

## ATO RECEIVABLES POLICY

### PART B The Collection of Taxation Debts

# Chapter 12

## GARNISHEE

*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.*

**Date of effect:** 24 July 2008 (This version replaces the 2006 version.)

**Key legislation:** *Taxation Administration Act 1953*

### PURPOSE

1. This chapter deals with the Commissioner's power to recover tax debts from third parties owing money to, or holding money for, the Tax Office debtor and sets out the circumstances in which that power will be used.

### INTRODUCTION

2. Where a person owes or holds money on behalf of a tax debtor, section 260-5 of the *Taxation Administration Act 1953* (TAA) empowers the Commissioner to direct the person to pay that money to the Commissioner rather than paying it to or continuing to hold it on behalf of the tax debtor. This power is colloquially referred to as a 'garnishee'.

### POLICY

3. Collection through third parties by serving a garnishee notice is often an efficient and cost effective way of obtaining payment of an outstanding debt. The Tax Office will use garnishee notices in circumstances where that action is considered to be the most effective method of obtaining payment of the debt.
4. In considering whether to issue a garnishee, the Tax Office will have regard to:
  - (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, and
  - (iv) the likely implications of issuing a notice on a debtor's ability to provide for a family or to maintain the viability of the business.

5. The Tax Office will consider any reasonable request from a debtor to either withdraw, or vary the requirements of, a garnishee notice, provided the debtor makes suitable alternative arrangements for payment.

### **Garnishee of Credit Card Merchant Facilities**

6. With the increasing use of e-commerce for transacting business, the Tax Office recognises that financial institutions may hold money on behalf of Tax Office debtors on account of business transacted through their Merchant Card Facility. This may include any business transacted electronically with clients, whether such transactions originate from a cheque, savings or credit card account. The financial institution's Merchant Agreement generally 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 with the amount of any credit paid by the financial institution on such invalid or unacceptable transactions. In the event of a chargeback, the Tax Office's view is that it 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 Tax Office, as the amounts on which the notice operated would have been properly payable at the time they were paid. The fact that the financial institution may have a separate contractual recourse against the merchant in such situations does not undo the initial transaction.

### **Privacy considerations**

7. In employing the Commissioner's garnishee power, the Tax Office will ensure that the secrecy provisions of the *Income Tax Assessment Act 1936* and the *Privacy Act 1988* are strictly observed at all times. Where notices are to be given to a debtor's employer pursuant to a garnishee of the debtor's wages or salary, the Tax Office will take care to preserve the debtor's privacy. Where the debtor's employer is a large organisation, there is potential for the notice to pass through the hands of a number of employees before reaching the person with the designated responsibility for complying with the notice. In an endeavour to restrict exposure of the notice to a minimum number of personnel at an employer's office, the Tax Office will observe the recommendation of the office of the Privacy Commissioner that the envelope containing the garnishee be marked '*Private and Confidential*' and addressed '*To be opened by the Paymaster only*'.

### **Limitations on the use of garnishees**

8. Where the garnishee is in respect of salary or wages, the Tax Office will not usually seek to garnishee more than 30 cents in the dollar of the gross. However, the Tax Office may elect to seek a higher percentage where the debtor has another source of income or where the debtor's financial position indicates that it would be fair and equitable to do so. Similarly, the Commissioner may reduce the garnishee percentage where the debtor's income is already subject to a garnishee (such as a garnishee in respect of an obligation to the Child Support Agency).
9. Where the Tax Office elects to send a garnishee to the Health Insurance Commission in respect of payments it makes to an indebted doctor, the Tax Office will inform the Health Insurance Commission to disregard the application of the garnishee in respect of 'pay doctor cheques' (that is, payments pursuant to subsection 20(2) of the *Health Insurance Act 1973*).
10. The Tax Office will not garnishee Centrelink or Department of Veterans' Affairs pensions or benefits (unless requested to do so by the debtor).

