, for offences that occurred prior to 1 July 1999, remission policy continues to be provided by Taxation Ruling TR 97/8. Debts resulting from offences that occurred prior to 1 July 1999 are subject to the GIC from 1 July 1999.

41. The main features of this Ruling are as follows:

- the 16% per annum component of the failure to deduct penalty has been replaced by the GIC;
- **voluntary disclosures** are rewarded through reduced rates of **culpability penalty**;
- to maintain consistency, specific rates of culpability penalty are provided for typical categories of behaviour, but may be varied to allow for mitigating or aggravating factors;
- the scale of typical culpability penalties is broadened to deal with a range of behaviours varying from honest mistakes to **intentional disregard** of the law;



- a **repeat offence** results in an increase in the culpability penalty;
- payers are held accountable for the acts of **authorised representatives**; and
- the **period of examination** has been varied to allow ATO officers a discretion to examine records for an extended period where an offence has been detected.

## Discretion of the Commissioner

42. Any exercise of a legislative discretion, including a discretion to remit penalties and charges, must take into account the facts of each particular case. The Commissioner considers all relevant factors and determines the most appropriate level of remission for the particular circumstances.

43. In examining cases where an offence may have occurred, the period of examination is that period which represents the best balance between the need to ensure a payer is complying with RPS, PAYE or PPS obligations, and the cost, both to the ATO and the payer, of these examinations.

44. The period of examination may be extended where:

- substantial undeducted or under-deducted amounts have been detected; or
- there is a reasonable likelihood that the payments made may not be disclosed as assessable income by the **payee**, e.g., payments made 'cash in hand' or where a payee quotes an incorrect tax file number.

45. Where the period of examination has been extended, the time frame set should result in a penalty amount that is both correct and capable of deterring a payer from committing further breaches.

## Failure to deduct by non-government bodies

### *Penalty*

46. A payer that is not a **government body** is liable to a culpability penalty if the payer makes a reportable payment, pays salary or wages, or makes a prescribed payment without first making a deduction as required under section 220AF (RPS), 221C (PAYE), 221YHD or 221YHDA (PPS). These statutory penalties are automatically imposed by the operation of subsection 220AS(1) (RPS), 221EAA(1) (PAYE) or 221YHH(1) (PPS).

*Amount of penalty and GIC*

47. The penalty referred to above is a flat amount equal to the amount of tax the payer failed to deduct. This amount is referred to in this Ruling as culpability penalty and is subject to the GIC. The GIC compounds daily and accrues from the date when a deduction should have been paid, had it been made as required, until all outstanding amounts have been paid.

*Remission of culpability penalty*

48. Culpability penalty is imposed on payers for failure to comply with the law. It reflects the level of accountability to be assigned to the payer for non-compliance.

49. The Act applies a culpability penalty equal to 100% of the amount not deducted. However, the Commissioner has a discretion to remit the whole or any part of this penalty under subsection 220AU(1) (RPS), 221N(1) (PAYE) or 221YHL(2) (PPS). Paragraphs 50 to 53 set out concessional treatment applied to voluntary disclosures. Paragraphs 54 to 62 set out further reduced rates for culpability penalties that may be expected in typical cases, as well as explaining factors warranting a departure from that standard (whether further decreasing or increasing a penalty from the standard). The culpability penalty rate consists of the sum of the typical culpability rate, decreased or increased by a factor for mitigating or aggravating circumstances, and a factor for repeat offences. Before considering those circumstances, a decision should be made as to whether the payer has voluntarily disclosed the failure to deduct or the under-deduction.

*Voluntary disclosure*

50. Persons who voluntarily disclose their non-compliance may generally receive concessional treatment when the level of remission of a culpability penalty is being considered. The concession given reduces the statutory penalty (100% of the amount not deducted) by 80% to a figure of 20% of the amount not deducted. To qualify for this concessional treatment, a voluntary disclosure must:

- be in writing (to avoid disputes about the timing and extent of the disclosure);
- contain all relevant material facts; and
- not be made as a result of any ATO activity relating to the payer's RPS, PAYE or PPS liability.

