

Part D Credits and Refunds**72 OFFSETTING OF REFUNDS AND CREDITS AGAINST TAXATION AND OTHER 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 as if it were legislation. If you consider that something in the chapter is incorrect or misleading, please advise the Tax Office.

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72.1 PURPOSE

72.1.1 This chapter details the circumstances in which credits and refunds will be offset against taxation debts and the factors that may influence the Commissioner to refund, rather than offset those amounts. The chapter also explains when tax credits will be offset against the outstanding debts owed to other Commonwealth agencies, such as the Child Support Agency and the Department of Family and Community Services.

72.1.2 The following policy chapters contain some related information that are relevant to this chapter:

- [Allocation of payments or credits](#) describes the process for allocating credits and payments and the order in which the credits and payments are applied to tax and other debts;
- [Refunds of pay as you go withholding amounts withheld in error](#) explains the policy relevant to the obligations and rights of a payer, a recipient and the Commissioner, in circumstances where an amount has been withheld in error from a payment under the pay as you go (PAYG) withholding system. It also provides general information as to how the recipient may obtain a refund of these incorrectly-withheld amounts;
- [Retained refunds – financial institution account details ineligible or not provided](#) explains when the Commissioner will retain a business activity statement (BAS) refund where financial institution account details are ineligible or have not been provided. It also provides some details in relation to when an overseas traveller may be entitled to a refund of goods and services tax (GST) or wine equalisation tax (WET) paid on certain goods, and
- [Retained refunds – activity statements or related information not provided and other restrictions on refunds](#) explains when the Commissioner will retain a refund (including a GST refund) owed to an entity where they have not given a notification to the Commissioner required under the BAS provisions. This chapter also details when the Commissioner will retain a voluntary payment made in respect of an anticipated tax debt and provides some information about the Commissioner's policy in circumstances where a supplier has included GST incorrectly in the price of a non-taxable supply.

72.2 LEGISLATION

72.2.1 Two entities that are indebted to each other may have a right of ‘set-off’, leaving a residual obligation from one entity to the other. This entitlement to set-off may arise under general law—for example, equitable or legal set-off, or statute. Generally, this power to set-off is available to all types of entities including the Commonwealth, unless specifically prohibited by legislation or terms of a contract.

Statute Law

72.2.2 General law principles regarding set-off have been modified by statute. Statutory set-off arises under various laws—for example, the *Taxation Administration Act 1953* (TAA), the *Bankruptcy Act 1966* (Bankruptcy Act), the *Corporations Act 2001* and in some state statutes.

72.2.3 Since 1 July 2000, section 8AAZL in Division 3 of Part IIB of the TAA states that the Commissioner **must** apply any payment, credit or running balance account (RBA) surplus to either an RBA, or non-RBA tax debt. This application process was mandatory until subsection 8AAZL(3) of the TAA, applicable from 1 July 2000, was inserted by *Taxation Laws Amendment Act (No. 8) 2000*. This amendment enables the Commissioner to exercise a discretion not to offset a payment, credit or RBA surplus against a tax debt:

- (i) that is:
 - (a) not a BAS amount (as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997*); and
 - (b) due but not yet payable; or
- (ii) in respect of which, the taxpayer has complied with an arrangement under section 255-15 of Schedule 1 to the TAA to pay the debt by instalments; or
- (iii) in respect of which, the Commissioner has agreed to defer recovery under section 255-5 of Schedule 1 to the TAA.

72.2.4 Section 8AAZLD of the TAA provides priority for higher education contribution scheme (HEC) assessment debts, compulsory repayment amount arising under the *Higher Education Support Act 2003* (HESA) and student financial supplement (SFSS) assessment debts to be offset from credit that arises under the PAYG system.

72.2.5 Repayment of amounts that were not required to be paid to the Commonwealth under the *Higher Education Funding Act 1988*, that are less than \$50, may be credited against primary tax debts. Where a person pays an amount to the Commonwealth under Division 151 of the HESA and the amount exceeds the total debts owed under Chapter 4 of the HESA, the excess may be applied against the person’s primary tax debts.

72.2.6 Interest payable to a tax debtor, arising under the *Taxation (Interest on Overpayments and Early Payments) Act 1983* (T(IOEP)A 1983), is required to be offset against any tax debt owed in accordance with Division 3 of Part IIB of the TAA.

72.2.7 The sum of all GST and input tax credit attributable to the same tax period must be offset against each other to produce a net amount in

accordance with sections 7-5, 17-5 and 126-5 *A New Tax System (Goods and Services Tax) Act 1999*.

- 72.2.8 Section 72 of the *Child Support (Registration and Collection) Act 1988* (CS(R&C)A 1988) enables the Registrar to require the Commissioner to pay any refund otherwise payable to a taxpayer by the Commissioner, to the Registrar to be applied against the taxpayer's Child Support obligations.
- 72.2.9 Section 87 of *A New Tax System (Family Assistance)(Administration) Act 1999* allows the Commissioner to apply the whole or part of an income tax refund to Family Tax Benefit debts, on the request from the Secretary of the Department of Family and Community Services. Conversely, section 226 of this Act allows the Commissioner to apply the whole or part of a Family Tax Benefit credit (other than child care benefits) to primary tax debts.
- 72.2.10 Section 93 of *A New Tax System (Family Assistance)(Administration) Act 1999* allows a person, other than a person that owes a tax debt, who is entitled to an income tax refund, to give consent to the Commissioner of Taxation to apply the whole or part of their refund to reduce another person's family tax benefit debt (other than a child care benefit debt).

