

**Part B The Collection of Taxation Debts****12 'GARNISHEE' NOTICES**

*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 like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.*

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**12.1 PURPOSE**

## 12.1.1 This chapter:

- deals with the Commissioner's powers to recover tax debts from third parties owing money to, or holding money for, the Tax Office debtor; and
- sets out the circumstances when those powers will be used.

**12.2 LEGISLATION**12.2.1 Generic collection and recovery rules were introduced as a means of streamlining administrative processes. In Part 4-15 of Schedule 1 to the *Taxation Administration Act 1953* (TAA), these rules standardise the 'garnishee' provisions for recovering tax debts from third parties. This standardisation introduces administrative efficiencies, as only a single garnishee notice needs to be served on a particular recipient, rather than a separate notice for each tax-related liability.

## 12.2.2 From 1 July 2000, subdivision 260-A (sections 260-5 to 260-20) of the TAA, effectively replaced the following garnishee provisions:

- section 218 *Income Tax Assessment Act 1936* (ITAA 1936) in relation to income tax, provisional tax (including quarterly provisional tax), company instalments, tax instalment deductions, director penalty amounts, estimates under section 222AGA, dividend interest and royalty withholding taxes, prescribed payments, additional charges, fines, costs and reparation orders;
- section 74 *Sales Tax Assessment Act 1992* (STAA 1992) in relation to sales tax and associated additional charges, fines and costs;
- section 99 *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986) in relation to fringe benefits tax and additional charges, fines and costs;
- section 56 *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992) in relation to a superannuation guarantee charge and additional charges;
- section 40A *Superannuation Contributions Tax (Assessment & Collection) Act 1997* (SCT(A&C)A 1997) in relation to superannuation contributions, tax payable by a superannuation provider, fines and costs;
- section 35 *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Act 1997*

[SCT(CP)(A&C)A 1997] in relation to superannuation payable by members of constitutionally protected superannuation funds, fines and costs; and

- section 28A *Termination Payments Tax (Assessment & Collection) Act 1997* [TPT(A&C)A 1997] in relation to termination payments tax and additional charges, fines and costs.

12.2.3 The regime introduced new terms to replace the old. These are as follows:

- 'Debtor' replaces 'taxpayer' or 'employer';
- 'Third Party' replaces 'Person'; and
- 'Debt' refers to amounts recoverable under the Division which effectively includes all types of taxes, additional charges for late payment, judgment debts, reparation orders, costs etc (which includes essentially all amounts previously defined under the ITAA 1936 as 'Tax' and under the SGAA 1992 as 'Superannuation Guarantee Charge' etc).

12.2.4 The rules apply from 1 July 2000 to all tax-related liabilities, which exist on 1 July 2000, whether or not those liabilities had arisen before, on or after that day.

12.2.5 'Tax-related liabilities' is defined in section 255-10 of the TAA as:

a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable).

12.2.6 'Taxation Law' is defined in the *Income Tax Assessment Act 1997* (ITAA 1997) as:

- (a) an Act of which the Commissioner has general administration; or
- (b) regulations under such an Act.

12.2.7 Accordingly, the generic garnishee provisions apply to all debts arising under an Act of which the Commissioner has general administration.

12.2.8 The broad definition of tax-related liabilities now includes the following amounts which in the past were not capable of being garnisheed:

- an RBA deficit debt; and
- general interest charge payable in respect of unpaid Failure to Notify, Late Reconciliation Statement or Failure to Lodge on Time penalties; and

12.2.9 Non-tax debts or administrative overpayments which arose after 1 July 1999 (for example, incorrect refunds or overpayments arising from administrative errors). The table of tax related-liabilities provided in section 250-10 in Schedule 1 to the TAA was amended to include the shortfall interest charge which applies to shortfalls of income tax for the 2004-05 and later income years that arise when an income tax assessment is amended increasing the liability.