51. If the disclosure is incomplete, but in the Commissioner's opinion the degree of incompleteness has little material effect on the outcome, it may still qualify as voluntary.

**TR 1999/D10**

52. If a payer discloses one part of a shortfall in the amount deducted because he or she is only aware of that part of the shortfall and that disclosure is full and true, the payer may still qualify for a reduced penalty on that part of the shortfall. The remainder of the shortfall does not attract the concessional treatment associated with a voluntary disclosure.

53. If a disclosure is made as a result of ATO activity relating to the payer's RPS, PAYE or PPS activities, then that disclosure is treated as **positive co-operation**.

*Typical culpability rates*

54. Persons who fail to deduct or who under-deduct ordinarily have the culpability penalty reduced, depending on their level of accountability. Typically, the culpability penalty rate is reduced to the percentages in the table below:

<b>Reasonable care</b>	0%
<b>Lack of reasonable care</b>	15%
<b>Recklessness</b>	30%
<b>Intentional disregard</b>	60%.

55. As indicated previously, where a voluntary disclosure has been made, the typical culpability rate is applied to the concessional amount of the culpability penalty (i.e., the rate is applied to an amount being 20% of the amount not deducted: see paragraph 50).

56. It should be noted that:

- in the event of multiple offences for failure to deduct, each offence is considered separately;
- the culpability component is applicable even if the culpable behaviours are the actions of an authorised representative of the payer; and
- the typical rates set out above may be further decreased or increased should there be other mitigating or aggravating circumstances present.

*Mitigating or aggravating circumstances*

57. The Commissioner expects ATO officers to receive **reasonable co-operation** from payers and their representatives in the performance of their duties. Co-operation above or below this level during examinations may result in a variation to the typical culpability rate. The examples outlined below illustrate how the typical culpability rate may be varied.

58. Mitigating circumstances reduce the typical rate by a factor of up to 25%, and include the following:

- greater than reasonable co-operation during the examination 10%
- positive co-operation 25%.

59. Aggravating circumstances increase the typical culpability rate by a factor of up to 25%, and include the following:

- lack of reasonable co-operation causing delay of the examination 10%
- deliberate false or misleading statement 25%.

60. Only one of these rates may apply. If a payer exhibits more than one of these behaviours then the behaviour that provides the maximum increase or decrease in the typical culpability rate is applied.

#### *Repeat offence*

61. Where a payer has been penalised for a failure to deduct offence within 36 months before the **penalty decision** relating to the offence under consideration, the current offence may warrant an increase in the culpability rate otherwise determined by the application of paragraphs 50 to 60. Such an increase applies where the current offence is considered by the Commissioner to be similar in nature to the previous offence, e.g., failure to deduct from allowances paid to employees. Conversely, failure to deduct from a prescribed payment is not considered to be similar to failure to deduct from a salary or wage payment.

62. A repeat offence attracts a 33.3% increase in the culpability rate. The increased culpability cannot exceed the statutory penalty.

#### *Remission of the GIC*

63. The GIC provides a common rate of interest for all outstanding amounts payable to the Commissioner. Since the GIC is determined on a quarterly basis by adding 8% to the Treasury Note yield rate for the particular quarter, its effective rate may vary over a period of time.

64. Remission of the GIC is available under section 8AAG of the TAA where the Commissioner forms the view that one of the following three tests is satisfied:

- the failure to deduct was NOT caused directly or indirectly by an act or omission of the payer, and the payer has taken reasonable action to correct the cause;

# TR 1999/D10

OR

- the failure to deduct WAS caused directly or indirectly by an act or omission of the payer, but the payer has taken reasonable action to correct the cause AND, in the circumstances, it is reasonable to remit all or part of the GIC;

OR

- other special circumstances apply AND, in the circumstances, it is reasonable to remit all or part of the GIC.

65. The first two tests for remission indicate that it is necessary for the payer to have taken reasonable steps to correct the circumstances that led to the failure to deduct and that it is unlikely that such offences will recur. Where the payer has not taken such steps, there is no basis for remission of the GIC unless there are special circumstances.

