PS LA 2008/11 - Fraudulently altered or created income tax returns or activity statements

This document has changed over time. This version was published on *17 December 2012*

This practice statement was originally published on 26 June 2008. Versions published from 11 September 2008 are available electronically - refer to the online version of the practice statement. Versions published prior to this date are not available electronically. If needed, these can be requested by emailing TCNLawPublishingandPolicy@ato.gov.au .

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2008/11

This practice statement was originally published on 26 June 2008. Versions published from 11 September 2008 are available electronically – refer to the online version of the practice statement. Versions published prior to this date are not available electronically. If needed, these can be obtained from the Corporate Policy and Process Unit in Law and Practice.

FOI status: may be released

This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or is considered incorrect. Where this occurs, tax officers must follow their business line's escalation process.

SUBJECT:	**Fraudulently altered or created income tax returns or activity statements**
PURPOSE:	**To advise Australian Taxation Office (ATO) staff of the need to follow the prescribed procedures when dealing with both perpetrators and victims of fraud**

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BACKGROUND

1. Fraud[1] is one of the most expensive categories of crimes in Australia. Like many other Commonwealth agencies, the ATO is not immune to the incidence of fraud.
2. Fraud by tax agents[2], as well as identity fraud (which includes identity fabrication and identity theft) cost the taxpaying community millions of dollars in refunds issued as a result of fraudulent income tax returns and activity statements.
3. In line with *The prosecution policy of the Commonwealth* and the ATO policy outlined in Corporate Management Practice Statement PS CM 2007/02 *Fraud Control and the Prosecution Process*, the Commissioner is required to ensure that perpetrators of such frauds are brought to justice and appropriate restitution is made to the Commonwealth in respect of the defrauded funds. (Links to *The prosecution policy of the Commonwealth* and PS CM 2007/02 (both available to ATO staff only) are available in the Other References section at the end of this practice statement.)
4. The Commissioner is also duty-bound to ensure that integrity is restored to the victims' records and assessments.

SCOPE

5. This practice statement applies to fraudulently altered or created income tax returns and/or activity statements that have been used as the vehicle by a third party for the purpose of obtaining fraudulent refunds.
6. Cases to which this practice statement applies will have at least two victims, namely the Commonwealth by reason of the refund that was contrived from the consolidated revenue fund without lawful authority and the entity whose tax file number/ Australian business number has been utilised without their authority or consent to lodge income tax returns and/or activity statements to generate the fraudulent refund.

[1] *"Fraud"* is defined in PS CM 2007/02 as *'dishonestly obtaining a benefit by deception or other means'.*
[2] Tax agents for the purpose of this practice statement include all agents who are registered with the Tax Practitioners Board as well as those that are not.

7. The application of this practice statement is limited to cases where it has been confirmed, as a result of an audit, investigation or review, that the fraudulent act has been perpetrated by a third party, and that the third party has acted **without** the authority of the taxpayer.

8. The application of this practice statement does not extend to fraud committed by a taxpayer/entity themselves (for example, where a tax invoice or payment summary has been fabricated by the taxpayer/entity for the purposes of obtaining a refund).

9. This practice statement does not apply to cases where there is a mere suspicion[3] of fraud that is yet to be confirmed.

10. Cases where an attempted fraud has failed are also outside the scope of this practice statement. For example, where the credit emanating from the fraudulent refund has been intercepted by a garnishee from the Child Support Agency and applied towards payment of a taxpayer's child support liability, or where the credit has been offset against any of the taxpayer/entity's pre-existing tax liabilities.

STATEMENT

11. ATO staff must follow the prescribed procedures when it is identified that a refund has been obtained through a fraudulently created or altered income tax return or activity statement. In following these procedures, ATO staff must:

    - adopt a consistent approach in the treatment of all affected parties
    - treat victims of fraud who were financially disadvantaged fairly, and
    - take the most appropriate actions (prosecution and restitution), in relation to the perpetrators which are commensurable with the seriousness of the fraud.