12.2.10 The enactment of section 260-5 of the TAA is in essence a standardisation of the pre-existing garnishee provisions contained in the taxing acts mentioned above. Whilst the language and layout of the new

legislation is different, it is considered that no change was intended to be made to the law. Accordingly, the Commissioner's discretion to 'at any time, or from time to time, amend or revoke any such notice, or extend the time for making any payment in pursuance of the notice' as expressed under sub-section 218(1) of the ITAA 1936 remains.

## 12.3 INTRODUCTION

- 12.3.1 The Commissioner is empowered to collect tax debts from third parties who owe, hold money for or who may hold money for, a Tax Office debtor without having to proceed to judgment and the issue of execution. The notices the Commissioner can issue are similar to garnishee orders that any creditor can obtain through the court processes.
- 12.3.2 The effect of a valid notice is to charge a debt owed to the Tax Office debtor, preventing payment to the Tax Office debtor and requiring payment to the Commissioner. Any third party who pays money to the Commissioner as required by a notice is taken to have been authorised by the debtor or any other person who is entitled to all or part of that amount. The third party is indemnified for any money paid to the Commissioner.
- 12.3.3 The service of a 'garnishee' notice creates a statutory charge on all money due (from the third party on whom the notice is served) to the Tax Office debtor to the extent of the liability. The charge created by the service of the notice does not rank ahead of any existing fixed charge. However, it will rank ahead of floating charges that have not yet crystallised at the time the notice was served. (*Clyne & Ors v. DFC of T* 81 ATC 4429; *Tricontinental Corporation Ltd v. FC of T* 87 ATC 4454; *Elric Pty Ltd v. Taylor* 88 ATC 4578; *DFC of T v Donnelly & Ors* 89 ATC 5071). Unlike ordinary charges, the statutory charge created by the service of a 'garnishee' notice is not required by law to be registered with the Australian Securities and Investments Commission (*Goodin & Anor v C of T. & Anor* [2002] VSC 241).
- 12.3.4 'Garnishee' notices confer upon the Commissioner not merely the negative right to prevent the Tax Office debtor from accepting payment of the debt or disposing of it, but positive rights. 'Garnishee' notices issued by the Commissioner have a striking similarity to a garnishee order made by the Court and, thus, for the purposes of bankruptcy law, the effect of a 'garnishee' notice issued by the Commissioner is to charge the debt owed to the Tax Office debtor preventing the debtor from paying it and obliging him to pay it to the Commissioner. Accordingly, where an effective 'garnishee' notice has been served and a debt is due by the recipient to the Tax Office debtor, the charging of that debt confers upon the Commissioner the status of a secured creditor for the purposes of insolvency law. (The latter requires consideration when voting at creditors meetings) (*DFC of T v. Donnelly & Ors* 89 ATC 5071; *Macquarie Health Corp Ltd v. FC of T* 2000 ATC 4015).
- 12.3.5 For insolvency law purposes, a 'garnishee' notice will only be effective if it is served **before** the date of commencement of bankruptcy or winding up of the Tax Office debtor.

- (i) In addition to debts due to the Tax Office debtor ('the available money') at the time of service, the notice will also charge, in the case of a Tax Office debtor who is an individual bankrupt, any debts coming into existence after the date of service of the notice but before the date of bankruptcy.
- (ii) In the case of a Tax Office debtor who is a company, any available money coming into existence after the date of service of the notice but before the date of commencement of the winding-up will be charged by the notice. However, a notice will not charge any available money which comes into existence after the commencement of the winding-up (subsection 468(4) of the *Corporations Act 2001*).
- (iii) Payments received under effective 'garnishee' notices are not characterised as voidable transactions or unfair preferences and as such need not be disgorged by the Commissioner. (*DFC of T v. Donnelly & Ors* 89 ATC 5071; *Macquarie Health Corp Ltd v. FC of T* 2000 ATC 4015). (See policy chapter entitled 'Voidable transactions' for further details).

12.3.6 The Commissioner can serve 'garnishee' notices on the Commonwealth and State Government bodies pursuant to section 260-10 of the TAA. For example, the Commissioner can attach money seized and held by Excise investigators. Similarly, Bounties and Grants payable to a debtor by the Commonwealth or State may be attached by a 'garnishee notice'. However, due consideration will be given to the potential impact that such action may have on the viability of the debtor's business.