72.3 INTRODUCTION

- 72.3.1 The Commissioner maintains a system of accounts for taxpayers, recording their obligations, payments and credit entitlements under the various tax laws. For example, the Commissioner currently maintains an account for the activity statement obligations of a taxpayer and another account for their assessed income tax obligations.
- 72.3.2 "Offsetting" is a term generally used to describe when an amount owed to a taxpayer by the Commissioner is applied to reduce, in whole or in part, the taxpayer's liability to tax. It is a simple process that is efficient and one that makes it easier and cheaper for a taxpayer to comply with their tax obligations.
- 72.3.3 Offsetting may occur within an account, or between the accounts belonging to a taxpayer. For example, a credit balance on the account which maintains record of a taxpayer's assessed income tax obligations can be offset against a debit balance on the taxpayer's activity statement account.
- 72.3.4 In the interest of simplicity, the term 'credit', used throughout this chapter, also includes amounts referred to in some tax law as refunds (for example, a GST refund). The term 'refund' is generally used in this chapter, unless indicated otherwise, to describe the circumstances where a taxpayer has an entitlement to a credit and the taxpayer owes no tax debts to apply that amount against.
- 72.3.5 The offsetting of these amounts is supported by tax law, specifically [section 8AAZL](#) in Division 3 of Part IIB to the TAA.
- 72.3.6 Generally, the process of offsetting a payment or credit amount against a tax debt owed by an entity is mandatory, except in limited circumstances where the Commissioner has discretion to refund the amount to the taxpayer. These circumstances include where:

- the debt is not yet payable (unless the debt pertains to those obligations notified on an activity statement, in which case the discretions does not apply);
- the debt is the subject of an arrangement to pay by instalments; or
- the Commissioner has agreed to defer recovery of the debt.

72.3.7 Although the Commissioner's general principle is to offset the credit entitlements belonging to a taxpayer against any tax debt they owe, the credit may be refunded to the taxpayer provided the Commissioner has the discretion not to offset the credit, and the taxpayer has shown that the offset will cause 'serious financial hardship'.

72.3.8 The Commissioner will not offset small credit amounts, or offset amounts against small debts, except in certain circumstances, including where:

- the Commissioner has commenced legal recovery action in relation to the debt,
- the debt relates to the superannuation guarantee charge; or
- the credit and debit are contained on the same account (for example, an assessed income tax refund will usually be offset against an assessed income tax debt).

72.3.9 Taxpayers should be aware that the Commissioner has no discretion in cases where the Child Support Registrar requires the Commissioner to pay a refund owing to a taxpayer to the Registrar. The Commissioner must pay to the Registrar any amount that would otherwise be refunded to the taxpayer. The Commissioner will offset any credit against other tax debts prior to paying the residual amount to the Registrar in these cases.

72.3.10 The following information outlines the Commissioner's general approach to offsetting, the circumstances when the Commissioner will refund a payment or credit rather than offset, and the situations when an amount must be offset under a tax law.

Section	Topic
A.	<u>General</u>
(i)	<u>General Principle</u>
(ii)	<u>Small amounts</u>
B.	<u>Commissioner's discretion to refund</u>
(i)	<u>Tax is due but not yet payable</u>
(ii)	<u>Tax debt is subject to a payment arrangement</u>
(iii)	<u>Commissioner has agreed to defer recovery of a tax debt</u>
C.	<u>Disputed tax debts</u>
(i)	<u>Mass-marketed tax schemes</u>
(ii)	<u>Other disputed debts</u>
(iii)	<u>High compliance risk</u>
D.	<u>Specific credits</u>
(i)	<u>PAYG credits</u>
(ii)	<u>Higher Education Contribution (HEC) repayments and Higher Education Scheme Act refunds</u>
(iii)	<u>FBT credits</u>
(iv)	<u>Excise Fuel Payment Schemes and Excise Claims</u>
(v)	<u>Excess Imputation Credits</u>
(vi)	<u>Excess Baby Bonuses</u>

(vii)	Family Tax Benefit
(viii)	Input tax credits
(ix)	GST groups
(x)	Consolidated Income Tax Groups
(xi)	Taxpayers in arrangements under the Bankruptcy Act or Corporations Act
	Bankruptcy
	Part X Bankruptcy Act - Agreements with Creditors without Sequestration
	Part X Bankruptcy Act – Personal Insolvency Agreements
	Part IX Bankruptcy Act – Debt Agreements
	Division 6 of Part IV – Composition or Arrangement with Creditors
	Part 5.3A Corporations Act 2001 – Deed of Company Arrangement
	Corporate insolvencies
	Representatives of incapacitated entities
	Excise Fuel Payment Scheme credits and arrangements under the Bankruptcy and Corporations Acts
(xii)	Credit arising from Departing Australia Superannuation payment
(xiii)	Credits from Delayed Refund Interest, Interest on Overpayments and early payments
(xiv)	Credits arising from account adjustments
(xv)	Remainder credits
E.	Serious Financial Hardship

72.3.11 A list of relevant terms used can be found at the end of this chapter for further reference.

72.4 POLICY

A. General

(i) General Principle

72.4.1 As a 'general principle', and consistent with good business practice, the Commissioner will offset credits or payments belonging to a taxpayer against any tax debt that they owe. This applies to all tax debts including income tax, fringe benefits tax, the superannuation guarantee charge and the goods and service tax. It also applies to all credits (including 'Excise Fuel Payment Schemes' credits).

72.4.2 In limited circumstances, however, the tax law provides the Commissioner with the discretion to refund a payment or credit entitlement rather than offsetting the amount against a tax debt.

72.4.3 An overriding principle in the application of the law is to adopt a fair and reasonable approach, balancing the collection of tax properly payable with the issues faced by taxpayers if an offsetting occurs. In deciding whether or not to offset, the Commissioner must also consider those taxpayers who have paid all their debts on time.

(ii) Small amounts

72.4.4 The *Financial Management and Accountability Act 1997* requires the Commissioner to pursue all debts unless it is uneconomical to do so, or the debt is irrecoverable at law. It may be considered 'uneconomical to pursue' a debt where the costs associated with offsetting small amounts are excessive.

