

## Part B The Collection of Taxation Debts

### 6 ESTIMATING A LIABILITY

*The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted as like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.*

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#### 6.1 PURPOSE

6.1.1 This chapter deals with the Commissioner's ability to:

- estimate liabilities arising under remittance provisions; and
- recover the amount of the estimate.

#### 6.2 LEGISLATION

6.2.1 In Division 8 of Pt VI of the *Income Tax Assessment Act 1936* (ITAA 1936), section 222AGA enables the Commissioner to take prompt and effective action to recover amounts not remitted, by estimating those amounts when the time for payment has passed.

6.2.2 For amounts deducted or withheld from payments made **before 1 July 2000**, the remittance provisions of the ITAA 1936 to which the estimate provisions relate are:

- Division 1AAA - sections 220AAE, 220AAM and 220AAR apply to large, medium and small remitters respectively, and relate to reportable payments, tax instalment deductions and prescribed payment amounts;
- Division 3B - subsections 221YH(1) and (1A) (natural resource payments and unattributed income); and
- Division 4 - subsection 221YN(1) (withholding tax).

6.2.3 **From 1 July 2000**, a pay as you go (PAYG) withholding system replaced the prescribed payment system (PPS) and reportable payment system (RPS) and incorporated the main elements of the pay as you earn (PAYE) system. The remaining withholding systems also became part of the PAYG system. PAYG provisions are located in Part 2-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). It is important to note, however, that the estimate provisions do not apply to reporting periods in the financial year ended 30 June 2001.

6.2.4 Division 13 of Schedule 1 to the TAA applies the PAYG withholding provisions to personal services income attributed to an individual under subsection 86-15 (1) of ITAA 1997. These measures applied from 1 July 2000. However there were transitional arrangements for contractors who were in the PPS tax system. For these contractors, the measures did not apply until 1 July 2002.

6.2.5 Division 14 of Schedule 1 to the TAA applies the PAYG withholding provisions to situations where non-cash benefits are provided.

- 6.2.6 Division 8 of ITAA 1936 which provides for prompt recovery through estimates and payment agreements was amended to include Part 2-5 of Schedule 1 to the TAA in relation to PAYG amounts not remitted as required.
- 6.2.7 Section 16-150 of Schedule 1 to the TAA requires an entity who must pay an amount to the Commissioner under Division 12, 13 or 14 to notify the Commissioner of that amount in the 'approved form' on or before the day on which the amount is due to be paid.
- 6.2.8 Sections 220AAZA, 221YHZJ and 221YR of ITAA 1936, and Part 4-15 of Schedule 1 to the TAA provide for the recovery of amounts payable under Division 8.

### **6.3 INTRODUCTION**

- 6.3.1 The ability to estimate a liability provides a method to deal with cases quickly, particularly where debtors fail to notify amounts and there is a subsequent lack of cooperation in responding to requests for information, or where there are other problems in establishing debts. However, it is still desirable to establish correct amounts outstanding whenever that can be done expeditiously.
- 6.3.2 The failure to notify an amount payable and the non-receipt of remittances for a deduction period may be the first indicators that a debtor has become liable under a remittance provision and has failed to remit amounts deducted or withheld.
- 6.3.3 When the Commissioner makes an estimate of an unremitted amount, he must send written notice of the estimate to the debtor who made the deduction and failed to remit the deducted amount. The notice can contain more than one estimate, but will only relate to one liability type (if there is more than one liability type, a separate estimate notice will be prepared).
- 6.3.4 The Commissioner's notice must advise that the estimate:
- (i) will be reduced if the debtor provides a statutory declaration specifying the amount of the liability to which the estimate relates and the unpaid amount of that liability; or
  - (ii) will be revoked if the debtor declares that no deductions were made in the period or periods covered in the notice
- provided the statutory declaration is given to the Commissioner within 7 days (or such longer period allowed by the Commissioner).
- 6.3.5 If a statutory declaration is completed by an appropriate person, the estimate is automatically reduced or revoked to reflect the details provided in the declaration that discloses a reduced liability. The Commissioner may also decide of his own volition to reduce or revoke an estimate. This could be based on a statutory declaration received out of time or other documentation signed by the debtor. If the Commissioner does this, written notice of the reduction or revocation must be sent to the debtor to whom the notice of estimate was sent.
- 6.3.6 The Commissioner can recover the amount of an estimate and the additional charges applying to the estimate. An estimate is provable in bankruptcy or liquidation. The Commissioner is able to 'prove' for an estimate unless he has already lodged a proof of debt for the actual

liability. If the Commissioner lodges a proof of debt for an estimate and later establishes the actual liability, the proof of debt must be amended so that the actual liability is reflected.

- 6.3.7 A debtor against whom the Commissioner is seeking to recover the amount of an estimate has the right to defend those proceedings by filing an affidavit to prove that:
- (i) the underlying liability never existed; or
  - (ii) the underlying liability has been discharged; or
  - (iii) the underlying liability is less than the estimate.
- 6.3.8 The affidavit will have the same effect as a statutory declaration and will automatically revoke the estimate, reduce the unpaid amount of the estimate to nil or result in the Commissioner only being entitled to judgment for an amount equal to the unpaid amount of the underlying liability. If this last result occurs, the Commissioner will not be able to recover the balance of the estimate.
- 6.3.9 If the Commissioner sues for recovery of an estimate and the debtor files an affidavit which details the actual liability, the Commissioner is under no obligation to cease one proceeding and start a new proceeding to recover the actual liability. The Commissioner can simply proceed to obtain judgment for that part of the estimate that equals the actual unpaid liability.
- 6.3.10 If the estimated liability is paid and is then found to be less than the actual liability, the Commissioner can take recovery proceedings to recover the balance of the actual liability.
- 6.3.11 If the Commissioner recovers an estimate and later establishes that the actual liability is less than the estimated amount, the Commissioner must refund the excess or apply it against any other liabilities of the debtor to the Commonwealth under any laws administered by the Commissioner and then refund any excess.