12.3.7 The Commissioner can also take action against a third party who refuses or fails to comply with a 'garnishee' notice. A third party convicted for not complying with the notice can be ordered to pay an amount equal to 20 penalty units and may even be ordered to pay to the Commissioner the amount sought by the notice. In addition, the Commissioner could alternatively commence a civil action to sue the third party for the amount of money they have failed to pay pursuant to the notice.

12.3.8 The requirements are that:

- (i) 'garnishee' notices must be in writing;
- (ii) a copy of the notice must be forwarded to the debtor;
- (iii) the notice must be directed to a third party who meets one or more of the specifications within subsection 260-5 (3) of Schedule 1 to the TAA (a notice must be explicit and strictly within the terms of the relevant provision, otherwise the third party subject to the notice may be in doubt as to the duty under which the notice places them and this could render the notice invalid). Generally, the Commissioner will use composite notices, which cover all of the relevant circumstances set out at subsection 260-5 (3). However, the Commissioner may choose to issue a separate notice in relation to each of the relevant circumstances foreshadowed in subsection 260-5 (3);

- (iv) a notice must require payment either immediately after service or by a specified date or within a specified timeframe. A notice must require payment of such monies as is sufficient to pay the debt due to the Commissioner. In this context 'due' does not mean due and payable. The Commissioner can issue a 'garnishee' notice even though the payable date has not been reached. Once issued and served, the notice operates to prevent a subsequent dealing with the amount that may prevent compliance with the notice; and
- (v) 'garnishee' notices can seek payment of either a lump sum or payment by instalments (as a percentage or a fixed amount). If the notice requires payment by instalments, the amounts required to be deducted must be reasonable having regard to the particular circumstances as they exist at the time. The amount to be deducted from the gross salary or wages of an employee whose only source of income is the salary or wages subject to the 'garnishee' should not usually exceed 30 cents in the dollar.

12.3.9 The following are some restrictions on the use of 'garnishee' notices:

- (i) 'garnishee' notices cannot attach anything other than money. The 'garnishee' provisions are concerned with a money obligation which exists where a debtor is bound to pay a sum certain or a liquidated sum of money. For example, credit balances at a bank may clearly constitute 'money'. Conversely, non-money assets such as choses in action, chattels, real properties, cheques, traveller's cheques, gold and other commodities, held by the recipient of a notice cannot be attached until such time that they are negotiated, redeemed or realised and thereafter converted into 'money'. Similarly, 'garnishee' notices can only be effective in regard to 'money' held in Australian currency. Unlike court garnishees, section 218 (the precursor to section 260-5) and its equivalents do not require a recipient of such notices to convert foreign currency into Australian currency. (*Conley & Anor v. DFC of T & Anor* 98 ATC 4161);
- (ii) 'garnishee' notices will be effective in attaching monies held in a joint bank account where the taxation liability sought to be recovered is the joint and several liability of each person in whose name the joint bank account is held (eg a partnership liability for PAYG, GST & FBT etc.). However, 'garnishee' notices may not succeed if issued to attach monies held in a joint account where the amount sought to be recovered is merely owed individually by one of the account holders, such as a personal taxation liability of the Tax Office debtor (eg income tax). This would be so even if each person in whose name the joint bank account is held has a personal taxation liability owing to the Commissioner. The reason why 'garnishee' notices may fail in these circumstances is that it could be argued that no money is due by the bank to any one of the Tax Office debtors individually, nor held by the bank for any one of those Tax Office debtors individually. The question revolves around whether the Tax Office debtors are owed money jointly and severally, rather than jointly (*DFC of T v. Westpac Savings Bank Ltd* 87 ATC 4346);

