

Part B The Collection of Taxation Debts**26 DECIDING NOT TO PURSUE RECOVERY OF TAXATION DEBTS**

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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26.1 PURPOSE

26.1.1 This chapter deals with:

- the powers not to pursue recovery of debts under the Commissioner's delegation;
- the grounds for deciding not to pursue recovery; and
- the activities to be undertaken before a decision not to pursue recovery can be implemented.

26.2 LEGISLATION

26.2.1 Prior to 1 January 1998, the Minister for Finance specifically delegated to Tax officers occupying designated positions his powers under sub-section 70C(1) of the *Audit Act 1901* not to pursue:

- irrecoverable amounts of revenue, debts and overpayments; and
- amounts of revenue, debts and overpayments which are uneconomical to recover.

Section 70C applied to decisions not to pursue debts taken before 1 January 1998.

26.2.2 From 1 January 1998, section 47 of the *Financial Management and Accountability Act 1997* (FMAA) provides that the Commissioner must pursue recovery of each debt for which the Commissioner is responsible unless:

- the debt has not been pursued as authorised by an Act; or
- the Commissioner is satisfied that the debt is not legally recoverable; or
- the Commissioner considers that it is not economical to pursue recovery of the debt.

The FMAA thus imposes a positive duty on the Commissioner to pursue recovery of all debts. A decision NOT to pursue a debt may only be made on one of the grounds set out above.

26.2.3 With the commencement of the FMAA, the Commissioner issued Chief Executive Instructions and accompanying delegations whereby the Commissioner delegated his power to pursue recovery of debts, and his

authority to make a decision **not** to pursue a debt. Officers exercising a delegation must be aware of:

- the Commissioner's 'Chief Executive Instruction on Debt Management'. This instruction provides guidance on various debt collection issues, and cross references to this Policy; and
- any advice that the Minister for Finance may issue under section 63(1) of the FMAA concerning non-pursuable debts.

26.2.4 The authority not to pursue recovery of a debt is delegated by the Commissioner to Tax officers occupying specified positions. Copies of the Commissioner's delegations have been provided to all Branch Offices. Officers who approve the non-pursuit of any amount must ensure that they occupy one of the specified positions and should be aware of the ramifications of holding and exercising their nominated financial delegations.

(Delegates must distinguish between a decision not to pursue recovery of an amount for which they hold a delegation, and the waiver of an amount or a debt due to the Commonwealth for which the delegation is held only within the Department of Finance).

26.3 INTRODUCTION

26.3.1 A decision not to pursue a debt is the method of clearing a debt where the amount is either irrecoverable or uneconomical to pursue.

26.3.2 A decision not to pursue a debt does not absolve the debtor from ever having to pay the liability except if the amount was not pursued because it was irrecoverable at law. A debt that was not pursued because it was:

- uneconomical to pursue under either former section 70C of the Audit Act or section 47 of the FMAA; or
- because a debtor had no funds or assets under former section 70C of the Audit Act;

may be re-raised and action to collect the debt can recommence, if the circumstances which led to the decision not to pursue the debt change (for example, the financial position of the debtor improves).

26.4 POLICY

26.4.1 By section 47 FMAA , any debt must be pursued unless the Chief Executive is satisfied that an amount of tax is:

- (i) irrecoverable at law; or
- (ii) uneconomical to pursue.

Subparagraph (ii) above is interpreted as a combination of two grounds in the former section 70C of the Audit Act, namely uneconomical to pursue and irrecoverable because a debtor is without assets/funds and there was little chance of the financial circumstances improving.