## **6.4 POLICY**

- 6.4.1 The Commissioner will use the power to estimate liabilities and take proceedings to recover the estimated amounts whenever it is considered that the procedure will assist in the efficient collection of unpaid debts. The making of an estimate is not seen as a measure of last resort but as a measure which is to be used routinely where it will enhance the speed and/or efficiency of collection activity.
- 6.4.2 The Commissioner will make an estimate and issue a notice in circumstances where there is reason to suspect there is a liability to deduct/withhold and remit and:
- (i) there is difficulty in establishing that liability expeditiously, for whatever reason, such as:
    - there is a history of a failure to notify liabilities as required by the law and there is no reason or evidence to believe that a liability has not been incurred;
    - attempts to establish debts are met with a lack of cooperation, for example, phone calls are not returned, or there is a refusal to provide details of amounts deducted/withheld when

requested, or there are continuing delays or excuses for not making details available;

- a debtor refuses access to, or to cooperate with, field officers;
  - a debtor continually breaks appointments or refuses to meet with Tax officers;
  - there is a history of late payment and there is no reason or evidence to believe that a liability has not been incurred; and/or
  - a debtor claims that no deductions have been made but there is evidence of further deductions having in fact been made;
- (ii) there is a need to issue a statutory demand or summons/writ as quickly as possible to recover the whole of a debt and only part of the debt has been established;
- (iii) there is a need to 'prove' for a total debt in a bankruptcy/liquidation when only part of a debt has been established; or
- (iv) there is a desire, for the sake of completeness, to incorporate a total liability in a penalty notice to directors.

- 6.4.3 The Commissioner will have regard to anything he thinks relevant for the purposes of making an estimate and will be influenced by the pattern of remittances in the past and the particular circumstances in each case. If there are a number of remittances outstanding for a number of periods, there will be one estimate for each period in which deductions are made.
- 6.4.4 Whenever an estimate notice issues, additional charges for late payment/general interest charge (GIC) will be imposed at the rate prescribed by legislation. Any request for remission of additional charges/GIC will be considered under normal remission guidelines.
- 6.4.5 The Commissioner only seeks to recover the amounts actually deducted or withheld (and the additional charges for late payment/accrued GIC that apply). The Commissioner is prepared to consider extending the time for lodgment of the statutory declaration where a debtor can satisfy the Commissioner that it cannot be completed or lodged within the required time.
- 6.4.6 Payment of an estimated amount does not relieve a debtor of the obligation to pay amounts that were actually deducted in excess of the estimate. Where a debtor pays an estimated liability without disclosing the amount actually deducted, the Commissioner will, by audit activity or other means, establish the debtor's actual liability and where necessary, pursue recovery of any amounts still owing.
- 6.4.7 The Commissioner will not continue to send estimate notices to the same debtor on an ongoing basis without follow up action. Bankruptcy/insolvency action will be commenced to recover actual and/or estimated debts as a matter of urgency in cases where a debtor continually fails to meet obligations to remit. Action will also be taken to prosecute for breaches of the law.
- 6.4.8 The ability of the Commissioner, in certain circumstances, to achieve lodgment of an 'approved form' and bring to account 'tax-related liabilities' through the raising of default assessments and estimates is further discussed in chapter 'Default Assessments'.

## 6.5 TERMS USED

- 6.5.1 'Approved form' takes the meaning set out subsection 388-50(1) of the TAA, and includes requirements concerning declarations, full completion of the form, and the manner in which the form must be given. The Commissioner may combine in the same approved form more than one return, notice, statement or other document (for example, the activity statement).
- 6.5.2 'Non-cash benefit' is property or services in any form except money. If a non-cash benefit is dealt with by or on behalf of an entity, or is provided or dealt with as an entity directs, the benefit is taken to be provided to the entity.
- 6.5.3 'Personal services income' is income that is mainly a reward for the personal efforts or skills of an individual. Alienation of personal services income occurs when the services of an individual are provided through an interposed entity rather than directly by the individual who performs the services. As a result of measures introduced from 1 July 2000, PAYG obligations arise in respect of the personal services income that is to be included in an individual's personal assessable income and there are limitations to deductions that can be claimed.
- 6.5.4 'Remittance provisions' are those provisions of the *Income Tax Assessment Act 1936* (ITAA 1936) and TAA that require a debtor to remit:

### **before 1 July 2000**

- deductions made from reportable payments;
- tax instalment deductions made from payments of salary and wages;
- deductions from prescribed payments;
- deductions made from natural resource payments and unattributed income payments; and
- dividend, interest and royalty withholding taxes.

### **on or after 1 July 2000**

- amounts withheld under the PAYG withholding system;
- 6.5.5 'Underlying liability' in relation to an estimate means the liability to which the estimate relates.
- 6.5.6 'Withholding payment' means:
- (a) a payment from which an amount must be withheld under Division 12 of Schedule 1 to the TAA; or
  - (b) an alienated personal services payment in respect of which Division 13 of Schedule 1 to the TAA requires an amount to be paid to the Commissioner; or
  - (c) a non-cash benefit in respect of which Division 14 of Schedule 1 to the TAA requires an amount to be paid to the Commissioner.