- (iii) a 'garnishee' notice may entitle the Commissioner to receive payment in priority to certain earlier secured creditors. However, the Commissioner will not always seek to enforce that entitlement. For instance, a 'garnishee' notice served on the purchaser of mortgaged land or property will be subject to the Commissioner's discretion as to whether the 'garnishee' should attach that part of the purchase price which is necessary to pay out the mortgage. The 'garnishee' places an obligation on the purchaser of the encumbered asset which supersedes the purchaser's obligation or discretion to pay money to a secured creditor in accordance with the debtor's instructions. Generally, where a genuine mortgage is concerned, the Commissioner will exercise his discretion and only require the notice to apply to that part of the purchase price to be paid to the vendor or as the vendor directs after the mortgage has been discharged. However, where there is evidence that the purpose of the mortgage (whether registered or unregistered) was to defeat the Commissioner's recovery powers, the Commissioner will require payment of all or part of the purchase price from the purchaser (see TR98/18). Note, also, that the Commissioner may issue a garnishee to a receiver in order to attach any surplus of moneys that would otherwise be payable to the mortgagor;
- (iv) money placed in an account which is in overdraft cannot be attached by a 'garnishee' notice, as it is money due to the bank, rather than money due by the bank to the debtor or held on account of the debtor;
- (v) 'garnishee' notices should not be served on a court (or Clerk of Petty sessions who holds money on behalf of the court). In *Clyne v. DFC of T 83 ATC 4001*, it was held that a court is not a person within the meaning of the former 'garnishee' provisions. Whilst the expression 'person' has been replaced by 'third party' in the generic recovery provisions, there was no intention to enlarge the definition of the recipient of a notice to include a court;
- (vi) a 'garnishee' notice in respect of any tax-related liabilities, other than superannuation contributions surcharge, is not effective against a superannuation fund until the debtor-member's benefits are payable to the debtor-member under the rules of the fund (eg the debtor-member retires or dies). Collection of superannuation contributions surcharge is dealt with more specifically by the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997*. Any surcharge assessed to be payable in respect of a superannuation fund member is payable by the superannuation provider that holds surchargeable contributions when an assessment of the surcharge on those contributions is made. If, however, the superannuation provider is an unfunded defined benefit superannuation provider, its liability to pay a surcharge debit account for a member is deferred to the time when a lump sum, pension, annuity or payment split becomes payable to the member. If the superannuation provider is a constitutionally protected superannuation fund, the surcharge is generally payable by the member;

- (vii) a 'garnishee' notice should not be served in relation to a pre-sequestration debt once a debtor is made bankrupt, or when the company is wound up. Any 'garnishee' notice in place prior to the sequestration or liquidation of a Tax Office debtor will not attach any debts becoming due to the Tax Office debtor after sequestration or liquidation. For example, where a 'garnishee' notice has been served on an employer to attach a portion of salary and wages of a Tax Office debtor who is subsequently made bankrupt, the employer should be immediately advised that no payment is required by the Commissioner after the date of bankruptcy;
- (viii) 'garnishee' notices cannot be used to attach benefits payable under defence forces retirement or death benefits legislation;
- (ix) 'garnishee' notices are generally not effective against the proceeds of life insurance policies until the person (whose life is insured) dies and monies become payable under the policies;
- (x) a 'garnishee' notice is ineffective against the Registrar of Commonwealth Inscribed Stock or Bearer Securities, as the Registrar is not a 'third party' on whom such notices can be lawfully and effectively served;
- (xi) 'garnishee' notices cannot be applied to trust funds held by a solicitor once such monies become charged (by a debt from the debtor to the solicitor created by the taxing of a bill of costs or by the delivery of the bill of costs to the debtor where the debtor does not object to the bill) *Gilshenan & Luton v. FC of T* 83 ATC 4758; and,
- (xii) 'garnishee' notices cannot be used to attach shares held by a debtor in either a private or public company until such shares are sold and converted to money in the hands of a third party. However, a 'garnishee' notice served on the company in which a debtor holds shares would entitle the Commissioner to payment of any dividend payable to the debtor in respect of such shares.

