

## ATO RECEIVABLES POLICY

### PART B The Collection of Taxation Debts

# Chapter 24 RELEASE FROM PAYMENT OF SOME TAXATION LIABILITIES

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

## PURPOSE

1. This chapter deals with the Commissioner's power to grant individual taxpayers release from their obligation to pay certain tax-related liabilities.

## INTRODUCTION

2. Division 340 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) provides for an individual or the trustee of the estate of a deceased person to be released from paying certain liabilities if payment of the liability will cause serious hardship. The person's application must be in the form required by the Commissioner, and the onus is on the applicant to furnish sufficient information to satisfy the Tax Office that payment of the liabilities would entail serious hardship and that release would be appropriate.
3. Applications are considered in the first instance by the Tax Office. Dissatisfied applicants are entitled to make an objection, which is then determined by an internal Tax Office review. Applicants have further recourse to a merits review by the Administrative Appeals Tribunal, sitting as the Small Taxation Claims Tribunal. The Tax Office will pay the lodgment fees incurred by taxpayers who wish to have their release case reviewed by the Small Taxation Claims Tribunal.
4. The release provisions apply in respect of liabilities of the following kind:
  - (i) income tax
  - (ii) a pay as you go (PAYG) instalment
  - (iii) fringe benefits tax
  - (iv) a fringe benefits tax instalment
  - (v) Medicare levy
  - (vi) Medicare levy surcharge
  - (vii) withholding tax (as at section 128B of *the Income Tax Assessment Act 1936* (ITAA 1936))

- (viii) mining withholding tax (as at section 128V of the ITAA 1936), and
- (ix) penalties and charges associated with the above liabilities, including:
  - additional tax (for example, section 93 or 112B or Part VIII of the *Fringe Benefits Tax Assessment Act 1986*)
  - administrative penalty in relation to fringe benefits tax or income tax (as at Part 4-25 in Schedule 1 to the TAA and includes failure to lodge penalty relating to lodgment of income tax returns)
  - general interest charge (for example, section 163AA or 170AA or subsections 204(3) and 221AZMAA(1) of the ITAA 1936), and
  - penalty (as at section 163A of the ITAA 1936).

5. Amounts to which the release provisions **do not apply** are:

- (i) amounts which have been incorrectly refunded or overpaid (such as incorrect refunds or overpayments arising from administrative errors – also referred to as ‘non-tax’ debts)
- (ii) amounts of tax instalment deductions, prescribed payments, reportable payments or PAYG withholding that have not been remitted or paid to the Commissioner
- (iii) interest on judgment costs
- (iv) legal costs
- (v) provisional tax and quarterly provisional tax and instalments of provisional tax
- (vi) instalments of company tax
- (vii) sales tax
- (viii) indirect taxes (goods and services tax (GST), wine equalization tax, luxury car tax)
- (ix) higher education contributions
- (x) student financial supplement scheme
- (xi) child support payments
- (xii) court imposed fines and costs, including reparation orders
- (xiii) director liabilities arising under Division 9 of Part VI, ITAA 1936
- (xiv) pre-sequestration debts
- (xv) any debts raised by the superannuation provisions in the:
  - *Superannuation Contributions Tax (Assessment & Collection) Act 1997*
  - *Superannuation Contributions Tax (Members of Constitutionally Protected Funds) Assessment & Collection Act 1997*
  - *Superannuation Guarantee (Administration) Act 1992*
  - *Termination Payments Tax (Assessment & Collection) Act 1997*
- (xvi) debts resulting from overpayments or advances of grants resulting under the *Diesel and Alternative Fuels Grants Scheme Act 1999*
- (xvii) debts resulting from overpayments or advances of grants resulting under

*Products Grants and Benefits Administration Act 2000*

- (xviii) debts resulting from overpayments of credits under the *Fuel Tax Act 2006*, and
- (xix) failure to lodge penalty related to lodgment of activity statements.

