

COMMISSIONER'S GUIDELINE

CG-GEN-002:

Interest and penalty tax

Guideline History

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Purpose

This Guideline explains the operation of the interest and penalty tax provisions of the *Taxation Administration Act* (TAA) and how the Territory Revenue Office (TRO) will administer those provisions.

This Guideline should be read in conjunction with the following Guidelines:

- 1) for general stamp duty assessments – Commissioner's Guideline CG-SD-001: *Document lodgement and payment periods*; and
- 2) for the stamp duty first home owner concession or the principal place of residence rebate – Commissioner's Guideline CG-HI-002: *Home incentive schemes: interest and penalty*.

Role of interest and penalty tax

Interest and penalty tax play an integral role in tax administration by:

- 1) deterring non-compliance by making it unprofitable to taxpayers;
- 2) promoting equity among taxpayers by ensuring that those who meet their obligations are not disadvantaged in comparison with those who do not;
- 3) encouraging taxpayers to make a full and immediate disclosure of any tax default identified by the taxpayer and to cooperate with investigations by TRO into tax defaults;
- 4) encouraging taxpayers to pay their tax liabilities by the due date; and
- 5) compensating the Government for receiving revenue that it is entitled to after it was due.

Having to pay interest and/or penalty tax does not depend upon or necessarily imply that there has been dishonesty on the part of a taxpayer. However, indifferent, reckless or dishonest conduct will result in higher levels of penalty tax being imposed.

Liability to interest and penalty tax arises from a tax default

When a **tax default** occurs, the taxpayer who has failed to pay the tax is liable to pay interest and penalty tax.¹ A tax default is a failure by a taxpayer to pay the whole or part of the **tax** that the taxpayer is liable to pay under a **taxation law** (the TAA, *Stamp Duty Act* (SDA), *Pay-roll Tax Act* (PTA) and regulations under those Acts).² That is, a tax default may be the late payment of tax or an underpayment of tax (or both).

'Tax' means any tax, duty or levy payable under a taxation law, and also includes any other amount payable by a taxpayer to the Commissioner or the Territory under a taxation law.³ Examples of other amounts payable under a taxation law include the costs of valuations recoverable from a taxpayer under section 25 of the TAA,⁴ the TRO's costs of recovering tax and fines and/or costs awarded against a taxpayer in a prosecution under a taxation law.

Interest

Where a tax default occurs, the taxpayer(s) are liable to pay interest on the unpaid primary and penalty tax at the **statutory interest rate** in force during the relevant financial year.⁵ The statutory interest rate is the sum of:

- 1) the **market interest rate**, which is the rate prescribed by regulation for the relevant financial year or if no rate is prescribed by regulation, the average yield (expressed as an annual rate) of the 90-day bank accepted bill published by the Reserve Bank of Australia for the month of May in the financial year preceding the relevant year; and
- 2) the **premium interest rate**, which is 8 per cent per annum from 1 July 2008.⁶

The interest rate for current and past years is available from TRO's website, www.revenue.nt.gov.au.

¹ Section 34(1) and 39(1) of the TAA.

² See section 3(1) ('taxation law') of the TAA.

³ Section 3(1) ('tax') of the TAA.

⁴ See Commissioner's Guideline CG-SD-010: *Tax assessments requiring evidence of value* for further information on the recovery of valuation costs.

⁵ Section 34(2) of the TAA.

⁶ Section 35 of the TAA. For the financial year ending 30 June 2008 and previous financial years, the premium interest rate is 7 per cent per annum.

Calculating interest generally

Interest is calculated on a daily basis from the date the person was required to pay the tax until the date of payment,⁷ although interest is not imposed if it totals less than \$20.⁸

Calculating interest on tax paid on a periodic basis (returns-based taxes)

Interest is normally calculated from the date of a tax default until the date of payment of the outstanding tax. For returns-based taxes such as payroll tax, this means that interest is payable on a late periodic payment, such as a monthly return. However, where TRO conducts an audit of a taxpayer who pays tax on a periodic basis, these audits are generally conducted on the basis of financial years (rather than return periods). Accordingly, the following special processes for calculating interest apply when assessments are issued following such audits.

Interest calculated from mid-point of financial year

Where a taxpayer has a tax default where tax is payable on a periodic basis (such as payroll tax or stamp duty on insurance policies) and TRO assesses the tax payable on one or more prior financial years, interest is calculated for each separate financial year's liability.

Interest is based on the number of days in the period commencing from the mid-point of that financial year or part of that financial year in which the tax default occurs. The interest on that tax default in subsequent financial years is based on a full year until the financial year in which the assessment is raised; in which case it is calculated on the number of days from the start of that financial year to the date the assessment is issued.