## **12.4 POLICY**

- 12.4.1 Collection through third parties by serving a 'garnishee' notice is often an efficient and cost effective way of obtaining payment of an outstanding debt, particularly in cases where the cost of initiating legal collection activity may seem prohibitive when compared to the size of the debt.
- 12.4.2 The Commissioner will use 'garnishee' notices in circumstances where that action is considered to be the most effective method of obtaining payment of a debt. 'Garnishee' notices may issue prior to the due date for payment of a debt, but not before notice of the debt has been served on the debtor, where feasible (*Clyne v. DFC of T* 81 ATC 4429).
- 12.4.3 Any decision to issue a 'garnishee' notice needs to be based on the best information available. The Commissioner can legally utilise all the data in his possession to determine whether a particular case lends itself to the garnishee process and to ascertain the source of available funds.
- 12.4.4 Some matters that may be taken into account when considering whether to issue a 'garnishee' notice are:

- (i) the financial position of the debtor and the steps taken to make payment in the shortest possible timeframe having regard to the particular circumstances of the debtor;
- (ii) the extent of any other debts owed by the debtor;
- (iii) whether the revenue is placed at risk because of the actions of the debtor, such as the debtor making payment to other creditors in preference to paying the Commissioner;
- (iv) the likely implications of issuing a notice on a debtor's ability to provide for a family or to maintain the viability of a business;
- (v) the quantum of the amount to be forwarded if the notice is looking to a regular contribution (the amount to be deducted from gross salary or wages should not usually exceed 30 cents in the dollar where the debtor's only income is that salary or wage). However, the Commissioner is not restricted to this percentage and may seek a higher percentage of the money where the debtor's financial position indicates that it would be fair and equitable to do so;
- (vi) whether the debtor has requested the Commissioner to issue a garnishee notice.

12.4.5 'Garnishee' notices will only be served on the following entities in circumstances where there is no more-suitable alternative action available:

- (i) the Health Insurance Commission in respect of 'pay doctor cheques'. This action may adversely impact upon those patients whose doctors may have had payments stopped on their cheques. 'Pay doctor cheques' are basically Medicare benefits which are drawn in favour of the practitioner who has rendered the service;
- (ii) Centrelink and the Department of Veterans Affairs in relation to pensions and benefits paid to debtors (unless requested by the debtor); and
- (iii) a bank, to the extent that the notice will have an impact on a "supervised account". The Commissioner recognises the special nature of supervised accounts created under Division 4B of Part VI of the *Bankruptcy Act 1966* for the purpose of collecting income contributions. However, as stated in subsection 139ZIG(8) of that Act, the Commissioner's power in relation to using garnishee action against such accounts is not affected. Due consideration will be given to representations from bankruptcy trustees in cases where the use of garnishee action by the Commissioner is perceived to have a detrimental effect on the ability of the trustee to collect income contributions.

12.4.6 The 'garnishee' process is an important power given by Parliament to assist the Commissioner in recovering unpaid tax. Care needs to be taken to ensure that this recovery power is not abused, nor perceived as being abused. For example:

- the power should not be used to prejudice to a significant degree the business of a debtor who is pursuing avenues of appeal against assessments that raised the debt (*Edelsten v. Wilcox* 88 ATC 4484 at 4495);