- 72.4.5 The Commissioner will not offset small amounts, or offset amounts against small debts, unless:
- the Commissioner has commenced legal recovery action;
 - the debt relates to the superannuation guarantee charge;
 - the credit entitlement and tax debt are located within the same account (for example, credit entitlements and debts notified on an activity statement will be offset against each other);
 - the credit entitlement and debt relate to the same tax type, even where these amounts are recorded on different accounts for the same taxpayer (for example, an income tax credit will be offset against an income tax debt); or
 - the Child Support Registrar requires the Commissioner to pay any refund towards child support debts.
- 72.4.6 The basis for not offsetting small amounts is that the administrative costs to the taxpayer and the Tax Office would exceed the amount of a small offset; that is, it would be uneconomical to pursue.
- 72.4.7 With the improvement to the Tax Office information technology systems, to provide taxpayers with full details of all automated offsets undertaken, these administrative costs should reduce and the policy will be reconsidered. The advantages to taxpayers and the Tax Office of offsetting against small debts are clear, provided that there is effective communication of the process.

B. Commissioner's discretion to refund

- 72.4.8 In limited circumstances, the Commissioner has discretion not to follow the 'general principle' and instead may refund an amount to a taxpayer. The following outlines how the Commissioner will exercise this discretion.
- (i) Exercise of the Commissioner's discretion not to offset where a tax debt is due but not yet payable**
- 72.4.9 The law requires the Commissioner to offset an amount against a debt that is due, but not yet payable, if the debt is in respect of those taxes notified on an activity statement. The Commissioner does, however, have the discretion not to offset if the debt is not an activity statement debt and is not yet payable.
- 72.4.10 The Commissioner will usually offset against an amount due, but not yet payable where both the credit and the payment relate to the same tax type. For example, an income tax credit will be offset against an income tax debt, including a HEC and FS assessment debt, even if the debt is not yet payable. This has been the practice over a number of years where the income tax debt may be shown as 'other amounts payable' on an assessment notice.
- 72.4.11 If a credit that is available for offsetting is of a different tax type to a debt that is not yet payable, the Commissioner will not usually offset those amounts (unless the debt relates to activity statement amounts). This will be the general approach unless the compliance record of the taxpayer is unsatisfactory.
- 72.4.12 For example, if a taxpayer lodges their income tax return a considerable time before the due date for lodgment, and expects a debit assessment

for that return, any credit (other than for income tax) that arises between the lodgment and the due date for payment would not be offset against that assessment. Where such an offset has occurred, the amount would be refunded on request provided there are no tax debts due and payable (unless the debt relates to activity statement amounts).

- 72.4.13 However, as indicated above, where the Commissioner believes that a taxpayer is dissipating assets to avoid payment, or has a poor history of non-lodgment or non-payment, the Commissioner may offset a tax credit against a tax debt which is due, but not yet payable.
- 72.4.14 The Commissioner will also offset a refund or credit against an amount that is due, but not yet payable, in cases where the Child Support Registrar requires the Commissioner to pay any refund owing to the taxpayer towards the taxpayer's child support debts.

(ii) Exercise of the Commissioner's discretion not to offset where a tax debt is the subject of a payment arrangement

- 72.4.15 Generally, the Commissioner will not offset any credit or payment against a tax debt that is the subject of a payment arrangement unless the Commissioner advised the taxpayer in writing at the commencement of the arrangement that this would occur. In cases where offsets will occur, taxpayers should consider the effect that the offsetting of these amounts may have on their cash flow when negotiating the arrangement.
- 72.4.16 If, during the course of the payment arrangement, these offsets cause the taxpayer unexpected cash flow difficulties, they should approach the Tax Office with a view to seeking a temporary variation to that arrangement. (Refer to the policy chapters entitled '[Arrangements to pay tax-related liabilities by instalments](#)' and '[Deferring the time for payment](#)'.)
- 72.4.17 The Commissioner will, however, offset a credit against an amount that is the subject of a payment arrangement (even where there was no prior advice that an offset would occur) in cases where the debt relates to the superannuation guarantee charge, or where the Child Support Registrar requires the Commissioner to pay any refund owing to the taxpayer towards the taxpayer's child support debts.

(iii) Exercise of the Commissioner's discretion not to offset where the Commissioner has agreed to defer recovery of a tax debt

- 72.4.18 The Commissioner will, in certain circumstances, agree to defer the recovery of a tax debt. For instance, the Commissioner may defer recovery where the taxpayer has a genuine dispute with the assessability of an amount.
- 72.4.19 The decision to defer recovery is a deliberate step taken by the Commissioner and taxpayers will be advised if such a deferral has been granted. The mere fact that Tax Office has not contacted a taxpayer for some time regarding the payment of a debt should not be construed as a deferral of recovery.
- 72.4.20 It is important to note that the deferral of recovery action is quite different from an arrangement to pay a debt by instalments, or the deferral of the due date for payment of a debt. The former is a recovery process negotiated between the Commissioner and the taxpayer. The latter is an

option available to the Commissioner where, due to exceptional circumstances, the due date for payment of the debt has been changed. (Refer to the policy chapters entitled '[Arrangements to pay tax-related liabilities by instalments](#)' and '[Deferring the time for payment](#)').

- 72.4.21 Generally, the Commissioner will not offset credits against a tax debt that is subject to a deferral of recovery action. If there is evidence, however, that the taxpayer is dissipating assets, the Commissioner will offset credits up to the full extent of the taxpayer's liability to tax.
- 72.4.22 The Commissioner will also offset any credit against an amount that is the subject of an agreement to defer recovery of the tax debt in cases where the Child Support Registrar requires the Commissioner to pay any refund owing to the taxpayer towards the taxpayer's child support debts.

C. Disputed tax debts

(i) Mass-Marketed tax schemes

- 72.4.23 The Commissioner will not offset refunds or credits against disputed income tax debts for the 1998-1999 income year and prior years of income arising from participation in mass-marketed tax schemes until after the appeals in relation to those schemes have been determined, or the taxpayer's debt is no longer disputed. The normal policy in relation to 'other disputed debts' applies to later years.
- 72.4.24 A credit or refund that has been offset since 1 July 2000 against these disputed scheme debts will be refunded on request, provided the taxpayer is acting in good faith and not taking action to avoid the payment of any debt that is payable, or is eventually confirmed to be payable.