11. Although subsection 139ZIG(8) of the *Bankruptcy Act 1966* specifically permits the use of a garnishee in respect of 'supervised accounts' created under Division 4B of Part VI of that Act, the Tax Office may withdraw or refrain from using a garnishee in respect of a supervised account where the bankruptcy trustee indicates that it would have a detrimental effect on the trustee's ability to collect income contributions.
12. Where a debtor is pursuing avenues of appeal against the assessments that raised the debt, the Tax Office will give due consideration to whether the use of a garnishee would prejudice the debtor's rights to a significant degree.
13. Money received pursuant to a garnishee is not required to be disgorged as a preferential payment in the event that the tax debtor becomes bankrupt or liquidated. Accordingly, where it is apparent that the tax debtor is about to enter bankruptcy or liquidation, the Tax Office will have regard to the potential adverse impacts on other creditors before deciding whether to issue a garnishee.
14. The Tax Office will not issue a garnishee notice once the debtor has proposed a debt agreement under Part IX of the *Bankruptcy Act 1966*, signed a section 188 authority under that Act or, in the case of a company, had an administrator appointed pursuant to Part 5.3A of the *Corporations Act 2001*.
15. Although a garnishee may entitle the Commissioner to receive payment in priority to certain earlier secured creditors, the Tax Office will not always seek to enforce that entitlement. For instance, where a garnishee is served on the purchaser of mortgaged land or property, the garnishee will also 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. However, the Commissioner will take account of individual circumstances and may exercise his discretion to require that the notice only 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. In any case 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. Note, also, that the Tax Office may issue a garnishee to a receiver in order to attach any moneys that would otherwise be payable to the mortgagor.
16. Whilst it is unquestionable that garnishee notices have a prospective application, the Tax Office generally does not expect financial institutions to carry out continuing searches to satisfy garnishee notices, particularly where all the money in the account has been paid to the Tax Office in compliance with a notice. If the bank cannot locate an account, it will generally be sufficient for the bank to notify the Tax Office of this fact to satisfy the requirements of a notice. If the balance of the identified account is \$100 or less, the Tax Office would expect the notice to remain in force for a period of three months. Where an investment account that has not yet matured is identified, the Tax Office would expect the notice to remain in force until the investment account matures or becomes payable because of closure of the account or other circumstances, whichever is the later event. In circumstances where the Tax Office 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 Tax Office 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 Tax Office.

### **Allocation of payments received pursuant to a garnishee**

17. As per Chapter 7 'Allocation of payments and 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.

### **Garnishees and external controllers or insolvency administrations**

18. Where, subsequent to the issue of a garnishee, the debtor:

- appoints a controlling trustee
- enters into a personal insolvency agreement
- becomes bankrupt
- becomes subject to the control of a voluntary administrator
- enters into a deed of company arrangement
- comes under the control of a receiver or receiver and manager
- becomes subject to the control of a provisional liquidator, or
- becomes subject to liquidation

the Commissioner will not ordinarily withdraw that garnishee. This is particularly so in circumstances where amounts have been validly charged pursuant to the garnishee notice, but the garnishee recipient has not yet paid the charged amounts to the Commissioner and where the Commissioner has not yet processed the receipt of those amounts.

19. However, where it is apparent that the debtor is about to enter or become subject to one of the processes described in the preceding paragraph, the Commissioner will not generally issue a garnishee in respect of amounts due (or expected to become due) to the debtor unless it appears that, in the particular circumstances, the need to protect the revenue justifies the expected impact that the garnishee will have on the debtor's unrelated, arm's-length creditors, in terms of their likely receipts from the debtor's insolvency administration.

### **TERMS USED**

**Due** – is a term used to define any amount owed to the debtor, including an amount that is not yet payable.

**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 debtor. The notice issued by the Commissioner is similar to (but legal distinct from) a garnishee order issued through the courts.

**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.

## **Chapter 12 - Archived version**

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link to chapter 12 pdf)