- a 'garnishee' can issue to a firm of solicitors for monies held in a trust account for fees not yet due (*Gilshenan & Luton v. FC of T* 83 ATC 4758) and not subject to a solicitor's lien (*DFC of T v. GIO of NSW* 93 ATC 4901 at 4913), though care may need to be exercised if the funds proposed to be 'garnisheed' are covered by the Proceeds of Crime legislation (and in such a situation, consult with the Technical Leadership and Advice or ATO Fraud);
- a 'garnishee' notice may issue before the due date for payment of a debt if notice of the debt has been served on the debtor (eg *Heath v. DFC of T* 95 ATC 4430);
- a 'garnishee' notice should not be served in respect of a pre-sequestration debt of a discharged bankrupt. In the GIO case, *supra*, where the money became due to the Tax Office debtor pursuant to a judgment for damages, the Court held that upon discharge there was no longer a debt due to the Commissioner in respect of which the 'garnishee' notice could operate. The same outcome would be expected if the money had become available after bankruptcy but before discharge where the Commissioner's right to recover the tax debt due would have converted to a right to prove in the bankrupt's estate. (See *Clyne v. DFC (Cth)* (1984) 154 CLR 589 at 594-595; *Knight v. DFC* 87 ATC 4970). From that point of view, the principles decided in *DFC of T v. Steele* 87 ATC 5050 and *Kerrison v. Acting DFC of T* 88 ATC 4476 may no longer be applicable.
- a 'garnishee' notice should not be issued after a Tax Office debtor has signed an authority pursuant to section 188 of the *Bankruptcy Act 1966* or an Administrator has been appointed to the Tax Office debtor company pursuant to Part 5.3A of the *Corporations Act 2001*. Similarly, where a 'garnishee' notice is already in place when the aforementioned events occur, the Commissioner would, under normal circumstances, revoke such notices. However, the Commissioner may consider serving a 'garnishee' notice or leaving one in place where the existence of other debts or the conduct of the administration is open to question.
- the Commissioner should vary the rate at which monies are withheld under a garnishee if the debtor advises that his income is already subject to a pre-existing court garnishee or a Child Support Agency garnishee. Assuming that other recovery options remain inappropriate, allowance should be made for ordinary living expenses in varying the rate (*Edelsten* *supra* at page 4496); and
- an effective notice which charges debts due by the recipient to the Tax Office debtor elevates the Commissioner to the status of secured creditor. This means that the Tax Office would not be required by law to disgorge monies collected under such a notice in the event that the Tax Office debtor becomes bankrupt or is liquidated. Accordingly, where the Tax Office debtor's financial situation is known to the Commissioner, serious consideration needs to be given at the outset to any adverse consequences that a garnishee notice may have on the Tax Office debtor's business as well as on other creditors.

12.4.7 The Commissioner will consider any reasonable request from a debtor to either withdraw, or vary the requirements of, a 'garnishee' notice, provided the debtor makes alternative arrangements for payment that are suitable to the Commissioner. A notice will be withdrawn or varied as required by legislation.

12.4.8 The nature of 'garnishee' notices requires very close attention to detail. A notice will be defective if incorrect details are included. For example, the name of the financial institution shown on the notice must be the full registered name of that corporate legal entity. No variation from the registered name of the company (eg an abbreviation) is permitted.

12.4.9 Care needs to be taken when addressing 'garnishee' notices to financial institutions. Most financial institutions are part of a group of companies, with different subsidiaries specialising in, for example, the short term money market, term investments, 'normal' savings and trading banking etc. A notice to one company (eg the company undertaking the savings and trading banking activities, and the company by which the financial institution is commonly known) does not mean that it is obliged by law to carry out searches with any other company (eg the finance or investment company where the debtor may have deposits) within the same corporate group.

12.4.10 Most of the financial institutions have centralised their core business functions and have provided contact points for service of notices. Accordingly, the practice of serving notices on the local branch of a financial institution should be discontinued as the Commissioner no longer expects the local branch to undertake searching procedures where a central contact point has been provided to the Commissioner. To confirm whether a particular financial institution has provided a list of contact points for service of notices, contact should be made with Technical Leadership and Advice.

12.4.11 Account numbers should be quoted in an accompanying letter (if known) but the terms of the notice should not be limited to only these known accounts. The Commissioner will expect the financial institution to undertake searching procedures to locate all the accounts of the debtor held at all branches. Correct identification of the debtor will assist the financial institution's search.

12.4.12 Whilst it is unquestionable that garnishee notices have a prospective application, the Commissioner generally does not expect financial institutions to carry out continuing searches to satisfy 'garnishee' notices, particularly where all the money held in an account has been paid to the Commissioner in compliance with a notice. If the bank cannot locate an account(s), it will be sufficient for the bank to notify the Commissioner of this fact to satisfy the requirements of a notice. If the balance of the identified account is \$100 or less, the Commissioner would expect the financial institution to continue its searches for a period of three months. Where an investment account that has not yet matured is identified, the Commissioner would expect the notice to remain in force for a period of three months or until the investment account matures whichever is the later. In circumstances where the Commissioner has reasons to believe that a particular account is continually being used by a debtor after an initial attachment of all the funds previously held in it, the Commissioner may ask the particular bank to continue to monitor that account under the terms of an amended notice which sets out the balance of the debtor's

liability to the Commissioner. This should be done through direct liaison with the nominated contact officer at the relevant financial institution.