12. The prescribed procedures outline the principles of law which underpin a suite of administrative practices prescribed for cases involving such frauds against the Commonwealth. In particular, they deal with:

    - the remedial actions necessary to restore integrity to the victim's fraudulently altered or created income tax returns or activity statements
    - the victim's entitlement to refunds or exposure to a liability under their correct assessments
    - remission of penalties, general interest charge (GIC) and the granting of arrangements to pay by instalments where applicable, and
    - avenues of redress against the perpetrators of fraud on the Commonwealth.

    Links to the prescribed procedures are available (to ATO staff only) in the Other References section at the end of this practice statement.

[3] This practice statement only applies to cases where a determination of fraud has been made and remedial action is deemed necessary to restore integrity to the victim's return or activity statement.

EXPLANATION

Parties to the fraud

13. In most fraud cases, there are likely to be at least three parties involved, namely:

- the perpetrator who masterminded and implemented the fraud and is the ultimate beneficiary of the fraudulent refund
- the victim whose income tax return/activity statement, personal details such as tax file number (TFN)/Australian business number (ABN), or identity, has been used without his/her authority, and
- the Commonwealth which bore the loss of funds because of the fraudulent refunds.

14. In some instances, the perpetrator who masterminds the fraud will utilise complicit third parties to carry out the fraud.

Identity theft

15. Identity theft is the most common mechanism for perpetrating fraud and covers numerous scenarios where the perpetrator uses the TFN or pay as you go (PAYG) payment summary of another person to obtain refunds. The most common scenarios are where:

- the PAYG payment summary of a taxpayer is stolen and a false income tax return is lodged by the perpetrator, or
- the personal details of an entity including its ABN are used by the perpetrator to obtain a goods and services tax (GST) registration (if one does not already exist). A fictitious activity statement is lodged to generate a refund which is then directed to the perpetrator's or a third party's bank account.

Identity fabrication

16. Identity fabrication is where a fictitious identity[4] is created predominantly for the purpose of the fraud. An example of this type of fraud is where a perpetrator, using a fictitious identity, purports to be carrying on an enterprise, obtains an ABN and GST registration, opens a bank account and lodges fictitious activity statements claiming substantial GST input tax credits. These are refunded electronically to the perpetrator(s) or their associates.

[4] An entity which has a fictitious identity does not exist, and is not real nor has legal effect.

Fraud by tax agents

Agency and authority

17. The central and most important feature of the relationship between a principal and his/her agent is 'the agent's authority'. This topic dominates discussions on agency law[5] and is far too broad to articulate in this practice statement. Suffice to say that under common law, an agent can only assume the legal capacity which his or her principal has, and can only bind the principal in matters in which he or she has been given actual or ostensible authority by the principal.

18. In the context of taxation matters, the basic tenet of common law has been enshrined in statute so as to hold the taxpayer (the principal) responsible for the wrongdoing of his or her authorised tax agent (the agent). This is well-illustrated in *Re Taxpayer v. Commissioner of Taxation* (2006) 62 ATR 1207; 2006 ATC 137, where the Administrative Appeals Tribunal (AAT) dealt with a case involving a taxpayer who had innocently signed the returns prepared for him by his tax agent which contained a false statement. In arriving at its conclusion, the AAT noted that:

    - there was no suggestion by the Commissioner, or in the evidence that the taxpayer himself was guilty of any wrongdoing. However, section 284-25[6] of Schedule 1 to the *Taxation Administration Act 1953* (TAA) made it clear that the actions of a tax agent are visited upon the client, and
    - no element of deceitful or dishonest conduct on the part of the taxpayer needed to be established. The taxpayer's liability was strict and ameliorated only by section 251M of the *Income Tax Assessment Act 1936* (ITAA 1936) which enabled a taxpayer to recover from a negligent tax agent.

19. It is now well established law[7] that an authorised income tax return or activity statement that contains a false or misleading statement will expose the taxpayer to penalties under Division 284 of Schedule 1 to the TAA, whether or not the taxpayer is guilty of any wrongdoing personally. In certain circumstances, an entity may not be liable to a penalty under subsections 284-75(1) or 284-75(4) of Schedule 1 to the TAA if the 'safe harbour' exception contained in subsection 284-75(6) or former subsection 284-75(1A) of Schedule 1 to the TAA applies. The safe harbour exception in relation to the making of a false or misleading statement only applies to statements made on or after 1 March 2010.

