ATO RECEIVABLES POLICY

PART B The Collection of Taxation Debts

Chapter 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.

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PURPOSE

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

   (*Please note: the policy does not apply to securities obtained in relation to the Excise Act 1901.)*

INTRODUCTION

2. 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 the event the debtor does not pay. The advantages of obtaining a security are:

   (i) it reinforces the Tax Office's prospects of ultimate recovery of the debt (that is, the risk of non-payment is mitigated)

   (ii) adequate security can act as an incentive for a debtor to ensure that all possible steps are taken to finalise any review and appeal processes, and any other arrangements 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) it provides acceptable security in court disputes.

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

   (i) a debtor requests the Tax Office defer the time for payment of a debt

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

   (iii) the Tax Office has reason to believe the debtor intends to carry on business for a limited period only (as discussed in section 213 of the *Income Tax Assessment Act 1936*)

   (iv) the debtor admits he/she is temporarily unable to pay his/her taxation debts

(v) a debt is subject to dispute and an arrangement has been made with the Tax Office in accordance with Chapter 28 ‘Recovering disputed debts’

(vi) the debtor appears to be dissipating assets

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

(viii) the debtor is seeking a departure authorisation certificate from the Tax Office, and/or

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

4. 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 covered by Superannuation Industry Regulations 1994 subregulations 13.12-13.15.

POLICY

5. 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 Chapter 93 ‘General interest charge’.)

6. 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.

7. In some cases, the Tax Office will require a debtor to provide adequate security as a pre-condition to 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.

8. 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, and

(vii) the perceived risk to the revenue.

Types of security

9. The most common securities are:

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

   (ii) first registered mortgage over real property, or an equitable mortgage of land with 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 registered second or third party mortgage over real property, or

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

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

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

   (i) to do something, or

   (ii) not to do something (for example, 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.

Security considerations

11. 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 Legal Services Branch will prepare the necessary documentation and arrange the registration and lodgment of securities as appropriate.

12. Where the Tax Office decides to accept a security, the following matters have to be considered:

   - The preferred position is that the Tax Office obtains the best security which places the Commonwealth in the position of secured creditor.
   - The security has to be supported by contracts/deeds. This documentation may be prepared by the debtor's solicitor, but all should be checked by the Legal Services Branch. The Tax Office will insist on the terms normally included in commercial documents for example, rights of foreclosure, ability to sell and satisfy debts from proceeds of sale in the even to default.
   - Where appropriate, all securities should be lodged/registered. All registrations/release fees, including stamp duty, are to be borne by the debtor.

- The security should be for a set period (that is, the debt should not be allowed to remain outstanding indefinitely).
- 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.

Default by debtor

13. If a debtor defaults on the agreement, the Tax Office will ascertain the reason for the default and take appropriate action. This may include:

    (i) Allowing the agreement to continue. (The cost to update the timeframes in the agreement, contract or deed will be borne by the debtor.)

    (ii) Advising the debtor to pay the tax covered by the security otherwise action will be taken to enforce the security.

    (iii) Enforcing the security.

TERMS USED

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.

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

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