For example, where an audit determines a tax default in the first financial year of a three year audit period and the assessment is issued on 1 April of the third year, interest will be calculated using the number of days in:

- the period commencing 1 January (being the mid point) to 30 June in the first year;
- the full year of the second year (1 July to 30 June); and
- the period 1 July to 1 April in the third year.

If in the second year a further tax default is determined, the mid point rule will apply to that default amount in that year.

If the taxpayer becomes liable for periodic tax within a financial year and has a tax default in that year, the mid point for the purposes of the interest calculation, will be calculated as the date halfway between the date the taxpayer became liable and the end of that financial year (i.e. 30 June).

Crediting refunds before calculating interest

⁷ Section 34(3) of the TAA.

⁸ Section 36 of the TAA.

In some circumstances, an investigation into a taxpayer's liability for payroll tax or other tax paid on a periodic basis may reveal that there is a tax default in some financial years and an overpayment in other financial year(s).

Where an overpayment arises in respect of financial years subsequent to a financial year in which a tax default occurs, the interest payable in these subsequent financial year(s) is reduced. This reduction is determined by calculating the interest based on the 'net' underpaid tax for each subsequent financial year.

For example, where a taxpayer has been audited and the audit determines that tax has been underpaid by \$3000 in the first financial year of an audit period, interest will be charged on the underpaid amount in that year. If in a subsequent year the taxpayer is found to have overpaid tax by \$1000, the interest for the subsequent financial year is calculated on the net underpayment, that being \$2000 after offsetting the overpaid amount.

Where the overpayment of tax in a financial year is greater than the total underpayment of tax in prior years, no interest is calculated on the amount of the underpayment in respect of the year in which the net overpayment occurred. Where an overpayment is greater than prior year underpayments, the net overpayment will be offset against any underpayments identified in subsequent financial years when calculating the interest payable on those underpayments.

Remission of interest

TRO may remit all or part of the interest payable where satisfied that it is appropriate to do so.⁹ However, interest may only be reduced below the market interest rate in exceptional circumstances, having regard to the role that interest plays in deterrence, equity and compensation (as set out above).¹⁰

The interest rate will generally be reduced to the market interest rate where TRO is satisfied that the tax default is due to circumstances beyond the control of the taxpayer (other than the taxpayer's financial incapacity to meet the tax liability) and the taxpayer, having discovered the tax default, took all reasonable steps to rectify it.

The interest rate will be reduced to nil where the taxpayer can demonstrate that the tax due to the Territory has been paid in error to the revenue authority of another state or territory and it was paid on or before its due date for payment in the Territory.

Furthermore, where there is an unreasonably lengthy delay in TRO making an assessment after the taxpayer has provided all information required to issue the assessment in a timely manner, the period over which interest is charged will be reduced such that interest will not be imposed for the period of TRO's delay.

Statutory interest rate is payable on judgment debts

⁹ Section 38(1) of the TAA.

¹⁰ Section 38(2) of the TAA.

If judgment is given by or entered in a court in relation to unpaid tax, interest continues to accrue at the statutory interest rate until the tax is paid, rather than any other interest rate (such as that set out under the Supreme Court Rules).¹¹

Penalty tax

When a tax default occurs, a taxpayer is liable to pay penalty tax.¹² Penalty tax is in addition to primary tax and interest. Penalty tax is not payable for a tax default that consists only of a failure to pay interest or penalty tax previously imposed.

As a general rule, the amount of penalty tax imposed will be 25 per cent of the amount of the tax default, although it will not be imposed if it amounts to less than \$20.

The penalty tax will be changed from 25 per cent of the amount of the tax default to:

- 1) **nil**, where TRO is satisfied that the tax default arose from **circumstances beyond the control of the taxpayer** other than the taxpayer's financial incapacity to meet the tax liability and the taxpayer, having discovered the tax default, took all reasonable steps to rectify it;¹³
- 2) **10 per cent** of the amount of the tax default, where TRO is satisfied that the taxpayer took **reasonable care to comply with the taxation laws**;¹⁴
- 3) **75 per cent** of the amount of the tax default, where TRO is satisfied that either:
 - a. the tax default arose wholly or partly from the **intentional disregard of a taxation law** by the taxpayer or a person acting on behalf of a taxpayer; or
 - b. the taxpayer or a person acting on behalf of a taxpayer deliberately **concealed or suppressed information** from the Commissioner relevant to the assessment of the tax liability or the investigation of the tax default or **hindered the assessment of the tax liability or the investigation of the tax default** in any other way; or¹⁵
- 4) **95 per cent** of the amount of the tax default where the Commissioner is satisfied that both of the circumstances set out in 3) above exists.¹⁶

A matrix of the different levels of penalty tax payable based on the culpability of the taxpayer is provided at the end of this Guideline.