66. The fact that the culpability penalty may be imposed some time after the failure to deduct offence has occurred is not seen as a reason to remit the GIC accrued from the date when the deduction should have been paid, had it been made as required. Requests for remission of the GIC should provide specific reasons linked to the failure to deduct offence and which satisfy one of the three tests referred to above.

67. Factors that may help to determine remissions under the first two tests include:

- whether the offence was caused by factors beyond the control of the payer, e.g., industrial action of employees;
- the period over which the failures to deduct continued;
- whether the payer has taken action to ensure that the circumstances that contributed to the failure to deduct are unlikely to recur;
- the speed with which the payer identified and corrected the breach(es); and
- whether a remission would represent consistent application of this Ruling.

68. Where a 'special circumstances' remission is sought, officers may consider circumstances such as flood, fire or other natural disaster or serious ill health. Care must be taken by officers to ensure the circumstances relied on prevented the payer from making deductions. In other words, the circumstance (e.g., a fire that destroys the payer's business records necessitating some reconstruction of

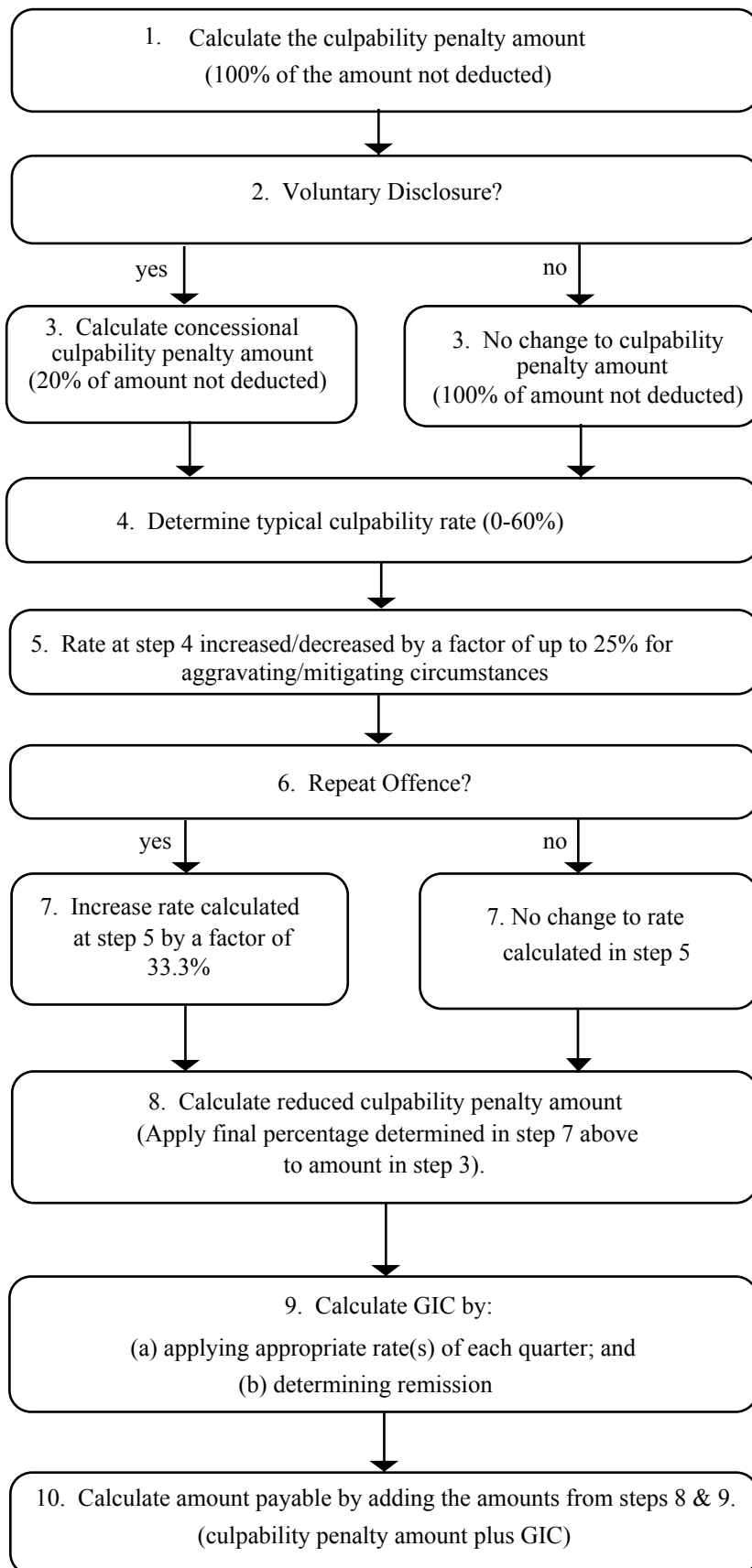
records to determine the exact amount required to be deducted) should not be viewed in isolation, but in the light of its effect on the payer's capacity to make the deduction.

