

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: 2 October 2009 (This version replaces the 2008 version.)

Key legislation: Section 260-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)

PURPOSE

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

INTRODUCTION

2. Where a person (third party) owes money to or holds money for a tax debtor, section 260-5 of Schedule 1 to the TAA empowers the Commissioner to require the third party to pay that money to the Commissioner rather than paying it to, or continuing to hold it for, the tax debtor. This power is commonly referred to as a 'garnishee power' and a written notice issued by us under subsection 260-5(2) of Schedule 1 to the TAA is referred to as a 'garnishee notice'.
3. 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.

POLICY

Considerations – before and after issuing a garnishee notice

4. Collection through third parties by serving garnishee notices is often an efficient and cost-effective way of obtaining payment of outstanding debts. We will use garnishee notices in circumstances where we consider that action to be the most effective method of obtaining payment of a debt.
5. In considering whether to issue a garnishee notice, we will have regard to:
 - 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
 - the extent of any other debts owed by the debtor

- 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
 - 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.
6. We 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

7. With the increasing use of e-commerce for transacting business, we recognise that financial institutions may hold money on behalf of tax 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. We may use the garnishee power to require a financial institution to pay us amounts transacted through a business's merchant card facility before the amounts are deposited into the business's account.

Privacy considerations

8. In employing the Commissioner's garnishee power, we will ensure that the secrecy provisions of the *Income Tax Assessment Act 1936* and our privacy obligations under the *Privacy Act 1988* are strictly observed at all times.
9. Where garnishee notices are to be given to a tax debtor's employer in respect of wages or salary owed to the debtor, we will take care to preserve the debtor's privacy.
10. Where the debtor's employer is a large organisation, there is potential for the garnishee notice to pass through the hands of a number of employees before reaching the person with the designated responsibility for complying with the notice. To minimise the number of people who see the notice at an employer's office, we will observe the Privacy Commissioner's recommendation – the envelope containing the garnishee will be marked 'private and confidential' and addressed 'to be opened by the paymaster only'.

Limitations on the use of garnishees

Salary and wages

11. Where the garnishee is in respect of salary or wages, we will not usually seek to garnishee more than 30 cents in the dollar of the amount of salary and wages payable. However, we 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.
12. Similarly, we 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).

Medicare Australia payments

13. Where we elect to send a garnishee to Medicare Australia in respect of payments it makes to an indebted doctor, we will inform Medicare Australia to disregard the

application of the garnishee in respect of 'pay doctor cheques' (that is, payments under subsection 20(2) of the *Health Insurance Act 1973*).

Centrelink or Department of Veterans' Affairs benefits

14. We will not garnishee Centrelink or Department of Veterans' Affairs pensions or benefits, unless requested to do so by the tax debtor.

Taxation appeals

15. Where a debtor is appealing to a tribunal or court against the assessments that raised the debt, we will consider whether a garnishee would significantly prejudice the debtor's rights in pursuing those appeals.

Purchaser of mortgaged land or property

16. Although a garnishee may place the Commissioner ahead of certain earlier secured creditors, we will not always seek to enforce our entitlement. For instance, where a garnishee notice 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 purchaser's obligation in relation to a garnishee supersedes the obligation or discretion to pay money to a secured creditor in accordance with the debtor's instructions, however, the sale would not proceed if the seller is unable to provide the purchaser with clear title to the property.
17. Therefore, we will take account of individual circumstances and may 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, we will require payment of all or part of the purchase price from the purchaser.
18. We may also issue a garnishee notice to a receiver appointed by a secured creditor in order to attach the balance of any moneys that would otherwise be payable to a mortgagor.

Financial institution accounts

19. We will serve garnishee notices according to arrangements made for service of notices with specific banks and other financial institutions. We expect that the financial institution will undertake searching procedures to locate all the accounts of the debtor held at all branches. To assist in this process, we will list any known account numbers in the notice.
20. While garnishee notices unquestionably continue to apply on an ongoing basis, we generally do not expect financial institutions to carry out continuing searches where all the money in the account has been paid to us as required by a notice. If the financial institution cannot locate an account, notifying us of this fact will generally satisfy the requirements of a notice. If the balance of the identified account is \$100 or less, the garnishee notice is taken to remain in force for a period of three months.
21. Where an investment account that has not yet matured is identified, the garnishee notice will remain in force until the account matures or becomes payable because of closure of the account or other circumstances.
22. In circumstances where we have reason 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, we may ask the particular financial institution to continue to monitor that account under the terms of an amended garnishee notice setting out the balance of the debtor's liability to the Commissioner.