¹¹ Section 37 of the TAA.

¹² Section 39(1) of the TAA.

¹³ Section 41(2)(a) of the TAA.

¹⁴ Section 41(2)(b) of the TAA.

¹⁵ Section 41(2)(c) of the TAA.

¹⁶ Section 41(2)(c) of the TAA.

Determining the level of penalty tax

Circumstances beyond the control of a taxpayer

Circumstances beyond the control of the taxpayer that may warrant no penalty tax being imposed include:

- 1) fires, floods, cyclones or other natural disasters;
- 2) key personnel not being available because of sudden resignation, ill health or death; and
- 3) computer system breakdowns, including third party systems such as electronic funds transfer systems.

However, the taxpayer must make a reasonable effort to rectify or mitigate the tax default arising from those circumstances.

Reasonable care to comply with the taxation laws

The reasonable care standard is essentially the ordinary requirements of good commercial governance. A taxpayer is required to:

- 1) be honest and cooperative in their dealings with TRO;
- 2) keep complete and accurate records;
- 3) make diligent efforts to understand and comply with the taxation laws; and
- 4) seek expert advice on uncertain or complex matters.

In relation to stamp duty lodgements, taking reasonable care to comply with the SDA means that a taxpayer should, as far as possible:

- 1) lodge the instruments for assessment as early as possible within the requisite 60-day lodgement period (see Commissioner's Guideline CG-SD-001: *Document lodgement and payment periods* for further information on the lodgement and payment period and practices that will assist taxpayers with complying with that timeframe);
- 2) provide all information relevant to the assessment of stamp duty on the instrument up-front when lodging the document for assessment (in accordance with the requirement to make full and true disclosure – see Commissioner's Guideline CG-GEN-005: *Requirement for full and true disclosure*); and
- 3) cooperate fully and promptly with any requests by TRO for further information or documents relevant to the assessment, such as a request for a valuation (see Commissioner's Guideline CG-SD-010: *Tax assessments requiring evidence of value*).

In determining whether or not a taxpayer has taken reasonable care to comply with the taxation laws, TRO will consider the taxpayer's knowledge of the relevant

legislation, commercial experience, access to expert advice and familiarity with the English language.

TRO will also consider a range of factors including whether or not, in relation to the particular taxation law under which the tax default has occurred, the taxpayer has, where appropriate:

- 1) maintained appropriate and proper recording systems – that is, systems that minimise the risk of tax default, allow reconciliation of the tax paid or payable with returns required to be lodged and fulfil the taxpayer's obligation under the taxation laws to maintain records for the purposes of TRO investigations or audits;
- 2) taken reasonable steps to be aware of and comply with their taxation obligations and to be familiar with the relevant legislative requirements;
- 3) applied in good faith any relevant Guidelines or other publications issued by the Commissioner;
- 4) sought professional advice in relation to the taxation laws for uncertain or complex matters where no Guideline applies or the taxpayer's circumstances differ from those described in a Guideline;
- 5) acted in good faith in applying any independent tax advice received;
- 6) observed any corporate reconstruction ruling received and notified TRO if there have been any changes in the information on which the ruling was formed;
- 7) acted promptly to seek advice or provide information once made aware, from any source, that the taxpayer might have a tax liability; or
- 8) actively cooperated with TRO, such as responding to inquiries by TRO, providing all information requested in a timely manner and registering to pay payroll tax as soon as a tax liability has been discovered.

Simple mistakes such as transposition errors or calculation errors that result in a tax default, can arise where a person is taking reasonable care to comply with the taxation laws. In this circumstance, these mistakes alone will not be taken as indicating that the taxpayer has not taken reasonable care, provided that the mistake does not arise from other factors that show that the taxpayer has not taken reasonable care.

For example, making a calculation error on a payroll tax annual reconciliation does not of itself mean that the taxpayer was not taking reasonable care. However, other factors may mean that the error actually arises from circumstances of the taxpayer not taking reasonable care, such as:

- 1) the taxpayer not maintaining appropriate and proper recording systems (for example, the taxpayer's wages information does not properly indicate whether total wage figures are inclusive of superannuation or fringe benefits so an error is made in the annual reconciliation); or
- 2) a failure of the taxpayer to be aware of the proper application of the PTA (for example, by not getting an accountant's advice or closely reading and applying

the *Employers' Guide to Payroll Tax in the Northern Territory* (I-PRT-001) and so failing to 'gross-up' fringe benefits).