69. The GIC is commercially based and tax deductible. It is not intended as a punitive measure. One of the tests outlined in paragraph 35 must be satisfied to enable the GIC to be remitted.

#### **Decision chart**

70. The following chart illustrates the decision making process to be followed to calculate the amount to which the statutory penalty and GIC may be remitted.

# TR 1999/D10



***Failure to deduct by government bodies***

71. The obligations of a government body to deduct tax are the same as those of a non-government body (refer paragraph 46), but the penalty and GIC provisions vary, as set out below. Factors influencing remission of the GIC where government bodies are concerned do not differ in principle from cases involving other payers.

***Penalty and GIC provisions***

72. No provision exists in the Act to impose culpability penalties on a government body for failure to deduct tax, although subsections 220AS(4) (RPS), 221EAA(4) (PAYE) and 221YHH(4) (PPS) impose the GIC on a government body for failure to deduct. However, subsection 8AAB(3) of the TAA does not allow the GIC to be imposed on the Commonwealth or authorities of the Commonwealth. Consequently, the GIC may only be imposed on a State or Territory government body or an authority of a State or Territory.

***Calculation of the GIC***

73. In the case of RPS and PAYE, the GIC applies from the day a deduction was required until 30 June in the financial year in which that day occurred. Whereas for PPS purposes, the GIC applies from the day on which the payer should have paid the amount of the deduction to the Commissioner ('the **due date**') until 30 June in the financial year in which that day occurred.

74. In order to achieve consistency across the collection systems, the Commissioner applies a general remission so that the same period is used to calculate the GIC irrespective of the collection system involved. Consequently, in relation to offences by government bodies that are subject to the GIC, it is calculated from the due date until 30 June in the financial year in which that day occurred.

***Remission of the GIC***

75. Because the GIC applicable to government bodies is identical to that imposed on non-government bodies, all remissions to take account of individual circumstances are determined according to section 8AAG (see paragraphs 64 to 68).

***Financial hardship***

76. Where the amount of culpability penalty or GIC determined according to these guidelines would cause genuine financial hardship for the payer, a further remission may be warranted. The extent of any reduction depends on the facts in each case.



# TR 1999/D10

77. The Commissioner does NOT consider a payer to be suffering financial hardship if the payer is unable to pay penalties due to temporary cash flow problems caused by circumstances such as:

- a loss of custom or clientele; or
- abnormal business related expenses or asset purchases.

78. Financial hardship may be demonstrated by:

- the INABILITY to borrow funds to pay outstanding penalties;
- the commencement of bankruptcy or liquidation proceedings;
- the effect the penalty amount has on the capacity of the business to continue to trade; or
- the necessity to sell **reasonable possessions** in order to pay the penalty or GIC amount.

## Review of decisions relating to penalty and GIC

79. Under subsection 220AU(2) (RPS), 221N(2) (PAYE) or 221YHL(3) (PPS), the Commissioner must give written notice of a decision not to remit, or to remit only part of, a culpability penalty. Payers have a right to object against the Commissioner's remission decision on culpability penalty in respect of RPS and PPS. These rights arise under section 220AZH (RPS) or subsection 221YHT(2) (PPS).