(ii) Other disputed debts

- 72.4.25 The Commissioner will not offset refunds or credits against other disputed debts until after the objection relating to that debt has been determined, or the taxpayer withdraws their objection.
- 72.4.26 If the debt is subject to an appeal and the taxpayer has entered into a 50/50 arrangement, the Commissioner will not offset any refund or credit against the remaining balance of the disputed tax, until the period of deferral under the arrangement has expired.
- 72.4.27 However, if the taxpayer has not entered a 50/50 arrangement in relation to a tax debt subject to an appeal, the Commissioner will offset refunds and credits up to the full extent of the taxpayer's liability to tax.
- 72.4.28 If a credit or refund is offset against a disputed debt contrary to this policy, the amount will be refunded immediately upon the taxpayer's request.

(iii) High compliance risk

- 72.4.29 The treatment outlined above in relation to disputed tax debts, including disputed mass-marketed scheme debts, is not available to taxpayers where the Commissioner determines that:
- (i) there is a risk to revenue—for example, evidence that the taxpayer is dissipating assets;
 - (ii) the taxpayer is a promoter of schemes, or

- (iii) the taxpayer has a poor compliance history in meeting their tax obligations.

In these circumstances the Commissioner will generally offset refunds and credits up to the full extent of the taxpayer's liability to tax.

D. Specific credits

- 72.4.30 Credits, other than payments, can arise on a taxpayer's account as a result of account adjustments, transfers, lodgment of an activity statement, or as a result of credit assessments. However, unlike payments, these credits are often subject to specific rules with regard to the manner in which they are offset. Some of these rules are:

(i) PAYG credits

- 72.4.31 Section 8AAZLD of the TAA provides priority for HEC assessment debts, compulsory repayment amounts arising under the HESA and SFSS assessment debts with regard to the offset of the credit that arises under the PAYG system. For example, where an entitlement to a credit arises in relation to an income year for PAYG instalments payable, or from amounts withheld from PAYG withholding payments, that credit will be applied initially to any HEC assessment debt, compulsory repayment amount and FS assessment debt before being applied against any income tax debts that are payable for that year.

(ii) HEC repayments and HESA refunds

- 72.4.32 Repayment of amounts less than \$50 that were not required to be paid to the Commonwealth under the *Higher Education Funding Act 1988* may be credited against primary tax debts. Where a person pays an amount to the Commonwealth under Division 151 of the HESA and the amount exceeds the total debts owed under Chapter 4 of the HESA, the excess may be applied against the person's primary tax debts prior to being refunded.

(iii) FBT credits

- 72.4.33 An entitlement to a tax credit for fringe benefits tax (FBT) instalments payable, that arises upon the Commissioner making an assessment of the FBT, will be initially applied to the respective assessed tax for that FBT year.

(iv) Excise Fuel Payment Schemes and Excise Claims

- 72.4.34 Excise fuel payment schemes are administered under the *Product Grants and Benefits Administration Act 2000* and include fuel sales grants, product stewardship (oil) benefits, energy grants (on-road and off-road credits) and cleaner fuel grants.
- 72.4.35 The Tax Office will usually contact excise fuel payment scheme and excise claim (refunds or drawbacks of excise paid) recipients to discuss offsetting these credits against their tax debts. The Commissioner has a legal right to offset in these cases; but will attempt to discuss the offset with recipients.
- 72.4.36 If the recipient agrees to the offset, the credit will be promptly allocated against their tax debt. This agreement does not constitute a payment

arrangement to pay the tax debt by instalments, it relates solely to an agreement to retain the credit.

- 72.4.37 Where the recipient enters into a suitable payment arrangement to pay off their outstanding tax debt, the Commissioner will seek to offset their entitlement to these credits as part of that arrangement, but understands that this may not always be practical. If a suitable payment arrangement cannot be reached because of prior arrangements that have been put in place in relation to the credits, for example, between the recipient under the *excise fuel payment scheme* and their supplier, the recipient may be given three months to make alternative arrangements so that a suitable payment arrangement can be reached which would include these credits.
- 72.4.38 If the recipient is not prepared to agree to an offset or a suitable payment arrangement, or has not lodged returns or met other tax obligations when required, the amount will be offset.

(v) Excess Imputation Credits

- 72.4.39 Certain taxpayers will be entitled to a refund of excess imputation credits in relation to dividends paid on or after 1 July 2000. The law allows for these credits to be offset against any tax debts owed.
- 72.4.40 The Commissioner recognises that it may be uneconomical to offset these credits against old small taxation debts owing by taxpayers who have not been required to be in the taxation system for some time, for example, certain retirees.
- 72.4.41 Taxpayers who have had no obligation (other than the outstanding debt) to be in the taxation system for over two years, will not have these credits offset unless the amount of both the credit and the debt are substantial. If either the debt or the credit is not substantial, the Commissioner considers that it is uneconomical to pursue the debt.
- 72.4.42 If other taxpayers receiving these credits still continue to have obligations in the taxation system, any credits arising from the excess imputation will be offset against their tax debts.
- 72.4.43 Even in cases where the debt and credit are small, the Commissioner will offset an amount against any superannuation guarantee charge debts. Additionally, in cases where the Child Support Registrar requires the Commissioner to pay the credits to the Registrar, the Commissioner will offset the credits against any tax debts, regardless of whether the debt and credit are small, prior to paying any residual amount to the Registrar.
- 72.4.44 Where a refund of excess imputation credit is offset contrary to this policy, the Commissioner will refund the amount immediately upon the taxpayer's request.

(vi) Excess Baby Bonus

- 72.4.45 From 1 July 2001, eligible taxpayers have been entitled to a refund of excess baby bonus in assessments for the 2001-2002 income year and later years of income. The law allows for this credit to be offset against any tax debts.
- 72.4.46 As with the treatment of excess imputation credit, the Commissioner recognises that it may be uneconomical to offset credits in relation to the baby bonus against old small taxation debts owed by these taxpayers who have not been required to be in the taxation system for some time.