20. It is not within the scope of this practice statement to prescribe a process for the treatment of such cases. However, it may be helpful to those dealing with these cases to recognise the indicia of fraud perpetrated by tax agents while acting with the authority of the taxpayer, where the proper remedial action would be by amendment and imposition of penalties in accordance with normal practices, as opposed to those frauds perpetrated without authority that this practice statement seeks to address.

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[5] For further reading see Fridman's *Law of Agency* or Bowstead on Agency.

[6] **'**The Division applies to a statement made in the approved form by your agents as if it had been made by you'.

[7] See *Federal Commissioner of Taxation v. Turner* (1984) 15 ATR 379; 84 ATC 4161; *Zeta Force Pty Ltd v. Federal Commissioner Taxation* (1998) 84 FCR 70; *Kajewski v. Federal Commissioner of Taxation* (2003) 52 ATR 455; 2003 ATC 4375.

Indicia of an authorised income tax return/activity statement

21. Although not exhaustive, underlined hereunder are some indicia of an authorised income tax return or activity statement in two scenarios where the taxpayer may not necessarily be complicit to the fraud but will bear responsibility for the shortfall and applicable penalty upon issue of an amended assessment:

- the taxpayer had engaged the services of the tax agent to prepare and lodge his/her income tax return or activity statement
- the income tax return or activity statement prepared by the tax agent contains false and misleading statements (which the taxpayer is unaware of) is signed by the taxpayer and lodged with the Commissioner
- the income tax return/activity statement lodged with the Commissioner is identical to the copy provided to the taxpayer by the tax agent
- the taxpayer received the exact amount of refund as calculated by the tax agent.

22. A variation of the above scenario may be where a taxpayer engages the services of the tax agent to prepare and lodge his/her income tax return or activity statement:

- the taxpayer provides his books and records to the tax agent
- the taxpayer signs a blank form (income tax return or activity statement) and gives it to the tax agent to complete and lodge on his behalf
- the taxpayer also authorises the tax agent to receive his refund and deduct his fees before sending him the balance
- the tax agent enters false and misleading statements into the blank signed form which generates a refund
- the taxpayer does not have a copy of the form submitted by the tax agent to the Commissioner
- the Commissioner issues a refund to the tax agent on behalf of the taxpayer on the basis of the form lodged, and
- the tax agent retains part of the refund and forwards the balance to the taxpayer. (Often this balance will be consistent with the actual circumstances of the taxpayer or with an estimate given by the tax agent before the taxpayer authorised the tax agent to receive the refund and deduct the tax agent's fees.)

23. In the latter scenario, the taxpayer will be liable for the full amount of the tax shortfall and be exposed to penalty. However, the taxpayer may have a cause of action against his tax agent for recovery of the penalties as well as the portion of the contrived refund that the tax agent had kept.

Situations covered by this practice statement

24. This practice statement essentially applies to fraudulent practices by both registered and unregistered tax agents (including any other person who may have access to their lodgment facilities such as employees and associates) who use their clients' income tax returns or activity statements to contrive refunds.

25. The most common scenarios are:

- where the tax agent alters the taxpayer's authorised income tax return to include fictitious deductions or losses before its lodgment via the electronic lodgment system (ELS). Similarly, the authorised activity statement of an entity is altered to include false claims for input tax credits or understatement of the entity's GST liability
- where the tax agent lodges an amended income tax return without the taxpayer's knowledge or authority via ELS. The contrived refunds are usually paid into the tax agent's trust account, or
- where the tax agent uses the taxpayer's details (TFN or ABN) to lodge a fabricated income tax return without their knowledge or authority (see paragraph 15 of this practice statement).

26. It should be noted that, generally, the authority given by taxpayers to their tax agents is not an 'enduring authority' to continually lodge income tax returns and activity statements on their behalf. In other words, the authority can be said to be renewed each time the taxpayer engages the services of his/her tax agent for the preparation of a particular income tax return or activity statement and to be limited to that particular preparation.