80. There is no provision for lodging an objection against the GIC, or against a PAYE culpability penalty. In these cases, a payer may request a review by writing to the ATO, setting out the circumstances that led to the failure to deduct and the basis on which remission is sought.

81. Where an objection to an RPS or PPS culpability penalty is lodged, it must be submitted in writing, within 60 days after notification of the original decision.

82. Where an objection is disallowed in whole or in part, the payer may apply to the Administrative Appeals Tribunal (AAT) for a review of the decision, or appeal to the Federal Court against the decision. The application for review or appeal must be lodged with the AAT or the Federal Court as appropriate.

83. The requirements of the objection and appeal provisions are set out more fully in Part IVC of the TAA.

84. A decision not to remit the culpability penalty or the GIC may also be reviewed by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

## **Examples**

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85. The following are intended as a guide only.

86. The examples are of offences involving non-government bodies under the PAYE provisions. However, the principles used to determine the level of culpability can be equally applied to RPS and PPS cases.

87. As explained in paragraph 72, the law does not provide for a culpability penalty for government bodies, although they may be subject to the GIC.

### **Example 1**

- **Non-voluntary disclosure**
- **Reasonable care**
  - **honest mistake**
  - **minor carelessness**
  - **insignificant amount**
- **Reasonable co-operation.**

### ***Facts***

88. During an examination, an ATO officer discovered the employer had been using superseded tax scales. As a result, the employer had under-deducted small amounts from some payments over a period of several months. The employer had consulted with its accountant when it completed its annual group tax reconciliation and, when advised of the error, the employer had corrected it by deducting PAYE at the correct rate from all subsequent payments.

### ***Decision***

89. The employer has acted with reasonable care in complying with its obligations and provided reasonable co-operation to the ATO officer.

90. Factors considered when determining the penalty were:

- deductions were made in accordance with what the employer honestly believed were the correct rates;
- the employer has a history of deducting at the prescribed rate;

# TR 1999/D10

- the mistake resulted in a small amount of tax not being deducted; and
- the employer corrected the error as soon as it was identified.

## *Penalty calculation*

91. Culpability penalty is calculated as:

Typical culpability rate (reasonable care)	= 0%
Penalty payable	= NIL.

## **Example 2**

- **Voluntary disclosure**
- **Lack of reasonable care.**

## *Facts*

92. The employer has failed to deduct tax instalments of \$10,000 from payments to casual employees. The nature of the work performed was different from the work undertaken by permanent employees of the company. No enquiries were made of her accountant or the ATO to ascertain the correct treatment of the payments. Before the notification of any examination, the employer disclosed to the ATO that she was unsure of the status of the casual employees.

93. Assuming the 13 week Treasury Note yield is 5%, the daily effective rate of interest for GIC purposes is 13% divided by 365 or .0356%. The 13% is obtained by adding 8% and 5% as provided for by subsection 8AAD(1) of the TAA. The culpability penalty was payable from 21 October and was paid on 21 November (i.e., the culpability penalty remained unpaid for a period of 31 days).

## *Decision*

94. The employer has acted with a 'lack of reasonable care'.

95. By disclosing the error prior to the commencement of any examination, the employer made a voluntary disclosure and is entitled to concessional treatment.

96. Factors considered when determining the typical culpability rate were:

- the payment was made to a class of worker not normally engaged by the employer;

- at the times of payment the employer was unsure of the status of the workers; and
- the employer did not attempt to establish the correct treatment of the payment.

***Penalty and GIC calculation***

97. Statutory penalty amount  
(100% of amount not deducted) = \$10,000  
80% remission for voluntary disclosure = \$8,000  
Concessional penalty amount  
(20% of amount not deducted) = \$2,000

98. Culpability penalty is calculated as:  
Typical culpability rate  
(lack of reasonable care) = 15%  
Culpability penalty amount = \$2,000 x 15%  
= \$300.

99. The GIC is payable since no grounds arose for its remission. Therefore, the amount of culpability penalty and GIC payable is calculated using the formula:

$$A \times (1^N + D)$$

Where A is the Amount of culpability penalty (in this example \$300).