- 72.4.47 Eligible taxpayers for the baby bonus who have had no obligation (other than the outstanding debt) to be in the taxation systems for over 2 years, will not have these credits offset unless the amount of both the credit and the debt are substantial. If either the debt or credit is small, the Commissioner would consider that it is uneconomical to pursue the debt.
- 72.4.48 If taxpayers receiving these credits still continue to have other obligations in the taxation system, any credits arising from the excess baby bonus will be offset against those other tax debts.
- 72.4.49 Even in cases where the debt and credit are small, the Commissioner will offset an amount against any superannuation guarantee charge debts. Additionally, in cases where the Child Support Registrar requires the Commissioner to pay the credits to the Registrar, the Commissioner will offset the credits against any tax debts, regardless of whether the debt and credit are small, prior to paying any residual amount to the Registrar.
- 72.4.50 Where a refund of excess baby bonus is offset contrary to this policy, the Commissioner will refund the amount immediately upon the taxpayer's request.

(vii) Family Tax Benefit

- 72.4.51 On request from the Secretary of the Department of Family and Community Services, the Commissioner will apply the whole or part of an income tax refund to any family tax benefit **debts**, provided there are no other tax debts to apply the credit against. Where the Child Support Registrar requires the Commissioner to pay refunds to the Registrar, any remaining credit, after tax debts have been offset, will then be applied to any child support debts.
- 72.4.52 Conversely, the Commissioner may apply the whole or part of a family tax benefit (FTB) **credit** (other than child care benefits) to any primary tax debts. These credits arise where a taxpayer claims their FTB entitlements through the Family Assistance Office (via Centrelink) and subsequently lodges the relevant year income tax return where, upon assessment, it is established that they had over-estimated their income for the purposes of claiming FTB. Credits may also arise where a taxpayer claims their FTB entitlement for the year as a lump sum when they lodge their tax return rather than through Centrelink. These credits will initially be applied to any income tax debts before being applied against any other tax debt.

(viii) Input tax credits

- 72.4.53 The sum of all GST and input tax credits attributable to the same tax period must be set off against each other to produce a net amount in accordance with sections 7-5, 17-5 and 126-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).
- 72.4.54 Where the net amount of GST notified in an activity statement is less than zero, the taxpayer will be entitled to a corresponding credit. This credit will initially be applied to any other liabilities notified in the same activity statement before being applied against other tax debts.

(ix) GST groups

- 72.4.55 Under Division 48 of the GST Act, certain entities may elect to group, so that one entity within the group (the representative member) deals with all the GST debts of the group. The representative member is liable for all

the GST debts of the group and is entitled to all the input tax credits of the members of the group. However, all members of the group are jointly and severally liable to pay the group's GST debts.

- 72.4.56 In these cases, the Commissioner may apply any member's entitlement to credit against any tax debt of other members of that group. The Commissioner will, as a general rule, apply such credit amounts of a member initially against any of their own tax liabilities.
- 72.4.57 If that member has no tax liabilities, the amount would then be allocated across the group commencing with the member that has the oldest period tax debt for each tax type. (Refer to the policy chapter entitled '[Allocation of payments or credits](#)' for further details.)
- 72.4.58 The joint and several liability provision does not apply to a member of a GST group if an Australian law has the effect of prohibiting that member from entering into any arrangement under which they become liable for another entity's debts (for example, some financial institutions). However, that member will remain liable for any amount payable under an indirect tax law by the representative member of the group, to the extent that the liability arises from its own acts or omission.

(x) Consolidated Income Tax Groups

- 72.4.59 Under Division 703 of the *Income Tax Assessment Act 1997*, wholly owned-groups of entities can elect to consolidate and thereafter be treated as a single entity for income tax purposes. Broadly, this means that the subsidiary entities lose their individual income tax identities and are treated as parts of the head company (HC) of the consolidated group for the purposes of determining income tax liability during the period in which they are members of the group.
- 72.4.60 Liability to pay the income tax attributable to group activities rests with the HC. If the HC does not pay a group liability by the due date (the HC's due time), all entities that were members of the group for a part of the liability period (the contributing members) become jointly and severally liable for that group liability. However, joint and several liability is avoided by the contributing members if, just before the HC's due time, the particular group liability was covered by a Tax Sharing Agreement (TSA) that reasonably allocated the liability amongst the parties to that agreement, and that agreement is provided when requested by the Commissioner. Where a group liability is covered by a TSA, a particular contributing member may have no liability or be liable for only a portion (the contribution amount) of the group debt.
- 72.4.61 A member's full joint and several liability or liability equal to the contribution amount under a TSA does not become due and payable until 14 days after the Commissioner gives the entity written notice. (Refer to the policy chapter entitled '[Collection of consolidated group liabilities](#)' for further details.)
- 72.4.62 The Consolidated Group regime does not enable the offsetting of one entity's credits against the debts of another entity except where both entities are members of a GST group for the purposes of Division 48 of the GST Act. The law in relation to offsetting should be distinguished from the legislation that makes entities jointly and severally liable for a liability.
- 72.4.63 It is conceivable that the HC and/or one or more subsidiaries of a consolidated group could also be members of a GST group. In discussing

offsetting in this scenario, the legislative intent behind the introduction of the TSA regime is to be respected.

72.4.64 Accordingly:

- (i) if the HC is a member of a GST group, any refund or credit belonging to any other member of the GST group (who is not a subsidiary member of the consolidated group) may be offset against any of the HC's debts;
- (ii) if the HC is a member of a GST group, any refund or credit belonging to any other member of the consolidated group that is not a member of the GST group will not be offset against any of the HC's debts;
- (iii) if the HC is not a member of the GST group, offsetting other members' refunds or credits against any of the HC's debts cannot occur;
- (iv) if the HC is a member of a GST group, its refunds or credits may be offset against any liability of the other members of the GST group even if those companies are not members of the consolidated group; or
- (v) if the HC and one or more subsidiary members of a consolidated group are also members of a GST group, a refund or credit of a subsidiary member will not be applied to any HC group liability or another subsidiary's joint and several consolidated group liability or TSA component amount where that liability is covered by an existing TSA that includes the subsidiary member.

