

ATO RECEIVABLES POLICY
PART B The Collection of Taxation Debts

Chapter 37

RECOVERY OF ADMINISTRATIVE OVERPAYMENTS

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: 24 July 2008 (This version replaces the 2006 version.)

Key legislation: Section 8AAZN of the *Tax Administration Act 1953*

PURPOSE

1. This chapter should be read in conjunction with the Chapter 3: 'Risk management'. It deals with:
 - the Commissioner's ability to recover amounts paid by mistake, and
 - the circumstances and risk factors which will determine how and when action will be taken to recover such amounts.

INTRODUCTION

2. The Taxation System operates predominantly under a self-assessment regime, which relies on taxpayers to honestly self-assess their tax liabilities, as well as their entitlements to refunds of overpaid tax. Underpinning this regime is the Compliance Program, which aims to ensure that taxpayers do not understate their liabilities or overstate their entitlements to refunds.
3. The Tax Office computer system processes a voluminous number of transactions that can inevitably lead to system errors which result in money being mistakenly paid as refunds to which the recipient is not entitled. Additionally, the Compliance Program will detect cases where money has been mistakenly paid as refunds to which the recipient is not entitled.
4. These mistakenly paid amounts are referred to hereunder as 'administrative overpayments'.
5. Section 8AAZN was inserted in the *Taxation Administration Act 1953* (TAA) to enable the Commissioner to recover amounts paid to a person by mistake. The meaning of 'mistake' was considered in *David Securities Pty Ltd v Commonwealth Bank Of Australia* (1992) 175 CLR 353 and it was held to include both mistakes of fact and law. The mistakes contemplated by section 8AAZN include both the mistakes by the Commissioner, as well as those induced by the recipient of those overpayments.

6. Section 8AAZN treats certain overpayments by the Commissioner as a debt due to the Commonwealth “by the person to whom the overpayment was made (the recipient)” and requires payment to the Commissioner. It provides the Commissioner with a statutory cause of action which allows him to sue and recover administrative overpayments as tax-related liabilities. That cause of action authorises recovery **only** from the person or persons to whom the Commissioner makes payment. Section 8AAZN does not permit the tracing of money beyond the initial recipient.
7. The statutory regime applies to administrative overpayments made on or after 1 July 1999.
8. An administrative overpayment is defined in subsection 8AAZN(3) as:
 - an amount that the Commissioner has paid to a person
 - by mistake
 - being an amount to which the person is not entitled.
9. Prior to the enactment of section 8AAZN, the Commissioner’s ability to recover administrative overpayments was limited to common law causes of action such as:
 - an action for ‘money paid from consolidated revenue without statutory authority’
 - an action for money ‘had and received’
 - an action for ‘deceit’.
10. These causes of action remain valid and will continue to be used where section 8AAZN has no application (for example, where it is desired to sue the person or persons to whom an amount of an overpayment has been transferred by the initial recipient of the overpayment or a subsequent transferee of the money). It should be noted that claims pursued under common law can only be made in the name of the Commonwealth, as plaintiff, and will not attract general interest charge (GIC).
11. Administrative overpayments can be categorised according to their cause into two broad groups:
 - Mistakes by the Tax Office
 - Mistakes by taxpayers and/or their representatives

Mistakes by the Tax Office

12. Mistakes by the Tax Office are essentially processing errors that can produce an erroneous refund to a person. Although not exhaustive, they include the following:
 - Incorrect keying or scanning of amounts
 - Crediting of electronic refund to an incorrect bank account
 - Incorrect calculation and refund of interest entitlements, and
 - System and accounting errors.

Mistakes by taxpayers and/or their representatives

13. This category includes those cases where money has been refunded to a person as a result of inaccurate information being provided to the Tax Office either orally or in writing, which may be subsequently discovered as a result of voluntary disclosures, audits or compliance verifications.
14. Administrative overpayments can commonly occur as a result of false and misleading statements or fraud. For instance, under the new tax system, this could range from unintentionally understating activity statement liability amounts or overstating activity statement credits through false and misleading statements in an activity statement, to the more serious fraud, where an entity purports to conduct an enterprise for the sole purpose of obtaining substantial refunds.
15. A statement will be false and misleading where it is erroneous or incorrect; no element of deceitful or dishonest conduct on the part of the taxpayer or anyone else needs to be established. Fraud, on the other hand, occurs where a party intentionally induces a course of action by deceit or other dishonest conduct involving acts or omissions or the making of false statements, orally or in writing, with the object of obtaining money or other benefit from, or of evading a liability to the Commonwealth.
16. Administrative overpayments commonly occur as a result of a mistake induced by the taxpayer and or his/her tax agent in the following instances, which are not necessarily exhaustive:
 - overstated input tax credits or understated GST payable on activity statements
 - overstated claims for early payment of fuel tax credits
 - identity theft or take-over
 - tax agents fraud.