D is the Daily effective interest rate (in this example 0.0356%, see paragraph 93).

N is the Number of days the culpability penalty is unpaid (in this example 31 days, see paragraph 93).

$$\begin{aligned} \text{Amount payable} &= \text{Culpability penalty amount} + \text{GIC} \\ &= 300 \times (1 + 0.0356\%)^{31} \\ &= 300 \times 1.011 \\ &= \underline{\$ 303.33}. \end{aligned}$$

# TR 1999/D10

## Example 3

- **Non-voluntary disclosure**
- **Recklessness**
- **Aggravating circumstances.**

### *Facts*

100. During an examination it was discovered that the employer had failed to deduct tax instalments of \$10,000 from site allowance payments. The employer made no attempt to contact his accountant or the ATO to ascertain the correct treatment of these payments. The employer delayed the examination by stating the records were with the accountant and later admitted that the records were always in his possession. The employer also stated during the examination that he understood many of the allowances paid in his industry are subject to tax instalment deductions but, to create the impression that he was paying over the award, he decided not to deduct tax from any allowances.

### *Decision*

101. The employer has been reckless in complying with his obligations and deliberately obstructed the ATO officer in the conduct of the examination. There was no voluntary disclosure of the failure to deduct tax.

102. Facts considered when determining the typical culpability rate were:

- the payment was made to a class of worker normally engaged by the employer;
- at the time of payment the employer was unsure of and did not attempt to establish the correct treatment of the payment; and
- the employer was aware that most allowances are subject to tax instalment deductions.

103. The aggravating circumstance is the deliberate false statement made to the ATO officer about the location of the records.

### *Penalty and GIC calculation*

104. Statutory penalty amount  
(100% of amount not deducted) = \$10,000.

105. Culpability penalty is calculated as:  
typical culpability rate (recklessness) = 30%

aggravating factor (deliberate false or misleading statement) [25% of 30%]	= 7.5%
culpability penalty rate [30% + 7.5%]	= 37.5%
culpability penalty amount	= \$10,000 x 37.5%
	= \$3750.00.

106. The GIC is payable since no grounds arose for its remission.

Therefore:

$$\begin{aligned} \text{Amount payable} &= \text{Culpability penalty amount} + \text{GIC} \\ &= \$3750 + \text{GIC}. \end{aligned}$$

#### **Example 4**

- **Non-voluntary disclosure**
- **Intentional disregard**
- **Aggravating circumstances**
- **Repeat offence.**

#### ***Facts***

107. The employer had failed to deduct tax instalments of \$10,000 from payments made to employees. The employer advised the ATO officer during the examination that he did not have any employees. The employees and the employer had agreed between themselves that there would be no deductions made and payments were disguised to make detection of the arrangement difficult. The employer had been previously penalised for failing to deduct tax from payments to his workers following an examination conducted 15 months ago.

#### ***Decision***

108. The employer has intentionally disregarded the advice of the Commissioner. The employer made false statements to the ATO officer and disguised the nature of the payments. There was no voluntary disclosure of the failure to deduct tax and a repeat offence warrants an increase in the culpability rate.

109. Factors considered in determining the typical culpability rate were:

- the payment was made to a class of worker normally engaged;
- at the time of payment the employer was aware of the proper treatment of the payment; and

# TR 1999/D10

- the employer had been advised previously of the obligation to deduct tax.

110. Aggravating circumstances are:

- the employer concealed the nature of the payments; and
- the employer made a false statement to the ATO officer.

111. Repeat offence factors are:

- the previous examination was conducted within 36 months; and
- the employer was penalised for a similar breach detected at that examination.

### *Penalty and GIC calculation*

112. Statutory penalty amount  
(100% of amount not deducted) = \$10,000.

113. Culpability penalty is calculated as:

typical culpability rate  
(intentional disregard) = 60%

aggravating factors (concealment,  
false statement) (25% of 60%) = 15%

repeat offences component  
(33.3% of (60 + 15%)) = 25%

culpability penalty rate  
(60% + 15% + 25%) = 100%\*  
(\*this is the maximum rate that the Act permits)

Culpability penalty amount = \$10,000 x 100%  
= \$10,000.

