

## ATO RECEIVABLES POLICY

### PART C Lodgment of Documents and Notification of Liabilities

# Chapter 57

## RAISING LIABILITIES WHERE DOCUMENTS NOT LODGED

*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:** Various

### PURPOSE

1. This chapter outlines the various ways in which the Tax Office may raise a tax-related liability where a document has not been lodged.

### INTRODUCTION

2. Under various provisions of the taxation laws the Commissioner can:
  - (i) make an assessment of the taxable income upon which income tax ought to be levied (section 167 of the *Income Tax Assessment Act 1936* (ITAA 1936))
  - (ii) make an assessment of the fringe benefits taxable amount and the amount of fringe benefits tax (FBT) payable (section 73 of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA))
  - (iii) make an assessment of the net amount for a tax period (section 105-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA))
  - (iv) make an assessment of a net fuel amount for a tax period or a fuel tax return period (section 105-5 of Schedule 1 to the TAA)
  - (v) make an estimate of unreported pay as you go (PAYG) withholding amounts (section 222AGA of the ITAA 1936)and bring to account, where appropriate
  - (vi) Goods and services tax (GST) instalments
  - (vii) FBT instalments, and
  - (viii) PAYG instalments.
3. Circumstances under which the Tax Office may raise a tax-related liability include:

- (i) where any person has not complied with a requirement to lodge a document
  - (ii) certain cases where a person has presented information in a document that is incomplete or incorrect
  - (iii) where there is reason to believe that a person who has not lodged a document has derived taxable income, acquired a fringe benefit taxable amount, become liable to make a tax-related payment under PAYG withholding, or has become liable for other tax-related liabilities
  - (iv) where prosecution action has not resulted in effective compliance with the requirements to lodge a document, and
  - (v) where the Commissioner believes that this course of action is the most appropriate in the circumstances.
4. The raising of an assessment of indirect tax, default assessment of income tax or the issue of an estimate does not technically satisfy the requirement for the taxpayer to lodge in the approved form. In appropriate cases, prosecution or other action may be taken to achieve lodgment of the outstanding document even though an assessment or default assessment has been raised, or an estimate has been issued.

### **Income tax and FBT**

5. The requirements for a default assessment are the same as for any assessment:
- (i) the assessment must be the result of an act or operation of the Commissioner
  - (ii) it must lead to an assessment, after consideration of all relevant facts, of the amount of tax payable by a given taxpayer
  - (iii) the assessment must be definitive in character, rather than tentative or provisional, and
  - (iv) at the completion of the process, the Commissioner must serve the taxpayer with a notice of assessment which provides details of the taxable income or a fringe benefits taxable amount.
6. Where the Commissioner makes a default assessment of the amount upon which tax ought to be levied, that amount then becomes the taxpayer's taxable income or fringe benefits taxable amount.
7. Under the ITAA 1936 and the FBTAA the Commissioner shall serve notice of an assessment on the person liable to pay the tax. For the purposes of those acts and associated regulations the Commissioner may serve a notice of assessment on a person by delivering it personally or by leaving it at or posting it to their preferred address for service.
8. In the event of an objection against an assessment, the Commissioner needs to be satisfied that the basis of the assessment is supportable, considering all the information and evidence available.
9. In an appeal against an objection decision on a default assessment, the onus is on the taxpayer to show that the assessment is, on the balance of probabilities, excessive.

### **Activity statement liabilities**

10. There is no legal impediment to the Tax Office revising an activity statement or, where a taxpayer fails to lodge an activity statement, initiating a process which will post tax-related liabilities to the taxpayer's account, provided that:
  - (i) the correct amount of a tax-related liability can be ascertained, or
  - (ii) there is a provision in the legislation which allows the Commissioner to raise an estimate or an assessment.
11. If the Tax Office is able to ascertain the correct amount of a tax-related liability or can establish a liability by other means (for example by making an estimate of a PAYG withholding amount), the Tax Office may pursue any amounts outstanding as a result.
12. If the taxpayer has more than one tax obligation to be notified on an activity statement, any one or more of those liabilities can be raised or revised as they are separate obligations in taxation law.
13. An entity may only object against an indirect tax assessment, but not against revisions to other items on the activity statement. An assessment of fuel tax is an indirect tax assessment.

### **Liability to penalty**

14. Where the Commissioner raises a default assessment or indirect tax assessment without the required document being lodged, a penalty of 75% of the tax-related liability may also be imposed (section 284-75 of Schedule 1 to the TAA). This penalty may be increased by a further 20% for any repeat failure to provide a required document (section 284-220 of Schedule 1 to the TAA).
15. The penalty is additional to any failure to lodge on time penalty that may be applied (refer to Chapter 98 'Penalties for failing to lodge documents on time').

### **POLICY**

16. In cases where compliance action has not resulted in lodgment of a document (refer Chapter 56 'Actioning non-lodgment') the Commissioner may, depending upon the nature of the outstanding obligations:
  - (i) make an assessment of indirect tax or default assessment of income tax
  - (ii) make an estimate, or
  - (iii) bring to account a tax-related liability for the relevant tax period.
17. There may also be situations where it is preferable to consider those options rather than take action to enforce lodgment of the document. For example, in situations where:
  - (i) there is a risk that taxpayers would remove themselves or their assets from Australia
  - (ii) there is evidence that a non-lodger has derived taxable income, has a PAYG withholding obligation or other tax-related obligation and there is a risk that moneys that are available to satisfy the tax debt would be lost if collection action were delayed
  - (iii) a taxpayer's compliance record is so poor that it suggests that the person's level of compliance would not change as a result of prosecution, or

- (iv) a taxpayer's compliance record and other information available indicates that prosecution action is neither warranted nor cost effective.