## **POLICY**

### **Release application**

6. A person has a right to apply for release. Where the debt is an eligible debt and it is believed that the application will have a reasonable prospect of success (refer to the subsection entitled 'Release decision – determining serious hardship'), the Tax Office will suggest to the taxpayer that the lodgment of a release application should be considered.
7. A person should apply for release on the form approved by the Commissioner. It is in the person's best interests to provide all relevant information required by the form so that the Tax Office can make a proper decision.
8. The Tax Office may require a person to supply further information, or answer questions that would be relevant for the consideration of the person's application for release. Where that additional information is not supplied and/or the application for release is incomplete, provided there are no reasonable grounds for failing to supply the information (for example, where the person is sick and others are unable to supply the information on the person's behalf), the application may not be considered and the application form may be returned to the person.
9. If the person wishes the Tax Office to consider the application they should submit an application form with all the information required. Meanwhile, normal action to recover the debt may be continued.
10. Generally, when considering an application for release, the Tax Office requires that income tax and activity statement lodgments are up to date (as an assessment may result in a refund that could reduce the debt or alternatively, the assessment may result in additional debt the Tax Office should consider for release). On receipt of the application for release, the Tax Office will check the lodgments and request any returns and/or statements that are outstanding be lodged. Where the outstanding returns and/or statements are not subsequently lodged and, provided there are no reasonable grounds for failing to lodge, the application for release may not be considered and the application form may be returned to the person.
11. If the person wishes the Tax Office to consider the application they should submit an application form with all the outstanding lodgments. Meanwhile, normal action to recover the debt may be continued.
12. Where there is a disputed debt, the final liability of the person is not certain and consequential hardship implications can only be speculated upon. Therefore, the Tax Office will generally not consider an application for release until the dispute is resolved and the application form may be returned to the person.
13. Once the dispute is finalised, if the person wishes the Tax Office to consider the application they should resubmit an application form. Meanwhile, normal action to recover the debt may be continued. (Refer to Chapter 28 'Recovering disputed debts').
14. Unresolved insurance, compensation or damages claims make it impossible to properly evaluate the person's true longer-term position. Therefore, the Tax Office

will generally not consider an application for release until the claims are resolved, and the application form may be returned to the person.

15. Once the claim is finalised, if the person wishes the Tax Office to consider the application, they should again submit an application form. Meanwhile, normal action to recover the debt may be continued.
16. Applications for release may be regarded as warranting a decision to defer recovery during the time in which the application remains undetermined. In certain circumstances, however, it may appear that the deferral of recovery action is not appropriate, such as where the facts of the case indicate a risk to recovery action or where the application for release is considered to be frivolous or without merit, as per the subsection below entitled 'Applications without merit'.
17. In cases where the person dies after lodgment of an application for release, the application lapses. The trustee of the estate of a deceased person may lodge an application for release if payment of the amount of the releasable liabilities would cause serious hardship for the beneficiaries of the estate of the deceased person.

### **Release liability**

18. In order to determine the amount of releasable liability, the Tax Office might need to determine which of a person's liabilities have been paid. This will require payments to be matched against particular tax liabilities that existed at the time of the payment.
19. It should not be assumed that payments would be applied on a pro-rata basis across outstanding liabilities, as a person would be expected to remit to the Tax Office amounts *collected* on behalf of the Tax Office (for example, tax withheld from employees' wages and GST) before paying their own personal liabilities (for example, their own PAYG instalments).

### **Release decision – determining serious hardship**

20. It is recognised that the payment of tax may require a degree of restraint in regard to expenditure on other goods or services. However, payment of tax at the prescribed rate will not usually create a situation of hardship. In some circumstances, however, financial losses or other adverse factors may limit a person's capacity to pay to such an extent that the impact of payment of the tax will amount to serious hardship.
21. The term 'serious hardship' is not defined at law and must be given its ordinary meaning. The Tax Office determines whether serious hardship exists by applying several tests which are designed to ascertain whether payment of the tax would produce unduly burdensome consequences for the person such that they would be deprived of necessities according to normal community standards.
22. Thus, serious hardship would be seen to exist where payment of a tax liability would result in the person being left without the means to achieve reasonable acquisitions of food, clothing, medical supplies, accommodation, education for children and other basic requirements. On the other hand, elements of hardship may be regarded as marginal or minor - rather than serious - if the consequences of payment of tax are seen, for example, as limitation of social activities or entertainment, or loss of access to goods or services of a more luxurious nature or standard.
23. As a first step in considering an application for release, the Tax Office must determine the person or persons to be included in his assessment of hardship

factors. The assessment of hardship is not limited only to the person's present circumstances; it may also consider the future prospect of an inability to provide food and clothing, for family members or others for whom the person has responsibility.