Accrual of general interest charge

17. As mentioned earlier, administrative overpayments which do not fall within the ambit of section 8AAZN of the TAA and can only be recovered under a common law remedy will not attract GIC.
18. GIC will, however, accrue by statute on any administrative overpayments arising under section 8AAZN:
 - from the specified due date, being at least 30 days after a notice is given to the recipient pursuant to subsection 8AAZN(2) of the TAA, or
 - from the date of the overpayment, upon allocation of the administrative overpayment debt to a running balance account (RBA) pursuant to section 8AAZF of the TAA.
19. Subsections (1) and (2) of section 8AAZN are severable to the extent that the giving of notice under subsection 8AAZN (2) is **not** a mandatory prerequisite to the cause of action under subsection 8AAZN(1). Put simply, the Commissioner is able to commence proceedings for recovery of administrative overpayments as soon as the mistake is detected, without giving a notice under subsection 8AAZN(2).
20. The giving of a notice, which essentially establishes a due date for payment being at least thirty days after the notice is given, is only required where the Commissioner, in his discretion, wishes to claim GIC under subsection 8AAZN(2). Notwithstanding this, it is also open to the Commissioner to claim

GIC in such cases where he allocates the administrative overpayment debt to an RBA.

Legal challenge to the application of the administrative overpayment regime

21. In *Deputy Commissioner of Taxation v. De Angelis*, unreported, SADC No DCCIV 2098 of 2005, the Court dealt with two simultaneous applications; the first by the Deputy Commissioner seeking orders that the defendant's defence be struck out and that judgement be entered summarily in his favour for an administrative overpayment debt and associated GIC and the second being an application by the defendant for a stay of proceedings. The defendant's defence was premised on the following propositions:
- An administrative overpayment is not a "primary debt" for the purposes of the running balance account within the meaning of section 8AAZC of the TAA.
 - The defendant is not an entity for the purposes of the RBA.
 - Payment made to the defendant by the ATO was not a mistake.
 - The plaintiff was not permitted to allocate the amount claimed to the RBA because (in addition to the matters referred to above) a primary debt does not include a RBA deficit debt.
 - That the plaintiff is not permitted to make the allocation or reversal as a matter of law.
 - The plaintiff is not entitled to claim GIC as no notice was given by the plaintiff to the defendant of any overpayment pursuant to section 8AAZN.
 - The plaintiff could not correctly allocate the primary tax debt as the primary debt figure was incorrect and that the defendant had not become liable to pay GIC.
22. The Court ordered :
- Judgment for the plaintiff in the sum of primary tax debt **only** being the administrative overpayment.
 - That there was no entitlement to a claim for GIC as no notice was given pursuant to subsection 8AAZN (2).
 - That the defendant's application for a stay of the proceedings be refused.
23. The Deputy Commissioner has appealed the Court's decision in relation to its refusal to enter judgment for the GIC and the defendant has crossed-appealed the applicability of the section 8AAZN to a refund of an overstated input tax credit.
24. The Appeal was heard by the Supreme Court of South Australia on 13 December 2007 and the decision has been reserved. In the mean time, the Commissioner will continue to interpret and administer the administrative overpayment legislation as outlined in this chapter.

POLICY

25. The Commissioner is duty-bound by law to ensure that money mistakenly paid out of consolidated revenue, without authority, is recovered in the most effective and timely manner. In doing so, the Commissioner will use the appropriate option for recovery.
26. In dealing with the recovery of an administrative overpayment, the treatment, timing and mode of recovery to be adopted in each type of case will depend on the amount involved and the circumstances or degree of mischief which gave rise to the overpayment.
27. Based on the principles of the compliance model (see Chapter 3 'Risk management'), the measure and sanction that the Commissioner must implement on a case-by-case basis will be commensurate with the level of risk to the revenue associated with the particular case and the capacity and willingness of the overpayment recipient to repay the amount. As each case will turn on its own facts, the Commissioner will apply the level of sanction that the circumstances dictate (that is, the most severe sanction in the case where the highest level of risk is identified).
28. The level of risk associated with each case will determine:
 - whether the Commissioner should rely on section 8AAZN of the TAA or one or more of the common law causes of action for recovery of the debt, and
 - if section 8AAZN is to be invoked, whether a notice under subsection 8AAZN (2) of the TAA should be given.
29. As a general principle, the Commissioner would regard administrative overpayments induced by taxpayers or their representatives as falling within a higher risk category than those which occurred as a result of a mistake by the Tax Office.
30. Accordingly, where the administrative overpayment is attributable to the recipient's (or their agent's) action or statement, the effect of giving a notice under subsection 8AAZN(2) of the TAA would be to forego part of the GIC accruing during the period in which the entity had the benefit of the administrative overpayment funds. In particular, GIC would not be recoverable during the period between the date the administrative overpayment was made until 30 days after issue of the notice, which would usually occur well after the Commissioner finally determined that the recipient was not entitled to the payment.
31. It is not considered an equitable outcome that a person who was responsible for the overpayment, should have the benefit of GIC-free funds during this period. For this reason, a subsection 8AAZN(2) notice should not be issued in these circumstances and the administrative overpayment will be taken to have been allocated to an RBA on the issue date of the overpayment/refund. Accordingly, GIC will accrue on the overpayment/refund from its issue date and on the revised net amount, from the original due date of the relevant activity statement.
32. Conversely, where an overpayment is solely the result of the Commissioner's mistake, for example, a keying error, a subsection 8AAZN(2) notice should **generally** be given to the recipient of the administrative overpayment. In such circumstances, GIC will not accrue until at least 30 days after the notice has been given to the taxpayer. This approach is in line with the Commissioner's policy to treat taxpayers fairly where the overpayment arises from circumstances beyond their control. The exception to this rule will be where the

administrative overpayment falls within a high risk category because of one or more of the following factors:

- the amount refunded is in excess of \$50,000
- the recipient has a poor compliance record
- evidence held (for example, where the recipient is a non-resident) suggests that there is a risk that the administrative overpayment may not be repaid.