72.4.65 Where a HC's or subsidiary member's refund or credit amounts can be offset against another member's liability, the Commissioner will, as a general rule, apply these amounts initially against their own tax liabilities. If that member has no tax liabilities, the amount would then be allocated across the group commencing with the HC or subsidiary member that has the debts with the earliest due date for each tax type. (Refer to the policy chapter entitled '[Allocation of payments or credits](#)' for further details.)

(xi) Taxpayers in arrangements under the Bankruptcy Act or Corporations Act

Bankruptcy

72.4.66 When debtors are discharged from bankruptcy, they are released from the debts that were provable in the bankruptcy. This has an important effect on the application of credits arising from assessments relating to income years after the date of the sequestration order. Until a bankrupt is discharged, any excess credits, such as credits for amounts withheld under the PAYG system, can be applied in reduction of any liability (both post- and pre-sequestration) before any remaining balance is refunded to the debtor (*Taylor v. DFC of T 87 ATC 4441*). However, once a bankrupt has been discharged, the pre-sequestration debt is considered to be irrecoverable at law and is written off. Any excess credits arising after the bankrupt's discharge will be refunded, assuming there are no other debts.

72.4.67 The only exception to this is when an assessment relating to a pre-sequestration year results in a credit. This would be offset against the

bankrupt's debt regardless of whether or not the bankrupt has been discharged.

- 72.4.68 If a taxpayer is an undischarged bankrupt, the Commissioner will firstly allocate or apply any entitlement to a tax credit relating to the post-sequestration income period, to any post-sequestration tax debt (including additional charges for late payment). This credit would then be allocated to any tax due in respect to the pre-sequestration income period.

Part X Bankruptcy Act - Agreements with Creditors without Sequestration

- 72.4.69 Prior to the enactment of the *Bankruptcy Legislation Amendment Act 2004* in June 2004, there were three different forms that a Part X agreement could take:
- a Deed of Assignment;
 - a Deed of Arrangement; or
 - a Composition.
- 72.4.70 When all dividends to which creditors are entitled have been distributed, any remaining balances owing up to the date of execution of the deed, or acceptance of the composition may be written off as irrecoverable at law. This has an important effect on the application of any excess credits, such as credits for amounts withheld under the pay as you go system.
- 72.4.71 Under a Deed of Assignment the taxpayer is released from their provable debts when the deed has been duly executed by both the taxpayer and the trustee (s230 of the Bankruptcy Act). Therefore, any excess credits arising after the execution of the deed will be refunded.
- 72.4.72 The execution of a Deed of Arrangement may provide for the taxpayer to be released from certain debts (s234 of the Bankruptcy Act). If tax debts have been released by the deed, any excess credits arising after that time will be refunded. If there is any tax debt which was due and payable at the date of execution of the deed and which has not been released, credits arising may be applied in reduction of the debt.
- 72.4.73 A Composition operates to release the taxpayer from all debts which would have been provable had a bankruptcy occurred (section 240 of the Bankruptcy Act). Any excess credits arising after the date of acceptance of the composition will be refunded.
- 72.4.74 Credits in relation to periods of income prior to the execution of a deed or acceptance of a composition will be offset even if the relevant assessment is made after these events.

Part X Bankruptcy Act – Personal Insolvency Agreements (PIA)

- 72.4.75 Since June 2004, the previous three types of Part X agreements have been replaced by a hybrid agreement (incorporating elements from each of these agreements) known as a **Personal Insolvency Agreement**. (For more detailed information, see the policy chapter entitled [‘Bankruptcy Act Part X – Personal insolvency agreements’](#).)

- 72.4.76 The execution of a Personal Insolvency Agreement (PIA) may provide for the taxpayer to be released from certain debts (as per s230 of the Bankruptcy Act).
- 72.4.77 If tax debts have been released by the PIA, any excess credits arising after that time will be refunded.
- 72.4.78 If there is any tax debt which was due and payable at the date of execution of the PIA, and which has not been released, then any credits arising may be applied in reduction of the debt.
- 72.4.79 The Commissioner will first seek to apply any credits arising from a post-PIA period to any post-PIA liabilities.
- 72.4.80 If there are no known post-PIA liabilities, the Commissioner will apply such credits to the pre-PIA debts – assuming, of course, that the PIA has not already operated to release the taxpayer from those debts.

Part IX Bankruptcy Act - Debt Agreements

- 72.4.81 Subsection 185J(1) of the Bankruptcy Act provides that a taxpayer is released from provable debts as if they had been discharged from bankruptcy, immediately upon details of their debt agreement being entered into the National Personal Insolvency Index. Accordingly, refunds of tax cannot be offset against a tax debt, subject to the agreement, unless the agreement is terminated or declared void (subsection 185J(2)).
- 72.4.82 Refunds in relation to periods of income prior to the agreement can of course be offset even if the relevant assessment is made after the agreement is registered. In this instance, the Commissioner can rely on either the crediting provisions of the tax statutes (for example, Division 3 of Part IIB of the TAA) or section 86 of the Bankruptcy Act.

Division 6 of Part IV - Composition or Arrangement with Creditors

- 72.4.83 The law operates in a similar fashion to Part X (above), but in this instance the taxpayer would be released from provable debts and their bankruptcy annulled upon the passing of the special resolution to accept the taxpayer's proposal. Accordingly, refunds of tax cannot be offset against a tax debt subject to the composition or arrangement unless the composition or arrangement is annulled.

Part 5.3A Corporations Act 2001 – Deed of Company Arrangement

- 72.4.84 Generally, liabilities that arise before the beginning of an administration are provable under a Deed of Company Arrangement (DOCA). The DOCA must provide the extent to which the company is to be released from those provable debts. A prescribed DOCA provision states that provable debts are released when the administrator has paid to the creditors their full entitlements under the Deed. This prescribed clause can be modified, as part of the DOCA approval process, to provide a different release date.
- 72.4.85 Until released from its provable debts, credits due to a company should be applied in reduction of any liability (both pre- and post- administration) before any balance is refunded. Once a company is released from its debts, however, any credit entitlements arising after that time will be

refunded to it, assuming there are no post-administration debts against which the amounts can be applied. The only exception to this rule is that credits relating to pre-administration periods will be applied against pre-administration debts regardless of whether or not a company has been released from those debts.