24. Conversely, although a person's immediate situation may suggest inability to meet the combined total of the tax debt and family expenditures, that factor will not indicate hardship if the income or asset positions of other members of the family are such as to suggest that the person cannot reasonably be regarded as responsible for all relevant outgoings. For example, the separate earnings, allowances or benefits received by other family members will be relevant to an assessment of the person's overall financial circumstances.
25. Subject to the general considerations above, the steps by which the Tax Office evaluates the merits of individual cases can be addressed in three segments:
  - Income/Outgoing Tests
  - Assets/Liabilities Tests
  - Other Factors.

### **Income/outgoing tests**

26. The tests under this heading are concerned with quantifying the person's capacity to meet the tax liability from his or her current income. The tests in sequence are:
  - (i) What is the person's capacity to pay, as measured by the income and outgoings stated in the application or supporting documents, that is, what net income remains after deducting total outgoings from total income?
  - (ii) Does the Tax Office accept that the income and outgoings stated are accurate and that the outgoings are necessary, or is there scope to increase the net income available or to reduce outgoings to meet the tax debt without serious detriment to living standards?
  - (iii) If there is a margin by which available income exceeds reasonable outgoings, is it sufficient to allow the liability to be met within an acceptable time frame?
27. In relation to the second test, above, the appearance of claims that a person incurs above-average expenditure on food, clothing or services, a high level of private travel or entertainment expenses, or payments for leisure goods such as caravans, boats and higher-priced motor vehicles would usually lead the Tax Office to a conclusion that capacity to pay exists. Within this test, the Tax Office also seeks to determine whether there are optional expenditures which could be reduced or deferred to improve capacity to pay the tax debt.
28. For the purposes of the third test, the Tax Office generally takes a two to three year payment span as an initial yardstick. Capacity to pay at a limited rate which would not see the debt cleared in two to three years would be a factor indicating that granting of partial release may be appropriate.

### **Assets/liabilities tests**

29. The tests within this segment are concerned primarily with determining whether the person's equity in assets is indicative of capacity to pay the tax debt. As a secondary consideration, the Tax Office may also need to address whether the acquisition of assets has unreasonably been put ahead of meeting tax liabilities.

30. There are several types of assets which the Tax Office would generally regard as normal and reasonable possessions, and which would not be expected to be surrendered or sold to meet revenue debts. Subject to the proviso that values are modest rather than extravagant, those assets include:
- (i) ownership of, or equity in, a residential property which is the person's home
  - (ii) a motor vehicle
  - (iii) furniture and household goods
  - (iv) tools of trade, and
  - (v) cash on hand or bank balance sufficient to meet outgoings for necessities or other reasonable expenditures (for example, funds put aside by aged persons to cover funeral expenses).
31. Other assets such as caravans (except where a caravan serves as the person's residence), holiday homes, luxury motor vehicles, boats, substantial life assurance or annuity entitlements, shares and other investments will generally be regarded by the Tax Office as indicating capacity to pay, through either disposal or use as security for borrowings, without involving serious hardship.
32. As a general proposition, the Tax Office would also seek to reach conclusions as to whether assets have been valued realistically, and liabilities are accurately recorded. Where doubts arise in relation to these aspects, the Tax Office may seek clarification of the basis of valuation, or of other information. However, certified valuations from professional valuers will not normally be required.
33. In relation to liabilities, the Tax Office's evaluation of the circumstances of the person may in some cases require consideration of whether deferment or rescheduling of commitments is a viable option. Where a person's asset position indicates untapped borrowing capacity, the likely quantum of repayments arising will, in turn, have a bearing on the outcome of the income/outgoings tests discussed earlier.

#### **Other factors**

34. Apart from the financial factors discussed in preceding paragraphs, various additional factors may require consideration during the Tax Office's evaluation of cases. Some could have a bearing on the Tax Office's decision while others, though offered as grounds warranting release, are not relevant.
35. If the Tax Office decides that payment of a releasable liability will cause serious hardship, it will then move to a second decision making process to decide whether or not to grant a release. Even if serious hardship is established, the Tax Office is not bound to grant release (*Corlette v. Mackenzie* 96 ATC 4502; 32 ATR 667). Nevertheless, it is clear that the Tax Office is obliged to act reasonably and responsibly, and should not act arbitrarily or capriciously. Examples of situations in which the Tax Office may decide against granting release, even though implications of serious hardship may be drawn, are:
- (i) where it appears that the person has, questionably or otherwise, disposed of funds or assets without making proper provision to meet tax liabilities
  - (ii) where the granting of release would not result in reduction of hardship, such as where the person has other liabilities or creditors to such an extent that release from the tax debt will not relieve hardship