33. In summary, the Commissioner will, wherever possible, adopt the following approach:

- In instances where the amount of the overpayment has resulted from a processing error, the Tax Office may contact the recipient and attempt to negotiate the return of the amount overpaid. Where appropriate, favourable consideration will be given to a repayment arrangement by instalments without the issue of a notice. Where a notice has been issued, remission in part or in full of the GIC incurred may be considered.
- Where the Tax Office does issue a notice under subsection 8AAZN(2) of the TAA, it is appropriate to wait for the expiration of the 30 day period after the notice was issued before any recovery proceedings are commenced.
- On the other hand, in the more serious cases where the revenue is at risk and the Tax Office seeks to secure the amount overpaid, the Commissioner may choose to immediately recover under subsection 8AAZN(1) of the TAA, claiming GIC under the RBA provisions. Where the Commissioner has allocated the administrative overpayment to an RBA, the 30-day notice under section 8AAZN (2) of the TAA will not be required. In these situations, GIC applies automatically to the RBA deficit debt at the end of a day (usually from the original date of the refund of the administrative overpayment). However, advice to the person concerned that the administrative overpayment has been allocated to their RBA is considered appropriate, although not mandatory.

34. The Tax Office may utilise any of the available measures to secure and recover an administrative overpayment and depending on the individual circumstances of each case, may take one or more of the following actions:

- Recover the administrative overpayment from a debtor by issuing a notice pursuant to section 260-5 of the TAA (a 'garnishee') to a third party who is taken to owe money to the debtor. (See Chapter 12 'Garnishee').
- Issue a summons or writ under either or both the statutory causes of action provided under section 8AAZN or common law, as appropriate.
- Apply to the Court for a Mareva injunction to preserve the money where it can be traced to third parties and where appropriate, apply to the Court for declaratory orders in aid of recovery. (See Chapter 36 'Mareva injunctions').

- Refer the matter to the Australian Federal Police for investigation with a view to requesting the Commonwealth Department of Public Prosecutions (CDPP) to lay charges against the recipient for 'Defrauding or conspiracy to defraud the Commonwealth' and where appropriate, apply for restraining orders under the Proceeds of Crime legislation to preserve the money or assets upon which the recipient of the overpayment has effective control, thereafter seeking the appropriate forfeiture order against those assets upon conviction. (Refer to PS CM 2007/02 Fraud control and the prosecution process.)
- Refer the matter to the CDPP to pursue prosecution action under the TAA for making false and misleading statements to the Commissioner and where appropriate apply to the Court for restitution.

Release from payment

35. Division 340 of the TAA empowers the Commissioner's to provide release from particular liabilities on the grounds of serious hardship. Section 340-10 specifically outlines the particular liabilities to which the provisions apply.
36. As administrative overpayments that arise under section 8AAZN are excluded from the scope of Division 340, recipients of administrative overpayments cannot avail themselves to this recourse.
37. Accordingly, where a debtor has applied and been granted full release from payment of all of his/her liabilities, except for the administrative overpayment, consideration should be given to whether it would be economical to pursue recovery of the unpaid administrative overpayment. (Refer to the Chapter 26. 'Deciding not to pursue recovery of taxation debts' for guidance).

TERMS USED

Administrative overpayment – has the same meaning as the definition in subsection 8AAZN (3) of the *Taxation Administration Act 1953* (TAA).

Cause of action – means the legal ingredients necessary for the plaintiff to succeed in his action against the defendant.

Declaratory order – means an order made by the court which declares what the rights are between the parties at the relevant date.

Defendant – means the person against whom legal proceedings are brought. In this chapter it refers to the recipient of the overpayment and in some instances a third party who is holding or is in possession of the amount overpaid.

Plaintiff – means the person who brings an action to court. In the case of an action under section 8AAZN, it can be the Commissioner, the Commissioner's delegate or a Deputy Commissioner. In terms of a common law action, it is the Commonwealth.

Recipient – refers to the person who has received the overpayment.

RBA – means running balance account as defined in section 8AAZA of the TAA.

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.

Traced – derives from the word 'tracing'. The term 'tracing a claim' and 'tracing remedy' is used to describe an equitable right a person has to recover his or her property from those into whose hands it has gone. Strictly speaking, tracing is neither

a claim nor a remedy but a process. Money can be followed at common law into and out of a bank account and also into the hands of a subsequent transferee provided it does not cease to be identifiable by being mixed with other money in that account derived from some other source.