12.4.13 Debt collection officers should use the national standard 'garnishee' notice to prevent the return of the 'garnishee' notice.

12.4.14 A 'garnishee' notice served on a financial institution should specify whether the notice is being served on them in their capacity as a financial institution or as an employer or both.

12.4.15 A 'garnishee' notice should not issue for debts less than \$100.

12.4.16 With the emergence of e-commerce and its increasing usage for transacting business, the Commissioner recognises that financial institutions may hold money on behalf of Tax Office debtors on account of business transacted through their Merchant Card Facility ('MCF'). The latter will generally include any business transacted electronically with clients, whether such transactions originate from a cheque, savings or credit card account.

12.4.17 In certain circumstances money held by a financial institution at the end of the day's trading in respect of MCF payments may legally be attached by a 'garnishee' notice. However, due consideration will be given to the potential impact that such action may have on the viability of the debtor's business as well as the compliance burden that would be imposed on financial institutions. Garnishee action on MCF would not be considered for the majority of cases, but rather used where no other viable recovery avenue is available.

12.4.18 As a general rule, financial institutions have a right to combine accounts so that a 'garnishee' notice only attaches to the overall surplus of the debtor's accounts with the recipient of the notice. (Loan accounts are generally disregarded for this purpose). Thus, money held at the end of the day's trading in respect of MCF payments may, for example, be offset against amounts owing by the debtor in an overdraft account. Where the overall result is a debit balance, there will be no surplus to which the 'garnishee' notice could attach. On the other hand, there may be cases where the financial institution in receipt of the notice only provides the MCF and is not the debtor's primary banker. In those instances where the debtor has directed that the funds emanating from the MCF be deposited in a designated account at another financial institution, provided that the merchant has no accounts in debit with the recipient of the notice, there would be a surplus at the end of the day's trading to which the 'garnishee' notice attaches irrespective of the fact that the debtor's designated account for the funds may be an overdraft facility with another financial institution.

12.4.19 Generally, the financial institution's Merchant Agreement provides that the financial institution may charge back to the merchant any transactions defined to be invalid or unacceptable and debit the merchant's account, or the merchant's fees account, with the amount of any credit paid by the financial institution on such invalid or unacceptable transactions. In the event of a chargeback, the Commissioner's view is that he is not legally required to disgorge the percentage of the amount which is the subject of the chargeback and which was previously remitted to the Commissioner, as the amounts on which the notice operated would have been properly payable at the time they were paid. The fact that the bank has a separate

contractual recourse against the merchant in such situations does not undo the initial transaction.

12.4.20 The Commissioner will consider any reasonable request from a debtor to either withdraw, or vary the requirements of, a 'garnishee' notice issued in respect of a MCF, provided the debtor makes alternative arrangements for payment that are suitable to the Commissioner.

## **12.5 SERVICE OF NOTICE**

12.5.1 When serving notices (by mail or otherwise) at the head office or at the nominated contact point provided by the financial institution, all necessary details should be provided by the Tax Office to facilitate identification of the debtor (for example, the debtor's date of birth, the last known residential address and any known account numbers, whether the debtor is an employee or a customer of the financial institution). It may be appropriate to contact the financial institution prior to the issue of notices to facilitate the efficient and orderly handling of the notice.

12.5.2 All 'garnishee' notices are to be printed on Tax Office letterhead paper and should have the name and telephone contact number of an officer who may be contacted to seek clarification of any aspects to assist the third party in complying with the notice (some notices become detached from the accompanying letter). The notices are to bear the name or facsimile signature of the appropriately delegated officer and are to be initialled by the issuing officer in all cases.