27. Accordingly, a tax agent who had previous been engaged by the taxpayer over a number of years to prepare other income tax returns or activity statements, and who subsequently lodges fictitious income tax returns or activity statements in the name of the taxpayer, with the intention of contriving a refund, without being engaged to do so, would be deemed to have committed a fraud on the Commonwealth as they would have acted without the authority of the taxpayer.

28. The type of fraudulent activity by tax agents who act without the authority of the taxpayer usually constitutes a fraud on the Commonwealth because the tax agent is the ultimate beneficiary of the fraudulent refund (or decides how to apply it). However, there are instances where the fraud may be also against the taxpayer. For example, the taxpayer may have advanced payment to the tax agent of an amount due under the authorised income tax return or activity statement of the taxpayer (before its unauthorised amendment to reduce the payment apparently required) and such advanced payment may be embezzled by the tax agent to the extent of the apparent reduction. Alternatively, a taxpayer may give the tax agent an authority to receive his/her refund, retain his fees and forward the balance to the taxpayer but the balance may be made larger by an unauthorised amendment and that balance may be wholly or partly retained by the tax agent.

Fraud on income tax returns

29. An income tax return that has been altered or created by a tax agent, without the taxpayer's authority, before being lodged is a forged document and not the taxpayer's income tax return. Accordingly, the assessment induced by the fraudulent representation will be invalid, as it will not constitute an exercise of the assessment power and will therefore have no effect.

30. Section 164 of the ITAA 1936 states:

> Every return purporting to be made or signed by or on behalf of any person shall be deemed to have been duly made by him or with his authority until the contrary is proved.

This section cannot validate an assessment which is rendered a nullity because of fraud. Nor, for similar reasons, does subsection 170(2) of the ITAA 1936

(which allows the Commissioner to amend an assessment where tax has been avoided due to fraud or evasion) have any application where the assessment itself is invalid because the income tax return is fraudulent. Since such assessment is a nullity, it follows necessarily that it cannot be remedied by amendment since there is nothing to amend.

31. Similarly, in the context of an identity theft, it follows that the fraudulent income tax return and the assessment founded thereon is a nullity and cannot be amended.

Remedial process

32. The correct remedial process where an assessment is a nullity due to fraud is:

- The Commissioner must disregard the 'assessment' as an invalid decision and update the ATO's computer records to reflect the cancellation of the invalid assessment transaction.
- In the case of an identity theft where the taxpayer's TFN has been compromised, the ATO will decide on a case by case basis whether to give the taxpayer a new TFN. Where a new TFN is given, the compromised TFN will be archived and become unusable.
- The taxpayer should be invited to lodge a fresh income tax return upon which the Commissioner will issue a fresh assessment. If the taxpayer elects not to lodge a fresh income tax return, the Commissioner may, on the basis of an audit or other information in the Commissioner's possession, raise a default assessment under section 167 of the ITAA 1936.

Fraud on activity statements

33. Fraud on activity statements is usually committed by either claiming an excessive or fictitious amount of GST input tax credit or understating the GST payable on the original activity statement or an amended activity statement, to contrive a refund.[8] As with income tax returns, an activity statement that has been fraudulently altered or created by a third party is a nullity.

34. There are three broad methodologies used to perpetrate fraud via the use of an activity statement. They are:

(i) where a fictitious entity, which does not carry on an enterprise, is created predominantly for the purpose of perpetrating fraud (identity fabrication). For example, a perpetrator may create a false identity by using fabricated or manipulated personal details to perpetrate fraud through the lodgment of fraudulent activity statements

(ii) where either the personal details of an entity are stolen or the existing ABN of an entity, which has ceased to carry on an enterprise, or its personal details including its GST registration are used to perpetrate a fraud (identity theft), or

[8] Note: Refunds contrived by fictitious claims for entitlements other than GST input tax credits under a fraudulent BAS (eg over-claimed fuel tax credits) are outside the scope of this practice statement.