- 72.4.86 The Commissioner will apply any credit relating to a post-administration period first to any post-administration liabilities. If there are no known post-administration liabilities, a post-administration credit will be applied against pre-administration debts, assuming those debts have not been released by operation of the DOCA. Pre-administration credits will first be applied against pre-administration debts, then against any post-administration debts before any balance is refunded.

Corporate insolvencies

- 72.4.87 Credits due to a company in liquidation must first be applied against any debts of the company before a refund can be made.
- 72.4.88 Credits in respect of post-liquidation periods should first be applied against post-liquidation debts and then any other debts of the company.

GST and Representatives of incapacitated entities

- 72.4.89 A GST credit due to a person in his or her capacity as a representative of an incapacitated entity cannot be offset against liabilities of the incapacitated entity. This is because, for GST purposes, the representative and the incapacitated entity are considered different entities.
- 72.4.90 A GST credit due to an incapacitated entity that arises after the appointment of a representative will initially be offset against any post-appointment tax debts of the entity. Any remaining credit will then be offset against any pre-appointment tax debts provided the entity has not been released from those debts.

Excise Fuel Payment Scheme credits and arrangements under the Bankruptcy and Corporations Acts

- 72.4.91 Excise fuel payment scheme credits arising after 1 July 2003 and administered under the *Products Grants and Benefits Administration Act 2000* (PGBAA) are excluded from the operation of the offset provisions in Division 3 of Part IIB of the TAA. This is because the definition of credit in Division 3 of Part IIB of the TAA does not include credits arising after 1 July 2003 and administered under the PGBAA. This affects the common law insolvency administration offset rules such that excise fuel payment scheme credits for post-insolvency periods cannot be applied against pre-insolvency debts.
- 72.4.92 Excise fuel payment scheme credits for pre-insolvency periods will be applied against pre-insolvency debts using the set-off provisions in section 553C of the *Corporations Act 2001*.
- 72.4.93 In receiverships, however, excise fuel payment scheme credits should be applied against any liabilities the entity has regardless of which period the excise fuel payment scheme credits and the liabilities relate. This is because the appointment of a receiver would not normally impact on the rights of unsecured creditors of the company, including a right of legal offset.

- 72.4.94 Excise fuel payment scheme credits include fuel sales grants, product stewardship (oil) benefits, energy grants (on-road and off-road credits) and cleaner fuel grants.

(xii) Credits arising from Departing Australia Superannuation Payment

- 72.4.95 The Superannuation Holding Accounts Special Account (SHASA) is an account into which an employer can pay small amounts of superannuation that may be too small to be accepted by 'normal' superannuation funds.
- 72.4.96 Temporary residents (such as backpackers) who may have had superannuation paid into SHASA on their behalf while working in Australia are entitled to request and receive those amounts of superannuation upon their departure from Australia. Such a payment is known as a DASP (Departing Australia Superannuation Payment).
- 72.4.97 From time to time the departing person who receives the DASP has an outstanding taxation liability. In these instances, the DASP from the SHASA should be applied against the tax liability.

(xiii) Credits from Delayed Refund Interest, Interest on Overpayments and Early Payments

- 72.4.98 Division 3 of Part IIB of the TAA enables interest payable, arising under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*, to be offset against any tax debt owed to the Commissioner. The interest will be initially allocated to the account to which it pertains.

(xiv) Credits arising from account adjustments

- 72.4.99 Credit arising from an account adjustment is to be applied against the account posting to which it pertains and then in reduction of any amounts due and payable on the account to which it is posted.

(xv) Remainder credits

- 72.4.100 Any remaining credit from the initial offset of the specific credits outlined above is to be allocated to any other liability the taxpayer has to the Commonwealth that arises under an Act of which the Commissioner has the general administration in the order outlined in the policy chapter entitled '[Allocation of payments or credits](#)'.

E. Serious Financial Hardship

- 72.4.101 Although the Commissioner's general principle is to offset the credit entitlements belonging to a taxpayer against any tax debts that they owe, where the Commissioner has legal authority to exercise a discretion not to offset the credit, the amount may be refunded if the taxpayer can demonstrate that the offset would cause 'serious financial hardship'. Alternatively, the Commissioner may in these circumstances suggest that the taxpayer consider alternative options in relation to their financial position. 'Serious financial hardship' is where a taxpayer cannot meet the basic necessities of life.
- 72.4.102 The Commissioner has legal authority to exercise a discretion not to offset the following:

- (i) a credit against a tax debt that is due but not yet payable (other than a BAS amount)
- (ii) a credit against a tax debt that is subject to a payment arrangement
- (iii) a credit against a tax debt that is subject to a deferral of legal action
- (iv) Energy Grants (Credits) Scheme amounts—that is, excise fuel payment scheme credits, against a tax debt, or
- (v) a Family Tax Benefit credit against a primary tax debt.

72.4.103 If the Commissioner has the discretion not to offset a credit and the taxpayer has shown that the offset will cause serious financial hardship, the credit will be refunded unless the Commissioner determines that:

- (i) there is a risk to revenue—for example evidence that the taxpayer is dissipating assets, or
- (ii) the taxpayer has a poor compliance history in meeting their tax obligations.

In these circumstances the Commissioner will generally offset credits up to the full extent of the taxpayer's liability to tax.

72.5 TERMS USED

72.5.1 'Additional charges', or the 'GIC' means the General Interest Charge worked out in accordance with Division 1 of Part IIA *Taxation Administration Act 1953* (TAA) that a person is liable to pay when a provision of an Act of which the Commissioner has general administration makes the person liable. For example, a person is liable to pay the charge if an amount that the person must pay to the Commissioner is not paid on time.

72.5.2 'BAS' stands for the business activity statement.

72.5.3 'BAS amounts' means any debts or credits that arise directly under the BAS provisions.