A Irrecoverable at law

26.4.2 The word 'recover' has a technical meaning in law, signifying to recover by action and by the judgment of the court. A debt is irrecoverable at law:

- (i) when it cannot be recovered by action and by the judgment of the court (that is, the debt cannot be 'proved');
- (ii) when it forms part of the pre-sequestration debt of a discharged bankrupt;
- (iii) when it represents the balance outstanding after an Official Receiver, Trustee in Bankruptcy or a Liquidator notifies that either no dividend or a final dividend is to be or has been paid. In a number of instances, an Official Receiver, trustee in bankruptcy or a liquidator may not be in a position to advise of the precise dividend for some considerable time. However, the essential cause of any decision not to pursue a debt is an insolvency which results in legal action for recovery no longer being possible, and the rights of the Commissioner to recover being converted into a right to prove in the estate/liquidation. Therefore, in these situations:
 - where the Official Receiver, trustee in bankruptcy or a liquidator advise, at the time of lodging the proof of debt, the approximate dividend expected, the balance of the debt is to be treated under the 'irrecoverable at law' category when the proof of debt is lodged; or
 - where the Official Receiver, trustee in bankruptcy or a liquidator advise, at the time of lodging the proof of debt, of a NIL dividend or they are unable to quantify even an approximate dividend, the total debt is to be treated as non-pursuable under the 'irrecoverable at law' category when the proof of debt is lodged.

In some cases, this advice will be oral and can be accepted on face value. It must be noted on the narrative screen on the case actioning system;

- (iv) when it represents the balance outstanding after a final dividend has been paid under an arrangement in terms of Part X of the *Bankruptcy Act 1966*;
- (v) when it represents the balance outstanding after the debtor has discharged all the obligations under their debt agreement in terms of Part IX of the Bankruptcy Act;
- (vi) when it represents the balance outstanding following the termination of a scheme of arrangement that has been sanctioned by the Court;
- (vii) when it represents the balance outstanding following the finalisation of a deed of arrangement that has been approved by creditors under Part 5.3A of the *Corporations Act 2001*; or

(viii) when it represents the balance of an undisputed debt the Commissioner has agreed not to pursue under a deed of compromise or settlement after the debtor has complied with all the terms of the deed. (Note: Until such time as the debtor complies with all the terms under a deed, it would be inappropriate to treat the balance as irrecoverable at law. However, this fact should not preclude the identification of the portion of the debt the Commissioner has agreed not to pursue as 'doubtful' at the time of signing the deed. Action should be taken to ensure this 'doubtful' portion is not recorded as an asset in the Tax Office's financial statements.)

26.4.3 In subparagraphs 26.4.2(iv), (v) and (vii), where at the time of lodging the proof of debt, the Official Receiver, trustee or administrator indicates the anticipated dividend, the balance of the provable debt will generally be treated as being uneconomical to pursue. When these administrations draw to a successful conclusion (ie after the debtor has adhered to all their obligations under the deed or agreement), the unsatisfied liabilities on the proof of debt will then be treated as being 'irrecoverable at law'.

26.4.4 Debts must satisfy the above criteria to be classified as 'irrecoverable at law'. It should be recognised that these debts can only be re-raised in very limited circumstances eg to offset a later payment that may arise from the activities of a trustee, administrator or liquidator locating previously unknown assets, or a refund amount to be applied to an undisputed debt the Commissioner has agreed not to pursue, or a credit arising from a return lodged prior to the discharge of a bankrupt.

B Uneconomical to pursue

26.4.5 A debt or an amount of revenue may not be treated as uneconomical to pursue unless a delegate is satisfied on all the facts that it is probable that the total costs of recovery action will exceed the return to the Commonwealth. The question of whether an amount is uneconomical to pursue will need to be decided on a case by case basis.

26.4.6 Some matters that should be taken into account by a delegate considering non-pursuit of amounts of revenue under this heading are:

- (i) the amount of revenue involved;
- (ii) the length of time the amount has been outstanding, the steps taken to recover the debt to date, and the costs to the Tax Office involved in those steps;
- (iii) whether adequate steps have been taken to locate or trace a debtor if the grounds for non-pursuit of the debt are that the debtor cannot be located;
- (iv) the likely cost of continuing action to recover the debt and the anticipated return from such action, including likely recovery of any costs awarded to the Commissioner (balanced against the need to maintain the integrity of the tax system);
- (v) advice provided by the Tax Office's solicitor where this has been sought; and,

- (vi) the type of revenue involved. For example, an unpaid amount of Superannuation Guarantee Charge (SGC) and related general interest charge (GIC) may be viewed differently to other revenue types because its collection directly affects the superannuation entitlements of the employees in respect of whom that SGC is owing. Whilst this does not preclude SGC amounts being viewed as 'uneconomical to pursue,' a delegate should bear the particular nature of SGC debts in mind when making a decision.