12.5.3 It is essential when dealing with third parties that the secrecy provisions of the ITAA 1936 and the *Privacy Act 1988* are strictly observed at all times. Where notices are being served on a debtor's employer to attach a percentage of salary or wages, care should be exercised to preserve the debtor's privacy. Where the debtor's employer is a large organisation, it is likely that the notice may pass through the hands of a number of employees before reaching the designated person responsible for complying with the notice. In order to restrict exposure of the notice to a minimum number of personnel at an employer's office, the office of the Privacy Commissioner has endorsed a recommendation that an envelope marked 'Private and Confidential' and addressed 'To be opened by the Paymaster only' be dispatched to the recipient employer.

12.5.4 Whenever the amount of a debt, in respect of which a 'garnishee' notice has issued, is reduced by a payment or credit from another source (that is, the payment did not eventuate as a result of the notice), the third party on whom the 'garnishee' notice has been served must be advised of the reduced liability.

12.5.5 Notification of the withdrawal of a notice must be in writing. This may occur when the debt is paid in full by the debtor or another, or where the recipient has no further funds and is unlikely to have further funds due to the debtor.

## **12.6 PAYMENTS RECEIVED PURSUANT TO 'GARNISHEE' NOTICES**

12.6.1 As per paragraph 7.7.20 of the chapter entitled, "Allocation of payments or credits", where a payment is made (in full or in part) pursuant to a 'garnishee' notice, the payment must be appropriated to the respective component amounts that constitute the total payable in that notice. Part

payments in respect of a garnishee notice should be allocated to debts with the earliest due date that contribute to the balance of the claim.

## **12.7 TERMS USED**

- 12.7.1 'Due' is a term used to define any such amount due to the debtor including any such amount that is not yet payable.
- 12.7.2 'Chattel' is a term used to describe *personal* property, as opposed to *real* property. The term 'chattel' may be further classified into 'chattels personal' (which are movable, tangible articles of personal property) and 'chattels real' (which are interests in real property such as leasehold interest, but the term does not include a freehold interest).
- 12.7.3 'Chose in action' is a term used to describe an incorporeal or intangible personal property right which is incapable of being taken into physical possession, but which is susceptible to enforcement by legal or equitable action. The term may include debts, shares, intellectual property, contractual rights, beneficiaries' rights, equitable securities and the right to recover pecuniary damages for the infliction of a wrong.
- 12.7.4 'Garnishee' is a term used to describe a notice the Commissioner can issue requiring a third party to pay money to him to meet the debt of another. The third party receiving the notice is required to pay to the Commissioner any monies which may be held for, owed to, or accruing to, the Tax Office debtor. The notices issued by the Commissioner are similar to garnishee orders issued through the courts, but they are not those orders.
- 12.7.5 'Penalty Unit' is an amount prescribed by Regulation, and is currently set at \$110.
- 12.7.6 'Supervised account' is a bank account supervised by a Trustee in Bankruptcy, into which the bankrupt's income is directed and from which the bankrupt may only make withdrawals with the explicit permission of the Trustee. The purpose of these accounts is to assist the Trustee in collecting income contributions for the benefit of creditors. A Trustee in Bankruptcy will only require the use of a supervised account where the bankrupt has previously failed to make income contributions as required.
- 12.7.7 'Tax-related liability' or 'liability' is a term used to define any pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable). It thus encompasses all types of taxes, penalties, additional charges for late payment, etc (including amounts previously defined under the ITAA 1936 as 'tax' and under the SGAA 1992 as 'superannuation guarantee charge' etc). A table which lists the tax-related liabilities is found at section 250-10 of Schedule 1 to the TAA. This includes excise and diesel fuel rebate debts administered under the provisions of the *Excise Act 1901*, diesel fuel rebate debts administered under the 'diesel fuel rebate Customs provisions' of the *Customs Act 1901* and both grant scheme debts administered under the provisions of the *Diesel and Alternative Fuel Grants Scheme Act 1999* and *Product Grants and Benefits Administration Act 2000*.