Part B The Collection of Taxation Debts

29 SECURITIES

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: 4 July 2006 *(This replaces the 2003 version.)*

29.1 PURPOSE

29.1.1 This chapter discusses the circumstances in which the Commissioner will require a debtor to provide security or a surety in relation to an outstanding tax debt.

29.1.2 However, it does not apply to securities obtained in relation to the *Excise Act 1901, Distillation Act 1901* or the *Spirits Act 1906.*

29.2 INTRODUCTION

29.2.1 The general concept of security involves a transaction where a creditor is given rights that can be exercised against some property of the debtor in order to discharge the debt if the debtor does not pay. The advantages of obtaining a security are:

(i) it reinforces the Commissioner's prospects of ultimate recovery of the debt (ie the risk of non-payment is mitigated);

(ii) adequate security can act as an incentive for a debtor to take all possible steps to facilitate the finalisation of the review and appeal processes, and any other agreements for the payment of tax;

(iii) debtors can retain a disputed amount pending completion of the review process;

(iv) debtors can be prevented from divesting themselves of assets while a debt remains outstanding; and

(v) the acceptability of security in court disputes.

29.2.2 In some cases, it may be appropriate for the Commissioner to obtain the best security available to him in order to make certain his position as creditor, or more importantly to make certain the process of debt collection. The Commissioner may seek to obtain security in cases where:

(i) a debtor requests the Commissioner to defer the time for payment of a debt;

(ii) a debtor is seeking to pay a debt by instalments;

(iii) the debtor admits he is temporarily unable to pay his taxation debts;

(iv) a debt is subject to dispute and an arrangement has been made with the Commissioner in accordance with the chapter entitled 'Recovering disputed debts' ;

(v) the debtor appears to be dissipating assets;

(vi) the debtor wishes to leave Australia, but is not in a position to pay the debt before leaving;

(vii) or the debtor is seeking a departure authorisation certificate from the Commissioner; or

(viii) there is an indication that the revenue may be at risk.

29.2.3 Securities may take any number of forms, for example, a mortgage over land or shares, a charge over the debtor's assets (which may be fixed or floating), a bill of sale, a pledge or a guarantee by a surety. Basically, securities may be given over any type of property unless excluded by statute. An example of statutory exclusion is the prohibition of a charge over, or assignment of, superannuation benefits by regulations 13.12 to 13.15 of the *Superannuation Industry Supervision Regulations 1994*.

29.3 POLICY

29.3.1 Where a security is offered, the debtor should be advised that:

- the security has to be supported by an agreement that should be in the form of a contract or deed. The debtor should be advised to read the terms of that agreement, contract or deed carefully; and
- additional charges for late payment will continue to accrue, unless their circumstances qualify for remission under normal remission guidelines. (Refer to the policy chapter entitled ‘General interest charge’)

29.3.2 A security is normally for a fixed amount. The amount reflected in the security should be the tax debt plus estimated additional charges for late payment until the debt is fully paid.

29.3.3 In some cases, the Commissioner will require a debtor to provide adequate security as a pre-condition to him agreeing to defer the time for payment of a debt, agreeing to permit payment of a debt by instalments or agreeing to issue a departure authorisation certificate.

29.3.4 It is not possible to identify cases where a security will be required — that is a matter to be decided by the officer dealing with the case. However, it is possible to identify matters that an officer should take into account in deciding whether to seek a security or surety. These matters include, but are not limited to:

(i) the quantum of the debt;

(ii) the period of time the debt has been outstanding;

(iii) the debtor's past compliance history;

(iv) the debtor's ability to pay, based on available information (either supplied by the debtor or obtained by the Tax Office by other means);

(v) the level of the debtor's other liabilities;

(vi) arrangements made by the debtor's other creditors to secure their debts;

(vii) the existing encumbrances on available assets; and

(viii) the perceived risk to the revenue.

29.3.5 The most common securities are:

(i) a deposit of cash to be held in trust;

(ii) first party mortgage over real property, or an equitable mortgage of land with a caveat;

(iii) first charge over company assets and property;

(iv) mortgage of 'blue chip', publicly-listed shares (but shares in private companies are generally not acceptable security);

(v) a bank guarantee;

(vi) irrevocable letter of credit drawn in the Commissioner's favour from an Australian bank or other Australian financial institution;

(vii) bills of sale over personal assets;

(viii) depending on whether the terms of a pre-existing mortgage permit further advances under that mortgage, a second or third party mortgages over real property; or

(ix) personal guarantees which must be supported by a mortgage over real and personal property.

The preferred securities are shown at (i), (ii), and (iii) above.

29.3.6 Securities can be held alone, or in combination with others. A personal guarantee by the debtor, either:

- to do something; or
- not to do something (eg not to dissipate assets), sometimes called a negative pledge

is not a security. Future property is generally also unsuitable as security for a debt due to the Commonwealth.

29.4 SECURITY CONSIDERATIONS

29.4.1 Where it is considered appropriate to seek a security for a debt, cases will be reviewed by a team leader or in consultation with the relevant technical area. If it is decided to seek a security, the ATO Legal Services will prepare the necessary documentation and arrange the registration and lodgment of securities as appropriate.

29.4.2 Where the Commissioner decides to accept a security, the following matters have to be considered:

- the preferred position is that the Commissioner obtain the best security which places the Commonwealth in the position of secured creditor;
- the security has to be supported by contracts/deeds etc. This documentation may be prepared by the debtor’s solicitor, but all should be checked by the ATO Legal Services. The Commissioner will insist on the terms normally included in commercial documents for rights of foreclosure, ability to sell and satisfy debts from proceeds of sale in the event of default etc;
- where appropriate, all securities should be lodged/registered. All registration/release fees, including stamp duty, are to be borne by the debtor;

- the security should be for a set period (ie the debt should not be allowed to remain outstanding indefinitely); and
- the alleged value of a security may need to be checked, particularly for real estate or other assets. Historical costs are irrelevant in most cases.

29.4.3 If a debtor defaults on the agreement, contract or deed, officers should:

- check the agreement, contract or deed for terms concerning rights of foreclosure and ability to sell in the event of default by the debtor; and
- contact the debtor to ascertain the reason for the default. If there is a reasonable explanation for the default, no further action should be taken once the narrative screen has been updated. Any time frames mentioned in the agreement, contract or deed should be updated (at the debtor's expense). If the explanation is unreasonable, the debtor should be advised action will be taken to enforce the security unless the debtor pays the tax covered by the security.

29.4.4 The procedures discussed in the policy chapter entitled 'Corporations Act - Part 5.3A Arrangements (Voluntary Administration)' should be followed if the decision is taken to enforce the security.

29.5 TERMS USED

29.5.1 A 'security' could be generally described as a possession such that the holder of the security holds, as against the grantor (the debtor), a right to resort to some property or some fund for the satisfaction of some demand, after which the balance of the property or fund belongs to the grantor.

29.5.2 'Surety' or 'guarantor' is a person who binds himself by a guarantee or deed to satisfy the obligations of another person, if the latter fails to do so.