C No assets/funds

26.4.7 Delegates exercising the delegations for non-pursuit of debts will frequently encounter debts where there are claims of no assets or funds and there is little chance of the debtor's financial circumstances improving. If the debt is not a potential relief case (see policy chapter entitled 'Release from payment of some taxation debts'), a potential insolvency case, or one where payments by instalments (after a delayed commencement) is unlikely, consideration could be given to treating the debt as uneconomical to pursue if there are sufficient facts to support the claims concerning the debtor's assets and funds situation.

26.4.8 Where no further action to recover the debt is appropriate through:

- (i) the issue of a 'garnishee' notice; or
- (ii) the issue of a notice under section 255 ITAA 1936 to a resident with the control of money belonging to a non-resident; or
- (iii) the continuation of legal action to bankruptcy/winding-up; or
- (iv) agreeing to accept payment of the debt by instalments (even for a lengthy period),

a debt may be treated as uneconomical to pursue if:

- (a) the debtor has no assets or a levy under a writ/warrant of execution has not been successful (and it is not possible or intended to pursue bankruptcy action); or
- (b) a notification has been received from a trustee or administrator that the debtor's estate is without sufficient assets to satisfy the liability; or
- (c) the debtor is deceased and there are no assets to be distributed from the estate; or
- (d) a company has ceased operations and has no assets. Officers should ensure, to the extent possible:
 - in the event that a company has been deregistered, it had no assets at the date of deregistration;
 - whether any assets owned by the company prior to deregistration were legally disposed of. If not, officers need to consider whether such assets could be recovered by a liquidator in the event of a company's reinstatement and subsequent winding up;
 - the company actually did cease to trade (per telephone inquiry); and
 - for debts due under a 'remittance provision' (eg PAYG withholding amounts, group tax, deductions from prescribed

payments), consideration has been given to initiating action against directors (*DFC of T v. Action Workwear Pty Ltd (Deregistered)* 96 ATC 4575).

26.4.9 Before deciding not to pursue a company debt, action to wind up the company may be taken. Where it is considered uneconomical to take wind up action and the company has ceased trading, the Australian Securities and Investment Commission (ASIC) is to be requested to consider deregistering the company. Note: ASIC may not be in a position to deregister the company immediately because of the criteria laid down at Section 601AB of the *Corporations Act 2001*.

26.4.10 It would be inappropriate to elect not to pursue the debt of a company whose directors (or persons acting in the management of the company) have a past history of being involved in failed companies without first exploring other avenues of action against, or recovery from the personal assets of, those directors. Directors of companies can be personally liable for the debts of a company if those debts were incurred when the company was trading insolvently. Enquiries should be made as to whether the director has become involved in another entity and whether that entity is complying with its payment obligations.

D Re-raising a debt

26.4.11 A debt may be re-raised for a variety of reasons. The most common are where new information becomes available that suggests recovery action is now viable (tracing, or the debtor has identifiable assets or income) or a later tax return has been lodged. In the case of debts not pursued because:

- they were uneconomical to pursue for some reason under either former section 70C of the Audit Act or section 47 of the FMAA; or
- because a debtor had no funds or assets under former section 70C of the Audit Act;

the situation may have improved and the debtor may be able to pay the debt in full, or be able to pay the debt by instalments over a period of time. Alternatively, legal recovery action may now be a viable option.

