

ATO RECEIVABLES POLICY

PART E Credits and Refunds

Chapter 73

REFUNDS OF PAY AS YOU GO WITHHOLDING AMOUNTS WITHHELD IN ERROR

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: Subdivision 18-B of Schedule 1 to the *Taxation Administration Act 1953*

PURPOSE

1. This chapter outlines 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, purportedly 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.

A refund may, however, be retained by the Commissioner in circumstances not outlined in this chapter. The following policy chapters outline those circumstances:

- i. Chapter 72 'Offsetting of refunds and credits against taxation and other debts' outlines the circumstances where the Commissioner will offset a credit or account surplus to reduce other liabilities before any remaining amount is refunded;
- ii. Chapter 74 'Retained refunds – financial account details 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, or fuel tax credits (FTC) and
- iii. Chapter 75 'Retained refunds – activity statements or other related documents not provided & other restrictions on refunds' explains when the Commissioner will retain a refund (including FTC and GST refunds) 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 to 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.

INTRODUCTION

2. The PAYG withholding system requires an entity (the payer) to withhold an amount from certain payments made to, or received for, another entity (the recipient) and to pay the withheld amount to the Tax Office. This system also applies to non-cash benefits and to certain payments of personal services income.
3. The recipient will receive a credit, equal to the amount withheld, if an assessment of their income tax in the relevant year has been made. If, on the other hand, the withholding is from a dividend, interest or royalty payment made to, or received for the recipient, and the recipient is a non-resident who has borne all or part of the amount withheld, the recipient is entitled to a credit equal to all or part of that amount against their non-resident's withholding tax liability
4. Whilst complying with their obligations under the PAYG withholding system, a payer may withhold an amount in error. When this occurs, the recipient may request a refund of the amount withheld in error from the payer or from the Tax Office.
5. An error may be an error of fact or an error of law. An error of fact is one where an error is made by a decision maker about the existence of a particular fact. An error of law is a misinterpretation or misapplication of a principle of law, or the application of an inappropriate principle of law to an issue of fact.
6. In the absence of an intention to the contrary the word 'error' takes on its broad, natural meaning, which includes both an error of fact and an error of law.
7. Subdivision 18-B of Schedule 1 to the TAA contains the rules allowing amounts withheld or paid to the Commissioner, in error, purportedly under any of the PAYG withholding provisions, to be refunded to recipients.
8. Subsection 18-65(1) of Schedule 1 to the TAA requires that the **payer** must refund to the **recipient** an amount, if the payer:
 - withheld the amount purportedly under Division 12 of Schedule 1 to the TAA from a payment made to, or received for, the recipient (whether the amount has been paid to the Commissioner or not)
 - paid the amount to the Commissioner purportedly under Division 13 of Schedule 1 to the TAA for an alienated personal services payment in relation to which an amount is included in the recipient's assessable income year under section 86-15 of the *Income Tax Assessment Act 1997*, or
 - paid the amount to the Commissioner purportedly under Division 14 of Schedule 1 to the TAA for a non-cash benefit provided to, or received for, the recipient, and
 - the amount was withheld or paid to the Commissioner **in error**

and

 - either:
 - a. the payer becomes aware of the error, or
 - b. the recipient requests the refund

by 21 July in the financial year after the one in which the amount was withheld or paid to the Commissioner

and

- any information requested by the payer under subsection 18-65 (3) has been given, or
 - the time for making the request (7 working days) has passed without such a request being made.
9. Subsection 18-65(2) of Schedule 1 to the TAA specifies that the amount to be refunded under subsection (1) is a debt recoverable by the recipient from the payer.
 10. Subsections 18-65(3) and (4) of Schedule 1 to the TAA allow the payer to request information regarding the recipient's tax file number (TFN) (or the deemed quotation thereof) or Australian business number (ABN) within seven days of receiving the application for refund, or becoming aware of the error. This does not apply if the payment was in respect of Subdivision 12-F (Subdivision 12-F applies to dividend, interest and royalty payments on which non-residents are liable to pay withholding tax.)
 11. Under subsections 18-65(5) and (6) of Schedule 1 to the TAA a payer who has refunded an amount to a recipient under sub-section 18-65(1) is entitled, up to the extent of the amount as has been paid to the Commissioner, to:
 - recover that amount from the Commissioner, or
 - offset that amount against a future withholding liability under Divisions 13 or 14 or subsection 16-70(1).
 12. Section 18-65 of Schedule 1 to the TAA will not apply where either:
 - the payer did not become aware of the error, or
 - the recipient did not apply to the payer for a refund