Furthermore, a taxpayer will not be regarded to have taken reasonable care where:

- 1) a reasonable person, having regard to the particular circumstances of the taxpayer, would have or ought to have been able to foresee the likelihood of a tax default; or
- 2) the taxpayer was indifferent to the possibility of the tax default occurring or recognised the risk of the tax default occurring and accepted the consequences of that risk.

Intentional disregard of a taxation law

Intentional disregard of a taxation law includes situations where, on an objective view of the facts, a tax default is either wholly or partly caused by, or arises from, an intentional act or omission by the taxpayer or by a person acting on the taxpayer's behalf or an act or omission that arises in circumstances where the person has so recklessly disregarded the requirements of the taxation law that the matter constituted intentional disregard. Examples of an intentional disregard of a taxation law include:

- 1) the use of contrived or artificial avoidance schemes;
- 2) tax evasion or fraud;
- 3) making false or misleading records or statements or concealing relevant facts regarding a tax liability;
- 4) ignoring a Guideline or ruling (such as a corporate reconstruction ruling), particularly on a matter where the law is clearly established;
- 5) failing to pay tax in accordance with well-established principles of law;
- 6) failing to meet a tax liability after being advised of its existence by TRO or another person; and
- 7) repeating a tax default on the same matter or a closely related matter.

Deliberately concealing or suppressing relevant information or hindering the assessment of tax

This includes circumstances where the person conceals or suppresses information from TRO that the person knows is relevant to the assessment of the tax liability. Such concealment will also generally constitute an offence under the TAA for a failure to make a full and true disclosure on a relevant occasion.¹⁷ For further information on this obligation, refer to Commissioner's Guideline CG-GEN-005: *Requirement for full and true disclosure*.

Hindering the assessment of a tax liability includes refusing to provide relevant information or material when requested or deliberately and unreasonably delaying the provision of such information or other material.

¹⁷ Section 24 of the TAA.
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Deliberately hindering investigation of a tax default

The TAA provides that a person hinders the investigation of a tax default in the following circumstances.¹⁸

- 1) The person deliberately falsifies, damages, conceals or destroys tax records to which the investigation relates. These actions may also constitute offences under the TAA.¹⁹
- 2) The person refuses or fails (without reasonable excuse) to comply with a requirement lawfully made in connection with an investigation. Examples include:
 - a. refusing to comply with a request to answer specified questions or provide information in the person's possession or control; or
 - b. refusing to comply with a requirement that a person attend for interview before an authorised officer.
- 3) The person hinders or obstructs an authorised officer exercising functions in the course of, or in connection with the investigation. Examples include:
 - a. hindering the authorised officer from exercising the power to enter or remain on premises where lawfully permitted to do so by either obstructing such entry or attempting to force the officer to leave;
 - b. obstructing the authorised officer from searching the premises or photographing or filming anything on the premises; or
 - c. refusing to comply with a request for the person to operate equipment or facilities on the premises or to give the officer any translation, code, password or other information necessary to gain access to or to interpret and understand any relevant material located or obtained by the officer in the course of the investigation.
- 4) The person does anything else to hinder or obstruct an investigation.

Discretion to reduce penalty tax where taxpayer makes a full disclosure or cooperates with TRO

TRO has the discretion to reduce penalty tax by up to:

- 1) **20 per cent**, if TRO conducts an investigation of the tax default and the taxpayer cooperates fully with the investigation;²⁰ and
- 2) **80 per cent**, if TRO has not commenced an investigation of the tax default and the taxpayer's full and immediate disclosure of the extent of the tax default avoids the need for an investigation.²¹

If the taxpayer is liable to penalty tax because of deliberate concealment or suppression of information, there is no reduction of penalty tax.²²

¹⁸ Section 41(4) of the TAA.

¹⁹ See Part 8 of the TAA.

²⁰ Section 41(3)(a) of the TAA.

²¹ Section 41(3)(b) of the TAA.

Full and immediate disclosure

The purpose of significantly reducing penalty tax where the taxpayer makes a full and immediate disclosure is to encourage taxpayers who discover their tax default independently of investigation by TRO to come forward and disclose their liability.

To qualify for a reduction in penalty tax of up to 80 per cent, the following three elements must be satisfied.

- 1) The taxpayer must make a written disclosure of the extent of the tax default.
- 2) The disclosure must occur before TRO has commenced an investigation of the tax default.
- 3) The disclosure must avoid the need for an investigation.