114. The GIC is payable since no grounds arose for its remission.

Therefore:

Amount payable = Culpability penalty amount + GIC  
= \$10,000 + GIC.

**Detailed contents list**

115. Below is a detailed contents list for this Ruling:

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Class of person/arrangement	2
<b>Definitions</b>	<b>4</b>
Authorised representative	5
Culpability penalty	6
Due date	7
General Interest Charge(GIC)	8
Government body	9
Intentional disregard	10
Offence	11
Payee(s)	12
Payer(s)	13
Penalty decision	14
Period of examination	15
Positive co-operation	16
Reasonable care	17
Reasonable co-operation	21
Reasonable possessions	24
Recklessness	26
Repeat offence	28
Statutory penalty	29
Under-deduct	30
Voluntary disclosure	31
<b>Date of effect</b>	<b>32</b>
<b>Previous Rulings</b>	<b>33</b>
<b>Rulings and explanations</b>	<b>34</b>
Changes to previous guidelines	40
Discretion of the Commissioner	42
Failure to deduct by non-government bodies	46
<i>Penalty</i>	46



# TR 1999/D10

<i>Amount of penalty and GIC</i>	47
<i>Remission of culpability penalty</i>	48
<i>Voluntary disclosure</i>	50
<i>Typical culpability rates</i>	54
<i>Mitigating or aggravating circumstances</i>	57
<i>Repeat offence</i>	61
<i>Remission of the GIC</i>	63
Decision chart	70
<i>Failure to deduct by government bodies</i>	71
<i>Penalty and GIC provisions</i>	72
<i>Calculation of GIC</i>	73
<i>Remission of the GIC</i>	75
Financial hardship	76
Review of decisions relating to penalty and GIC	79
<b>Examples</b>	<b>85</b>
Example 1	88
<i>Facts</i>	88
<i>Decision</i>	89
<i>Penalty calculation</i>	91
Example 2	92
<i>Facts</i>	92
<i>Decision</i>	94
<i>Penalty and GIC calculation</i>	97
Example 3	100
<i>Facts</i>	100
<i>Decision</i>	101
<i>Penalty and GIC calculation</i>	104
Example 4	107
<i>Facts</i>	107
<i>Decision</i>	108
<i>Penalty and GIC calculation</i>	112
<b>Your comments</b>	<b>116</b>

## Your comments

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116. We invite you to comment on this Draft Taxation Ruling. We are allowing **6 weeks** for comments before we finalise the Ruling. If you want your comments considered, please provide them to us within this period.

Comments by Date: 30 September 1999  
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### Commissioner of Taxation

18 August 1999

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*Previous draft:*

Not previously released in draft form

*Related Rulings/Determinations:*

TR 92/20; TR 97/8

*Subject references:*

- failure to make PAYE deductions
- failure to make PPS deductions
- failure to remit PAYE tax instalments deducted
- failure to remit PPS deductions
- General Interest Charge
- GIC
- PAYE
- PAYE deductions
- PAYE employer obligations
- PAYE employers
- PAYE penalties
- PAYE penalty remission
- PAYE remittances penalties
- PPS
- PPS payees
- PPS penalties

- PPS tax collection
- prescribed payments
- remission guidelines
- remission of penalties guidelines
- reportable payments
- reportable payments system
- RPS
- RPS payees
- RPS penalties

*Legislative references:*

- ITAA 1936 220AF
- ITAA 1936 220AS
- ITAA 1936 220AU
- ITAA 1936 220AZH
- ITAA 1936 221C
- ITAA 1936 221N
- ITAA 1936 221EAA
- ITAA 1936 221YHD
- ITAA 1936 221YHDA
- ITAA 1936 221YHH
- ITAA 1936 221YHL
- ITAA 1936 221YHT
- TAA 8AAB
- TAA 8AAG

# TR 1999/D10

*Case references:*

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ATO references:

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