by 21 July in the financial year after the one in which the amount was withheld or paid to the Commissioner. In these circumstances, the recipient will be entitled to claim a credit on assessment for the amount withheld in error (as is the case for amounts correctly withheld) or, if that is not appropriate, the recipient can apply to the Commissioner for a direct refund of the amount withheld in error under section 18-70. For example, it may be appropriate for the recipient to apply for a direct refund where the amount withheld in error was withheld purportedly under Subdivision 12-F or where the recipient is not required to lodge an income tax return.
 13. Subsection 18-70(1) of Schedule 1 to the TAA specifies that the recipient may apply in writing to the Commissioner for a refund of an amount if:
 - the amount has been paid to the Commissioner;
 - the payer withheld an amount purportedly under Division 12, or paid to the Commissioner an amount purportedly under Divisions 13 or 14
 - the amount was withheld, or paid to the Commissioner, in error, and
 - the payer did not become aware of the error, or the recipient did not request a refund from the payer, by 21 July in the financial year after the year the amount was withheld or paid to the Commissioner.
 14. Sub-section 18-70(2) of Schedule 1 to the TAA requires the Commissioner to refund the amount if certain identifying information is supplied (TFN, ABN or the

basis on which the recipient was taken to have quoted a TFN – even though the recipient did not have a TFN) and the Commissioner is satisfied that it is fair and reasonable to do so.

15. In relation to amounts withheld purportedly under section 12-85 of Schedule 1 to the TAA in relation to the 2005–06 and earlier income years, section 18-75 specifies that the Commissioner must refund all, or part, of an amount withheld from an eligible termination payment (ETP) if the Commissioner is satisfied that:
 - a part or whole of the ETP is taken to have been rolled over, or
 - will be taken to have been rolled over, and
 - the amount withheld exceeds the amount that should have been withheld from the ETP.
16. Sub-section 18-75(3) of Schedule 1 to the TAA defines the amount refundable as being the excess of the amount withheld over the amount that should have been withheld from the ETP.
17. Sub-section 18-75(4) of Schedule 1 to the TAA requires the Commissioner to refund the amount either to the recipient of the ETP or another recipient on his behalf.
18. Section 18-80 of Schedule 1 to the TAA requires the Commissioner to refund to an entity, if requested in writing by the entity, all or part of an amount withheld from a withholding payment from an investment body, to that entity, if the Commissioner is satisfied that the entity was entitled to give the investment body a declaration of exemption from quoting a TFN under Division 5 of Part VA of the *Income Tax Assessment Act 1936* but did not do so, and the Commissioner considers it fair and reasonable to do so.
19. An entity may object (under Part IVC of the TAA) if the entity is dissatisfied with the Commissioner's decision in relation to refunding an amount under section 18-70 or 18-80 of Schedule 1 to the TAA.

POLICY

Refunding of certain withheld amounts

20. If an amount is incorrectly withheld by a payer, the recipient **may** obtain a refund from the payer or the Tax Office, depending upon the circumstances.
21. The following examples illustrate where an amount would be considered to have been withheld incorrectly:
 - an investor quotes his or her TFN to an investment body and that body fails to record the TFN, and later withholds from a payment of investment income, because a TFN has not been quoted
 - an employer misreads the 'tax tables' when an amount is withheld from a payment of salary/wages paid to an employee and consequently withholds an amount at a much higher rate than is normally required
 - an amount is withheld from a payment that is exempt income in the hands of the recipient
 - an amount is withheld from a payment to:
 - a an entity that is not entitled to an ABN (the supply is made in the supplier's private capacity or in relation to a hobby)

- b a non-resident who derives it in carrying on business in Australia at or through a permanent establishment and the payment is a dividend or interest, or
 - c certain suppliers that are not carrying on an enterprise because it has no reasonable expectation of profit or gain.
- an amount is withheld from a recipient in one of the exception categories:
 - a the total payment for the supply is \$75 or less (exclusive of any goods and services tax (GST))
 - b the supplier is under 18 years of age and the payments for supplies do not exceed \$120 per week
 - c the supply is wholly input taxed under GST
- the wrong exchange rate is used in calculating an interest, unfranked dividend or royalty payment to a non-resident and an excess amount is subsequently withheld from these payments, or
- an incorrect (higher) withholding rate is used in calculating the amount withheld from a payment of an interest, unfranked dividend or royalty to a non-resident. Subsequently an excess amount is withheld from these payments.