(iii) where the entity concerned was carrying on, and continues to carry on an enterprise, the entity has its activity statement altered by any third party including its tax agent, employees or any associates without the entity's authority (actual or ostensible).

In all of the above three categories, the activity statements lodged are nullities.

35. Where a legally incorporated company which does not carry on an enterprise is created albeit for the sole purpose of a fraud, any fraudulent activity statements lodged to contrive a refund are not considered nullities but rather false and misleading statements made by the company which requires an amended assessment of the company's GST net amount and imposition of penalty.

Remedial process

36. The correct remedial process where an activity statement is considered a nullity by virtue of fraud is:

- The Commissioner must cancel the activity statement and disregard it for all legal purposes. In relation to the first two categories of cases mentioned in paragraph 34 of this practice statement, the GST registration will be cancelled and preclude processing of further activity statements.
- In the third category, the affected entity should be invited to lodge a fresh activity statement to properly notify its liability. If the entity elects not to lodge a fresh activity statement, the Commissioner may, on the basis of an audit or other information in the Commissioner's possession, make an assessment of indirect tax under section 155-10 of Schedule 1 to the TAA and give notice of that assessment to the entity pursuant to section 155-15 of Schedule 1 to the TAA.

Extension of time to lodge fresh income tax returns or activity statements

37. As a general rule, the Commissioner will grant the taxpayer 30 days from the date of a formal letter advising of the fraud, to lodge a fresh income tax return or activity statement. This period may be extended by negotiation based on the circumstances of the case.

38. Accordingly, where an extension of time to lodge is adhered to, failure to lodge on time penalties will not apply. Where an income tax return is lodged outside the agreed time frame, penalties will be applied, but only as from the date to which the extension of time was granted.

39. Where a fresh income tax return or activity statement is not received within an agreed timeframe, the Commissioner may raise default liabilities (for example income tax or GST assessments or PAYG withholding estimates) based on the information in his possession or other such information that may be obtained as a result of an audit. In such instances, any applicable penalties and GIC may be imposed in accordance with existing guidelines.

Processing of fresh income tax returns or activity statements

40. Upon the processing of fresh income tax returns or activity statements, there are several outcomes that can be anticipated:

- The resultant balance under the fresh income tax return or activity statement is a credit and the taxpayer is entitled to a refund.
- The resultant balance under the fresh income tax return or activity statement is a credit and the taxpayer is not entitled to a refund as the recipient of the fraudulent refund under the fraudulent income tax return or activity statement has already passed on the correct portion of that refund to the taxpayer.
- The resultant balance under the fresh income tax return or activity statement is a debit and the taxpayer had initially entrusted money intended for payment of a tax liability to his/her tax agent and such money has been misappropriated.
- The resultant balance under the fresh income tax return or activity statement is a debit and the taxpayer was aware that such amount would be payable under the authorised income tax return or activity statement prepared by the tax agent but has nevertheless made no payment in anticipation of the tax liability.

Entitlement to refund of overpaid tax

41. The Commissioner can only issue refunds pursuant to a legislative authority. Division 3A of the TAA deals with refunds of running balance account (RBA) surpluses and excess non-RBA credits.

Income tax refunds generally

42. In the context of income tax refunds, paragraph 8AAZLF(1)(b) of the TAA provides that the Commissioner must refund to an entity so much of a credit (including an excess non-RBA credit) in an entity's favour as the Commissioner does not allocate or apply under Division 3 of the TAA.

43. Credit is defined under section 8AAZA of the TAA to include (among other things) an amount that the Commissioner must pay to a taxpayer under a taxation law. This will include income tax refunds.

44. Income tax refunds are generally paid either by cheque or electronic funds transfer (EFT). (Law Administration Practice Statement PS LA 2011/22 *Refunds of running balance account surpluses and credits – Commissioner's discretion to retain amounts* sets out the policy for payment of refunds by EFT to a third party bank account.)

45. Where an income tax return is lodged via ELS which directs payment by EFT to the tax agent's trust account or posting of a refund cheque to a tax agent, the Commissioner will assume that such direction is subject to the taxpayer's authorisation and will issue the refund to the tax agent.