A written disclosure must provide TRO with sufficient information to determine the nature and extent of the tax default to issue an assessment. The disclosure must state the identity of the taxpayer or group of taxpayers, the nature and period of the tax default and an explanation of how the tax default occurred.

TRO will generally apply the reduction where a full and immediate disclosure occurs before the taxpayer or a member of the taxpayer's group is contacted by TRO. This includes:

- 1) contact by way of a direct inquiry with, or request for information from, the taxpayer or a third party;
- 2) investigation review or assessment under a taxation law,

but does not include instances where TRO has commenced an investigation by undertaking data matching exercises or other indirect examination of publicly available information of the taxpayer (such as the taxpayer's website or the public announcements of a listed company).

Full cooperation with an investigation

Full cooperation with an investigation includes:

- 1) responding promptly to requests for information or other relevant material and volunteering relevant information where it is not requested;
- 2) consenting to authorised officers entering premises for the purposes of an authorised investigation;
- 3) making records accessible to authorised officers (including the provision of appropriate facilities for the copying of records); and
- 4) being available for interview or allowing access to employees for interview.

Penalty tax on tax defaults that are 'mere' late payment of tax paid on a periodic basis (returns-based taxes)

Where tax is paid on a returns basis, such as payroll tax, TRO will generally exercise the discretion under section 44 of the TAA to reduce the amount of penalty tax payable for tax defaults that are 'mere' late payments of these periodic payments.

Where there is no information before TRO that the late payment is a result of an intentional disregard of the taxation law and the taxpayer does not notify TRO that the late payment arose from circumstances beyond the control of the taxpayer, TRO will generally remit the amount of penalty tax payable on a late payment on the following basis.

- 1) Where the taxpayer has not made any other late payment in the 12 months preceding that late payment – the penalty tax will generally be reduced to nil and only interest will be payable in respect of the tax default.
- 2) Where the taxpayer has previously made a late payment in the 12 months preceding that late payment – the penalty tax will generally be reduced to 5 per cent of the amount of the tax default and interest will be imposed as normal.
- 3) Where the taxpayer has made two or more late payments in the 12 months preceding that late payment, there will be no reduction of the penalty tax payable. However, TRO will determine the penalty tax payable in the normal manner.

In the circumstance of multiple late payments, it is considered unlikely that the taxpayer will have taken reasonable care to comply with the taxation law, so the penalty tax will generally be at least 25 per cent of the tax default and may be greater if TRO determines that there has been an intentional disregard of the taxation law.

The penalty will be remitted to nil where the taxpayer can demonstrate that tax has been paid in error to the revenue authority of another state or territory and it was paid on or before its due date for payment in the Territory.

Interest and penalty tax on tax defaults for stamp duty lodgements where the taxpayer makes a payment of estimated tax

Where an assessment will not be issued within the 60-day lodgement and payment period, a taxpayer should, in addition to the practices set out above under the heading 'Reasonable care to comply with the taxation laws' reasonably estimate the amount of stamp duty payable and pay that amount within the 60-day period.

Where that estimate is made on a reasonable basis and the taxpayer pays that amount within the 60-day period, interest and penalty tax payable on a tax default arising out of an underpayment of the tax actually assessed will generally be reduced to nil, provided that the amount of the tax default is paid within the time set out in the assessment.

Where a taxpayer does not reasonably estimate and pay the liability, TRO will determine the amount of interest and penalty tax having regard to the penalty scheme as set out in this guideline.

Matrix of penalty tax based on culpability of taxpayer

PENALTY CATEGORY	BASE PENALTY TAX	FULL AND IMMEDIATE DISCLOSURE BEFORE INVESTIGATION	FULL COOPERATION WITH INVESTIGATION
Circumstances beyond the control of the taxpayer where the taxpayer has taken reasonable steps to mitigate the tax default	0%	0%	0%
Reasonable care taken to comply with the taxation law	10%	2%	8%
Default penalty	25%	5%	20%
Intentional disregard of a taxation law	75%	15%	60%
Concealment or hindering an investigation	75%	n/a	n/a
Intentional disregard of a taxation law <u>and</u> concealment or hindering an investigation	95%	n/a	n/a

Commissioner's Guideline CG-GEN-001, which sets out information on the revenue publication system, is incorporated into and is to be read as one with this Guideline. All Circulars and Guidelines are available from TRO's website.

Date of effect

This version of the Guideline takes effect from 1 January 2008.



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COMMISSIONER OF TERRITORY REVENUE

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