22. The following examples illustrate where an amount would be considered to have been withheld correctly:

- where the payer withholds amounts correctly according to the circumstances at the time when the payment was made
- a payer withholds 46.5% from a payment for a supply because the supplier had not quoted their ABN on an invoice, or some other document relating to the supply, or
- an employee fails to complete a TFN declaration and the employer withholds an amount from the payments of salary/wages at the higher rate than that which applies to employees who have quoted a TFN.

Refunds from the payer

23. An amount that has been withheld in error (regardless of whether it has been paid to the Tax Office) must be refunded by the payer to the recipient if certain conditions are met (see paragraph 8, above).
24. The payer can offset a credit equal to the amount refunded against future PAYG withholding liabilities to the Commissioner, provided the payer has already forwarded the 'incorrectly' withheld amount to the Commissioner. A payer is entitled to recover the refunded amount from the Commissioner provided the amount is not recorded by the payer as offset against future withholding liabilities.
25. Where an amount has been withheld due to an error involving the quotation of a recipient's TFN or ABN, the payer may request the required information to enable the correction of their records before refunding an amount. If the recipient does not provide its TFN or ABN to the payer, or evidence of the basis on which the recipient is taken to have quoted it, the payer is not required to refund the amount.

26. The payer must refund the amount withheld in error to the recipient if the payer becomes aware of an error at any time up to 21 July in the financial year following the one in which the amount was withheld.
27. If the recipient has not applied for a refund, or the payer does not otherwise become aware by that date, the payer is not required to refund under section 18-65 of Schedule 1 to the TAA. In such a case, the recipient will be entitled to claim a credit on assessment for the amount withheld in error (as is the case for amounts correctly withheld) or, if that is not appropriate, for example, because the recipient is not required to lodge a return or the amount was withheld purportedly under Subdivision 12-F, the recipient can apply to the Commissioner for a refund of the amount.

Refunds from the Tax Office

28. A recipient may apply to the Tax Office for a direct refund of an amount withheld in error where the recipient did not apply to the payer for a refund by 21 July in the relevant year, or the payer did not become aware of the error by that date in the relevant year.
29. The Tax Office is required to refund the amount withheld in error if:
- the amount withheld or paid in error has been paid to the Tax Office, and
 - the application specifies, either
 - a. the recipient's TFN
 - b. the basis on which the recipient is taken to have quoted a TFN to the payer before the amount was withheld (where the recipient did not have a TFN), or
 - c. the recipient's ABN (where the payment or non-cash benefit from which the withholding was made was in respect to certain Part VA investments), and
 - the Commissioner considers it 'fair and reasonable' to refund the amount.

Fair and reasonable

30. In determining what is fair and reasonable the Tax Office will have regard to:
- the circumstances that give rise to the withholding obligation (if any), and
 - the nature of the error
 - any other matter the Tax Office considers relevant.
31. In considering whether it would be 'fair and reasonable' to refund the amount, the Tax Office may also have regard to matters such as whether:
- it is unlikely that the recipient will become entitled to a credit for the amount withheld in error, before the end of the financial year after the one in which the amount was withheld. For example, the recipient has been granted an exemption from lodging an income tax return, or is unable to lodge the return before the end of the financial year due to, for instance, delay in receiving information from overseas; or the amount was withheld purportedly under Subdivision 12-F of the TAA.

- the recipient will suffer hardship if the Tax Office does not refund the amount. In this context, hardship is where a recipient depends on using the full amount of the payment from which an amount has been withheld in error, in order to meet their immediate basic living expenses or in order to maintain the viability of their business.
32. The Tax Office will consider that it is **not** 'fair and reasonable' to refund the amount under section 18-70 of Schedule 1 to the TAA if, on the basis of the recipient's application, and/or other relevant information:
- the nature of the payment subject to the withholding error is assessable income in the hands of the non-resident in the relevant income year.

TERMS USED

Entity – means any of the following:

- a company
- a partnership
- a person in a particular capacity of trustee
- a body politic
- a corporation sole; or
- any other person.

Chapter 73 - Archived version

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