72.5.4 'BAS provisions' means:

- (i) Part VII of the FBTA 1986
- (ii) the indirect tax law (within the meaning of Part VI of the TAA)
- (iii) Parts 2-5 and 2-10 in Schedule 1 to the TAA (which are about the PAYG system)
- (iv) the following provisions:
 - (a) section 221AZK of the *Income Tax Assessment Act 1936* (ITAA 1936) in cases in which section 221AZKC ITAA 1936 applies (that section allows deferral of tax instalment payments)
 - (b) section 221AZKD ITAA 1936 (which requires notification of deferred tax instalment payments), and
- (v) sales tax law as defined in section 5 of the *Sales Tax Assessment Act 1992*.

72.5.5 'Contributing member' is an entity that was a subsidiary member of a consolidated group for at least part of the period to which the group liability relates.

- 72.5.6 'Contribution amount' in respect of a particular group liability is the amount allocated to a TSA contributing member under a Tax Sharing Agreement.
- 72.5.7 'Credit' includes an amount that the Commissioner must pay to a taxpayer under a taxation law, whether or not described as a credit. For example, GST law often refers to a net amount for a tax period that is less than zero, which the Commissioner must pay to an entity, as a GST refund.
- 72.5.8 'DASP' stands for Departing Australia Superannuation Payment. The payment consists of superannuation amounts that have been paid into an account by an employer on behalf of a temporary resident of Australia. The DASP is paid to the temporary resident on their departure from Australia.
- 72.5.9 'Excess non-RBA credit' will exist when a payment or credit is greater than the non-RBA tax debt to which it has been applied.
- 72.5.10 'Excise Claims' include applications for refunds or drawbacks by entities that conduct business activities with controlled commodities. More specifically:
- (i) refunds occur where Excise Duty has been overpaid and the taxpayer is entitled to a refund of the amount of overpaid duty, and
 - (ii) drawbacks occur where Excise Duty has been paid and the goods have been exported and the taxpayer is entitled to a refund of the amount of duty paid.
- 72.5.11 'Excise Fuel Payment Schemes' include fuel sales grants, product stewardship (oil) benefits, energy grants (on-road and off-road credits) and cleaner fuel grants.
- 72.5.12 'Incapacitated entity' is defined to be:
- (i) an individual who is a bankrupt
 - (ii) an entity that is in liquidation or receivership, or
 - (iii) an entity that has a 'Representative' (refer to the definition below).
- 72.5.13 'Family Tax Benefit debt' is an amount payable under *A New Tax System (Family Assistance) (Administration) Act 1999*.
- 72.5.14 'Group liability' is one of the tax-related liabilities referred to in subsection 721-10(2) ITAA 1997. A group liability includes a PAYG instalment and an annual income tax assessment.
- 72.5.15 'IAS' stands for the Instalment Activity Statement.
- 72.5.16 'Non-RBA tax debt' means a primary or secondary tax debt, but does not include an RBA deficit debt. Examples of non-RBA tax debts include a debit assessment for income tax or a debit net amount in respect to a tax period for the Goods and Services Tax and the GIC payable as a result of paying these amounts after they are due for payment.
- 72.5.17 'Personal Insolvency Agreement (PIA)' is a hybrid agreement introduced by the *Bankruptcy Legislation Amendment Act 2004* in June 2004, which incorporates elements of each of the three pre-existing types of Part X arrangements, that is, a deed of assignment, a deed of arrangement, or a composition, into one form.

- 72.5.18 'Primary tax debt means any amount due to the Commonwealth directly under a taxation law, including any such amount that is not yet payable. Primary tax debts are usually allocated to an RBA where they then are combined with other primary tax debts, payments and credits to form the balance of that RBA. For example, a primary tax debt includes a debit assessment for income tax and the GIC that would accrue as a result of paying this amount after it is due for payment. An RBA deficit debt is also a primary tax debt.
- 72.5.19 'RBA' means a running balance account established under section 8AAZC of the TAA to keep account of the primary tax debts, payments and credits allocated to that RBA. For the purposes of establishing an RBA, GIC that has accrued in relation to non-RBA tax debts or an RBA deficit debt cannot be allocated to an RBA. (An RBA deficit debt is subject to GIC under section 8AAZF of the TAA.)
- 72.5.20 '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.
- 72.5.21 'RBA surplus' means a balance on an RBA in favour of the entity, where the primary tax debts allocated to the RBA are less than the payments and credits allocated to that RBA.
- 72.5.22 'Representative' (of an incapacitated entity) is defined as:
- (i) a trustee in bankruptcy;
 - (ii) a liquidator;
 - (iii) a receiver;
 - (iv) an administrator appointed to an entity under Division 2 of Part 5.3A of the *Corporations Act 2001*;
 - (v) a person appointed, or authorised, under an Australian law to manage the affairs of an entity because it is unable to pay all its debts as and when they become due and payable; or
 - (vi) an administrator of a deed of company arrangement executed by the entity.
- 72.5.23 'Secondary tax debt' means an amount that is not a primary tax debt, but is due to the Commonwealth in connection with a primary tax debt—for example, an amount due to the Commonwealth under an order of a court made in a proceeding for recovery of a primary tax debt.
- 72.5.24 'Serious financial hardship' is where a taxpayer cannot meet the basic necessities of life.
- 72.5.26 'Tax debt' means a primary tax debt or a secondary tax debt. It does not include scheme debts under the *Products Grants and Benefits Administration Act 2000*.
- 72.5.27 'Tax-related liability' or 'liability' is a term used to define any pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable). It thus includes all types of taxes, penalties and additional charges for late payment (including amounts previously defined under the ITAA 1936 as 'tax' and amounts defined under the *Superannuation Guarantee Administration Act 1992* (SGAA) as 'superannuation guarantee charge').

A table which lists the tax-related liabilities is found at section 250-10 of Schedule 1 of the TAA. This table includes excise and diesel fuel rebate debts administered under the provisions of the *Excise Act 1901*, diesel fuel rebate debts administered under the 'diesel fuel rebate Customs provisions' of the *Customs Act 1901* and both grant scheme debts administered under the provisions of the *Diesel and Alternative Fuel Grants Scheme Act 1999* and *Product Grants and Benefits Administration Act 2000*.

72.5.28 'TSA contributing member' is a contributing member that is party to a Tax Sharing Agreement.