### **Income tax and FBT**

18. The Commissioner may make a default assessment of a person's taxable income or a fringe benefits taxable amount upon any basis that is reasonable in light of what is known of the particular circumstances. This includes the use of available external information, indirect audit methodologies, statistical information or extrapolation from previous years' returns.
19. Generally, the Tax Office will advise a taxpayer of the intention to issue a default assessment and the basis upon which it will be calculated. This provides a taxpayer with an opportunity to put forward an alternative basis of calculation or to rebut the assumptions upon which estimates are based. Any reply received should be given appropriate weight in making a default assessment. However, the Tax Office is not bound to accept a taxpayer's unsupported reply if it conflicts with independent evidence.
20. The Commissioner may consider a number of factors in determining whether to exercise the power to make a default assessment. Some of these relevant factors include:
  - (i) the facts of the case
  - (ii) the availability and reliability of information as to a taxpayer's likely taxable income or fringe benefits taxable amount
  - (iii) the choice of the most cost-effective method of changing a taxpayer's poor compliance.

### **Indirect tax components of an activity statement**

21. The Commissioner may, at any time, make an assessment of an entity's net amount for a tax period or make an assessment of a net fuel amount for a tax period or fuel tax return period. Situations in which the Commissioner may make an assessment include:
  - (i) where an entity has not lodged an activity statement, or
  - (ii) where the Commissioner has reason to believe that the amounts stated in an activity statement are incorrect.
22. Where the Commissioner makes an assessment, a notice of assessment will issue advising the entity of the net amount or net fuel amount assessed.
23. The mere lodgment of an activity statement by the entity notifying a net amount or a net fuel amount does not constitute an assessment.

### **PAYG withholding component of an activity statement**

24. The Commissioner has the power to estimate the amount of PAYG withholding which remains outstanding for a particular period. While this does not require an exact calculation, it does require that the estimate be reasonable and based on sufficient detail to justify the estimate (refer Chapter 6 'Estimating a liability').

### **Instalment amounts on an activity statement**

25. Generally, the Tax Office will not make an estimate of a PAYG instalment where the taxpayer reports using the income times rate method.
26. However, the Tax Office can bring to account a PAYG instalment amount, GST instalment amount or FBT instalment amount. This is because there is no reporting obligation for these amounts unless the taxpayer chooses to vary the instalment amount.
27. Where a taxpayer is an instalment amount payer, the amount notified to the taxpayer on their activity statement or instalment notice is the amount that is brought to account.
28. The following are situations where instalment amounts on an activity statement may be brought to account:
  - (i) where the activity statement contains only 'instalment amount' obligations and the document has not been returned by the due date
  - (ii) where the Commissioner has issued indirect tax assessments or estimates on other obligations contained on the same activity statement, or
  - (iii) to finalise instalment amounts where the relevant annual return has been lodged.

## **TERMS USED**

**Activity Statement** – a form that allows the taxpayer or representative to report obligations for GST, luxury car tax (LCT), wine equalisation tax (WET), PAYG withholding, PAYG instalments, FBT instalments and fuel tax credits (FTC).

**Assessment** – under the provisions of a taxation law, an assessment is an operation of the Commissioner that determines a tax-related liability such as the taxable income of a taxpayer for the purposes of income tax or the net amount of indirect tax for an entity.

**Approved form** – a form that has been approved by the Commissioner as acceptable to provide information required by the Tax Office. An example of an approved form is any income tax return or activity statement. Law Administration Practice Statement PSLA 2005/19 outlines how a form becomes an approved form and what is required to be in it.

**Business activity statement (BAS)** – a personalised form lodged by those taxpayers who have an obligation to lodge an activity statement and have a GST role as well as other obligations such as WET, LCT, PAYG instalments, PAYG withholding, FBT instalments and FTC. A BAS must be lodged with the Tax Office for each tax period.

**Default Assessment** – under the various provisions of taxation law, the Commissioner may make an assessment based upon available information, including information other than that contained in a return or statement lodged by a taxpayer. Such an assessment is sometimes referred to as a default assessment (refer section 167 of the ITAA 1936 and section 73 of the FBTAA).

**Indirect tax** – includes any of the following: GST, LCT and WET.

**Instalment activity statement** – a personalised form issued by the Tax Office for reporting tax obligations to be lodged by taxpayers who are either not registered or required to be registered for GST, or who are not required to report GST in a particular period, but may have other reporting obligations.

Instalment amount – includes PAYG instalment amounts, GST instalment amounts or FBT instalment amounts.

Net amount – the amount of indirect tax payable by you to the Commonwealth or the amount of indirect tax payable to you by the Commonwealth.

PAYG instalments – system used for paying instalments during the income year towards a taxpayer's expected tax liability on business and investment income. The actual tax liability is worked out at the end of the income year when the annual income tax return is assessed. PAYG instalments for the year are credited against the assessment to determine whether the taxpayer owes more tax or is owed a refund.

PAYG withholding – is the system whereby payers withhold amounts from payments to payees and report and pay the withheld amounts to the Tax Office.

GST return – the approved form through which an entity reports its net amount of indirect tax for a tax period. For quarterly and monthly reporting obligations, the GST return is the BAS.

Tax-related liability – a pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable). See section 250-10 of Schedule 1 to the TAA for a summary of tax-related liabilities.

#### **Chapter 57 - Archived version**

Version 4 – July 2006 (will link to chapter 57 pdf)
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