26.4.12 However, before re-raising a debt, consideration must be given to whether or not the debt can be legally re-raised. To do this, the relevant schedule is extracted to check the grounds for non-pursuit. If the ground for non-pursuit was one of the following:

- (i) uneconomical to pursue under either former 70C of the Audit Act, or section 47 FMAA; or
- (ii) the debtor had no funds or assets and there is no prospect of the financial situation improving, under former section 70C of the Audit Act;

then the total debt can be re-raised. For all taxes, the additional charges for late payment/general interest charge (GIC) should also be updated and imposed. Once the debt and any other relevant details have been updated, relevant recovery action may commence. Later, the balance, if any, may be the subject of a fresh decision not to pursue if the debt continues to satisfy one of the grounds for non-pursuit.

- 26.4.13 Re-raising the income tax or FBT debt (together with updated charges for late payment) will ensure that the full debt will be shown on the notice of assessment, and if there is a credit, the credit will be absorbed. The assessment will issue showing any remaining balance or additional debt. If a debt is re-raised and, after the allocation of a subsequent credit, there is still an amount outstanding, it may be considered appropriate to again decide not to pursue the balance. If this is the case, then the reason for non-pursuit must satisfy one of the grounds for non-pursuit.

26.5 MAKING A DECISION NOT TO PURSUE A DEBT

- 26.5.1 Prior to submitting a case for a decision on non-pursuit of the debt, the following steps must be undertaken:
- (i) the officer dealing with the case must be satisfied there are no other outstanding debts;
 - (ii) the reason for recommending non-pursuit of the debt must be documented in the case narrative;
 - (iii) the debt shown on the mainframe system must reconcile with the balance on the appropriate case management systems;
 - (iv) all transactions (eg debt, penalties, costs etc) must be finalised prior to submitting a case for a decision not to pursue; and
 - (v) all details on the appropriate case management non-pursuable debt screen should be completed (using the appropriate 'non-pursuit' code).
- 26.5.2 When a debt is submitted for a decision, it is essential that the following information is given to the delegate, so an informed decision may be made:
- (i) a break-up of the debt. If the debt is a running balance account (RBA) deficit debt, it is not necessary to provide a breakdown of the individual debts which were allocated to that RBA. However, there should be sufficient information for the delegate to be informed of the broad period of indebtedness. The delegate should also be told whether any of the primary tax debts allocated to the RBA are amounts due under a 'remittance provision' – in such a case there may be 'parallel liabilities' by way of director penalty amounts;
 - (ii) reasons for submitting that the amount not be pursued; and
 - (iii) a history of case action to date.
- This information is generally available electronically, stored on Tax Office systems.*
- 26.5.3 Officers approving a decision not to pursue a debt must ensure that they hold the appropriate delegation. In determining whether an amount should not be pursued, the delegate should have regard to:
- (i) the Commissioner's Chief Executive Instruction on debt collection, and any relevant advice issued by the Minister for Finance under section 63(1) FMAA;
 - (ii) this policy chapter; and
 - (iii) the specific circumstances regarding the case to be determined.

The delegate should then decide if the amount not to be pursued clearly falls within one of the appropriate categories.

The decision to approve the non-pursuit of the debt can be recorded electronically.

26.5.4 If the delegate decides that an amount should not be pursued because it is irrecoverable at law, the delegate can also approve the deletion of the 'non-pursuit' indicator from the debtor record.

26.5.5 The Tax Office is required to maintain a register of all cases where the decision not to pursue has been approved. This register must record the following details:

- (i) debtor details - name, address, file number;
- (ii) amount and years of the debts not pursued. Again, where the debt is an RBA deficit debt, recording of the broad period covered by the debts allocated to that RBA will be sufficient; and
- (iii) reasons for non-pursuit (that is, one of the two 'non-pursuit of debt' categories).

Such a register may be kept on an electronic Tax Office system.

26.6 TERMS USED

26.6.1 'RBA' means a running balance account established under section 8AAZC TAA to keep account of the primary tax debts, payments and credits allocated to that RBA. For more information, refer to the chapter on 'Running Balance Accounts.'

26.6.2 'RBA deficit debt' means a balance on an RBA in favour of the Commissioner, where the total amount of due and payable primary tax debts allocated to the RBA are greater than the payments and credits allocated to that RBA.