- (iii) where the person has used available funds to discharge debts due to other *private* creditors in preference to debts due to the Tax Office
- (iv) where the person has used available funds to discharge debts due to other *business* creditors where those payments are not considered reasonably necessary to maintain the viability of the business and could be considered as unfair preference payments to the detriment of the Tax Office
- (v) where the person, for less than adequate reasons, has failed to pursue debts due to him or her, or to seek possible contributions from insurers, or persons with joint responsibilities for debts
- (vi) where serious hardship is associated with a single event or short term outcome, such as might be encountered in the more speculative or seasonal business undertakings, the effects of which can be expected to abate within a short term
- (vii) where the person has a poor compliance history, and
- (viii) where the person is unable to demonstrate that they have made provision for future debts.

### **The Commissioner's decision**

36. The tests and procedures outlined above usually enable the Commissioner to determine whether or not he can be satisfied that serious hardship is likely and the extent, if at all, to which he should grant release. The Commissioner may decide not to grant a release, or to grant a partial release, or he may decide to grant a full release. Release from the full amount of the liability would not generally be appropriate where partial release is sufficient to avert hardship. If the Commissioner decides payment will not cause serious hardship, then he cannot grant release.

### **Partial release – allocation of credit**

37. Where partial release is granted, the Tax Office will determine the allocation of the release credit. It will generally be applied first to the releasable liability with the earliest due date.

### **General Interest Charge (GIC)**

38. The General Interest Charge will continue to accrue on the amounts subject to an application for release. Where the Tax Office refuses to grant release from GIC or the liabilities on which GIC has accrued, the applicant continues to have the right to apply for a remission of GIC under the normal guidelines (see Chapter 93 'General interest charge').

### **Judgment interest and costs**

39. Although the Tax Office cannot grant release from judgment interest or associated legal costs, these amounts will be written off if a full release is granted from the liabilities which are the subject of the associated judgment debt. If there is only a partial release from those liabilities, or if the judgment debt also includes liabilities from which release may not be granted (for these liabilities, see paragraph 5 above), the Tax Office will write off a proportion of the judgment interest that corresponds to the proportion of the judgment debt for which release was granted. Where it is clear that the Tax Office will not continue recovery action in respect of

any amounts that are the subject of the judgment debt, the Tax Office will write off all amounts of judgment interest and costs that relate to that debt.

### **Applications without merit**

40. In cases where it appears that the application for release is without merit or may have been lodged to delay recovery action, the matter will be referred to the relevant decision-maker with a request for an urgent determination. In such cases, action to recover the debt may be continued and the applicant will be advised accordingly.

### **Disputed release decisions**

41. Where a person disputes the release decision (whether by objection or by appeal) and the Tax Office forms the view that the dispute is without merit, recovery action in respect of those liabilities may continue.

### **Credit entitlements**

42. Any credit entitlements arising while the application is being determined will be treated in accordance with the Tax Office policy for allocating credits (see Chapter 7 'Allocation of payment and credits') and may be offset against the releasable debt.

### **Further release applications**

43. A person's circumstances – including their tax liabilities – can change quite rapidly. Accordingly, a person is not prevented from applying merely because they have previously been unsuccessful or partially successful in seeking release, including release from the same liabilities. This applies even where a person has unsuccessfully objected to a decision or undertaken further appeals. However, it would be unusual for the Tax Office to consider another application lodged within six months of a previous application. The Tax Office will make exceptions in circumstances such as where:
  - there are significant changes to the applicant's circumstances compared to those set out in the original application
  - the applicant has fresh material to submit which is likely to materially affect the original finding, or
  - the applicant shows that the decision made by the Tax Office was either misconstrued or inaccurate.

## **TERMS USED**

Applications without merit – are applications for release, release objections or release appeals that:

- have been lodged to delay recovery proceedings
- disclose considerable assets or other information such that the person's alleged inability to pay is contrary to the matter disclosed, or
- are second or subsequent applications where there is no change to the person's circumstances.



Disputed debt – is a term used for convenience to describe a tax-related liability which is the subject of an objection, a review or an appeal. Disputed debt also includes any other disputed component of an assessment such as GIC which is imposed in the assessment as an incorrect return penalty (section 170AA of the ITAA 1936) but does not include GIC imposed for late payment.

Releasable liabilities – are liabilities to which the release provisions apply.

**Chapter 24 - Archived version**

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