Superannuation funds

23. A garnishee notice in respect of any tax-related liabilities may be served on a superannuation fund but it will not be effective until the debtor's (member's) benefits are payable under the rules of the fund (for example, the debtor retires or dies). A notice served on the fund will generally request payment as a lump sum unless the anticipated retirement income stream can guarantee repayment within a satisfactory period of time.

Life insurance policies

24. A garnishee notice may be served in respect of the proceeds of life insurance policies but the notice may not take effect until the person (whose life is insured) dies or the monies otherwise become payable under the policies.

Courts

25. Garnishee notices will not be served on a court (or clerk of petty sessions who holds money on behalf of the court). A court is not a person within the meaning of the former 'garnishee' provisions. While the expression 'person' has been replaced by 'third party', there was no intention to enlarge the definition of the recipient of a notice to include a court.

Trust funds

26. A garnishee notice may be served on trust funds held by a solicitor but the notice may not be effective if all such monies have become charged by a lien. This happens when a debt from the debtor to the solicitor is 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.

Shares

27. A garnishee notice may be served on a company in which a debtor holds shares. This would then entitle the Commissioner to receive any dividend payable to the debtor in respect of such shares.

Other

28. As garnishee notices will not be legally effective they will not be served in respect of:
- benefits payable under defence forces retirement or death benefits legislation
 - the Registrar of Commonwealth Inscribed Stock or Bearer Securities
 - an individual's bank account, life policy or beneficial interest in a trust where it is known that the amount held is a 'first home saver account' under the *First Home Saver Accounts Act 2008*, which commenced on 1 October 2008. (A garnishee notice may constitute a charge or an assignment of rights for the purposes of subsection 126B(3) of that Act.)

Garnishee notices and external controllers or insolvency administrations

29. Where, subsequent to the issue of a garnishee notice, the tax debtor:
- appoints a controlling trustee
 - is subject to a personal insolvency agreement
 - has given a debt agreement proposal to the Official Receiver
 - is subject to a debt agreement

- is bankrupt
- is subject to the control of a voluntary administrator
- is subject to a deed of company arrangement
- is under the control of a receiver or receiver and manager
- is subject to the control of a provisional liquidator, or
- is in liquidation

we will not ordinarily withdraw that notice. In such circumstances, the notice will continue to operate on the relevant amounts.

30. However, where it is apparent that the tax debtor is about to enter or become subject to one of the processes described in the preceding paragraph, we will only issue a garnishee notice in respect of amounts due (or expected to become due) to the debtor, after having regard to a number of factors. These factors include the need to protect the revenue and 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.
31. In accordance with the decision of the High Court in *Bruton Holdings Pty Limited (in liquidation) v. Commissioner of Taxation & Anor* [2009] HCA 32, we will not issue a garnishee in respect of a debt owed to a company after an order has been made, or a resolution has been passed, for the winding up of the company.
32. Although subsection 139ZIG(8) of the *Bankruptcy Act 1966* specifically permits the use of the Commissioner's garnishee power in respect of 'supervised accounts' created under Division 4B of Part VI of that Act, we may withdraw or refrain from using the garnishee power 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.

Allocation of payments received pursuant to a garnishee

33. 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 will be appropriated to the respective component amounts that constitute the total payable in that notice. Part payments in respect of a garnishee notice will be allocated to tax debts with the earliest due date that contribute to the balance of the claim.

TERMS USED

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

Garnishee – is a term used to describe the power of the Commissioner under section 260-5 of Schedule 1 to the TAA to issue a notice requiring a third party to pay money to the Commissioner to meet the tax 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 legally distinct from) a garnishee order issued through the courts.

Lien – a type of security over property, including a right to retain possession of a debtor's property until the debt has been paid.

Supervised account – is an account maintained by a bankrupt but supervised by a trustee in bankruptcy under Subdivision HA of Division 4B, Part VI of the *Bankruptcy Act 1966*, into which a 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 help the trustee collect 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.

Tax debtor – most commonly a person who has a tax-related liability (including a liability which is not yet due and payable) which arises under an Act of which the Commissioner has general administration. The term also includes a person with a judgment debt (plus costs awarded) for a tax-related liability and a person who has amounts payable to the Commissioner because they have been convicted of a tax offence.

Chapter 12 - Archived versions

Version 4 – July 2006 (will link to chapter 12 pdf)
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Version 5 – August 2008 (will link to chapter 12 pdf)
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