

## ATO RECEIVABLES POLICY

### PART B The collection of taxation debts

# Chapter 13

## DEPARTURE PROHIBITION ORDERS

*The policy in this chapter is to be followed by ATO 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 ATO.*

**Date of effect:** 23 November 2010

**Key legislation:** Part IVA of the *Taxation Administration Act 1953* (TAA).

### PURPOSE

1. This chapter deals with the Commissioner's power to stop a debtor from departing from Australia until such time as their tax liability is paid in full or suitable arrangements for payment of their tax liability are made.

### INTRODUCTION

2. Part IVA of the TAA gives the Commissioner the power to issue a departure prohibition order (DPO) which prohibits the debtor from leaving Australia, regardless of whether the debtor intends to return.
3. The Commissioner's ability to exercise this power depends upon the existence of certain preconditions. These are:
  - (i) the debtor must have a tax liability, and
  - (ii) the Commissioner must believe on reasonable grounds that it is desirable to issue a DPO for the purpose of ensuring that the debtor does not depart from Australia without:
    - wholly discharging the tax liability, or
    - making arrangements satisfactory to the Commissioner for the tax liability to be wholly discharged.
4. The legislation applies to both Australian nationals and foreign nationals who are liable to pay Australian tax, except if a deportation order under the *Migration Act 1958* is in force. Where a deportation order is made after a DPO has issued, the DPO ceases to have force (section 14S(3)). The ATO will consult with the Department of Immigration, Multicultural and Indigenous Affairs about revoking the DPO.
5. A debtor in respect of whom a DPO is in force may apply to the Commissioner for the issue of a Departure Authorisation Certificate (DAC) to permit him or her to depart Australia temporarily.
6. The Commissioner is required to issue a DAC if satisfied that:

- (i) if a DAC is issued in respect of the debtor, it is likely that the debtor will depart Australia and will return within such a period as the Commissioner considers appropriate, and circumstances of a kind which would oblige the Commissioner to revoke the DPO under subsection 14T(1) of the TAA will come into existence within such period as the Commissioner considers appropriate, and
  - (ii) it is not necessary or desirable for the debtor to give security under subsection 14U(2) of the TAA for the debtor's return to Australia.
- 7. If the Commissioner is not satisfied with respect to the matters referred to at 7(i) and 7(ii) above, the Commissioner is required to issue a DAC authorising the debtor to depart from Australia if the debtor:
  - (i) has given security under subsection 14U(2) of the TAA to the satisfaction of the Commissioner for the debtor's return to Australia, or
  - (ii) is unable to give such security, the Commissioner is satisfied that a DAC should be issued on humanitarian grounds or that a refusal to issue a DAC would be detrimental to the interests of Australia.
- 8. In considering whether the debtor is unable to give such security, the Full Federal Court in *Lui v FC of T (No 2)* 2009 ATC 20-127, agreed with the Commissioner that the provision requires the Commissioner to conclude that the debtor is unable to give such security. In the context of section 14U 'unable' means something that the particular taxpayer could not do in the existing circumstances, and it is not enough that the taxpayer is merely either unwilling to do so or unable to obtain the Commissioner's agreement.
- 9. Where a debtor's application for a DAC is sought on humanitarian grounds, the debtor must produce evidence to support:
  - the contention that the debtor is unable to give security to the satisfaction of the Commissioner, and
  - the humanitarian grounds relied upon in the application for the DAC.
- 10. Similarly, where a debtor's application for a DAC is sought on the basis that a refusal to issue the DAC would be detrimental to the interest of Australia, the debtor must produce evidence in support:
  - the contention that the debtor is unable to give security to the satisfaction of the Commissioner, and
  - the reasons why a refusal to issue a DAC would be detrimental to the interests of Australia.

## POLICY

- 11. By its very nature, a DPO imposes a significant restriction on the normal rights of debtors in that it basically deprives them of their liberty to travel outside Australia. The ATO recognises the impact of this restriction on a debtor's liberty and freedom of movement.
- 12. The critical phase in the making of a DPO is the process of determining whether there are 'reasonable grounds' which make it desirable to ensure the debtor does not depart from Australia without wholly discharging or making arrangements satisfactory to the Commissioner to wholly discharge the tax liability.

13. In deciding whether to issue a DPO, the ATO will take into account all relevant facts and circumstances. These may include (but are not limited to) whether:
- (i) there is a tax liability and whether it can be recovered
  - (ii) known assets are sufficient to pay existing and future tax liabilities and whether those assets are in a readily-realisable form
  - (iii) recovery proceedings are in course
  - (iv) the debtor has recently disposed of assets to associated persons or entities (the transaction may be overturned in bankruptcy)
  - (v) there is any information to suggest concealment of assets (bank accounts in false names, use of an alias) or movement of funds (for example, AUSTRAC reports)
  - (vi) the debtor has entered into transactions that 'charged' assets in Australia and then moved the borrowed funds offshore
  - (vii) the debtor has assets overseas adequate to maintain a comfortable lifestyle
  - (viii) funds have been transferred overseas (and the purpose of the transfer)
  - (ix) the debtor has significant business interests in Australia
  - (x) the debtor is subject to investigation for criminal activities (and whether any charges have been laid)
  - (xi) there is a threat against the debtor's life as a result of criminal or other activities
  - (xii) there is ATO audit activity (or similar activity from other Government agencies)
  - (xiii) the debtor holds (or the debtor has applied for) an Australian or foreign passport/visa/work permit
  - (xiv) the debtor has given an indication of likely overseas travel, and there is no apparent need for travel
  - (xv) the debtor's family situation (this information may not be relevant by itself, but when combined with a number of other factors, it may influence a decision to issue a DPO).
14. When a DPO is made, the Commissioner or his delegate is required to serve a copy of the DPO on the debtor. However, the existence of a DPO is not dependent on the debtor being informed of its making. While service should take place as soon as possible after a DPO is made, the failure to inform the person is not considered to affect the validity of the DPO.
15. A DPO remains in force unless and until it is revoked by the Commissioner or set aside by a court. The Commissioner will revoke a DPO that is in force where:
- (i) the debtor's tax liabilities have been wholly discharged and the Commissioner is satisfied that any impending tax liabilities arising out of a completed transaction can also be wholly discharged or would be completely irrecoverable, or
  - (ii) the Commissioner considers that the debtor's tax liabilities are completely irrecoverable.
16. The Commissioner may revoke or vary a DPO at his discretion.

## TERMS USED

AUSTRAC Reports - refers to reports produced by the Australian Transaction Reports and Analysis Centre

Australian nationals - is a term used for the purposes of this chapter to describe residents of Australia which include Australian citizens as well as other permanent residents of Australia.

Foreign nationals - is a term used for the purposes of this chapter to describe non-residents or temporary residents of Australia who are liable to pay Australian tax

Tax liability - is defined in the TAA to mean a liability to the Commonwealth arising under, or by virtue of, a taxation law.

Taxation law - is defined in the TAA as having the meaning given by the *Income Tax Assessment Act 1997* (ITAA 1997). The ITAA 1997 defines 'taxation law' as an Act of which the Commissioner has the general administration (including a part of an Act to the extent to which the Commissioner has the general administration of the Act); or regulations under such an Act (including such a part of an Act); or the *Tax Agent Services Act 2009* or regulations made under that Act.

Wholly discharged - is defined in the TAA to include a reference to arrangements satisfactory to the Commissioner having been made for those tax liabilities to be wholly discharged.

### Chapter 13 - Archived versions

Version 4 – July 2006 (will link to Chapter 13 pdf)
Version 5 – August 2008 (will link to Chapter 13 pdf)