46. The general position of the ATO is that the Commissioner's obligation to pay a tax refund to a taxpayer will be discharged when the taxpayer is in actual or constructive possession of the refund. The taxpayer will be in constructive possession of a refund when it is received by the taxpayer's tax agent, provided the tax agent has actual or ostensible authority to receive the refund on the taxpayer's behalf.

Income tax refunds emanating from fraud

47. In the context of fraud, once it is confirmed that a refund was contrived through the processing of an unauthorised income tax return or activity statement, it can be concluded that such refund:

- does not constitute a refund of the taxpayer's overpaid tax
- has been paid without legislative authority, and
- is recoverable by the ATO from the perpetrator of the fraud.

48. On the basis of those conclusions, a taxpayer would generally be entitled to any refund due to him/her upon lodgment of his/her correct income tax return.

49. Where a taxpayer contends that his/her tax agent has embezzled his/her correct entitlement under a refund issued to that tax agent, it will be necessary for ATO staff to be satisfied, as part of the audit or investigation that the taxpayer has, in fact, not received any part of the contrived refund from his/her tax agent.

50. Where it is concluded that the tax agent has, in fact, passed on to the taxpayer that portion of the refund that would be due to the taxpayer under his/her correct income tax return, an administrative overpayment debit should be raised on the taxpayer's account to ensure that the taxpayer does not receive a second refund.

Refunds of amounts arising under activity statements

51. Section 8AAZLH of the TAA prescribes how refunds are made. It applies to refunds of RBA surpluses or excess non-RBA credits that relate to an RBA, if the primary debts arising under any of the business activity statement (BAS) provisions (as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997)* have been allocated to that RBA. Subsection 8AAZLH(2) of the TAA requires such refunds to be paid electronically into a nominated bank account and subsection 8AAZLH(2A) states that the account must be one held by:

(a) the entity, or the entity and some other entity

(b) the entity's registered tax agent, or

(c) a legal practitioner as trustee or executor for the entity.

52. Subsection 8AAZLH(5) of the TAA states that if the Commissioner pays a refund to the credit of an account nominated by an entity, the Commissioner is taken to have paid the refund to the entity.

53. Where a refund emanating from an authorised activity statement that contains a false and misleading statement has been paid into an account nominated by the victim/entity, the Commissioner would treat that refund as constituting good discharge of his obligation to pay any refund in accordance with subsection 8AAZLH(5) of the TAA. This is so irrespective of whether or not the entity is guilty of any wrongdoing or has or has not received the benefit of the refund. Under such circumstances, the Commissioner will not be authorised to issue a second refund to the entity.

Refunds emanating from fraud under activity statements

54. As with income tax refunds, once it is confirmed that a refund was contrived through the processing of an unauthorised activity statement, it can be concluded that such refund:

- does not constitute a refund of the entity's overpaid tax
- has been paid without legislative authority, and
- is recoverable by the ATO from the perpetrator of the fraud.

55. Under such circumstances, the Commissioner will issue any refund due to the entity under the correct activity statement.

56. Similar to the position with income tax refunds, where an entity contends that its tax agent has embezzled the correct entitlement under a refund issued to that tax agent, it will be necessary for ATO staff to be satisfied, as part of the audit or investigation that the entity has, in fact, not received any part of the contrived refund from the tax agent.

57. Where it is concluded that the tax agent has, in fact, passed on to the entity, that portion of the refund that would be due to the entity under the correct activity statement, an Administrative Overpayment debit should be raised on the entity's account to the value of the amount received so as to ensure that the entity does not receive a second refund.

58. The prescribed procedures contain a questionnaire which will assist ATO staff in deciding whether the Commissioner needs to issue a second refund to the entity.

59. Where it is concluded that the Commissioner's obligation to pay the refund has been discharged, any aggrieved taxpayers should be instructed to seek independent legal advice as to their avenues of recourse against the tax agent or other third parties.

Embezzled payments

60. Where a taxpayer has entrusted money intended for payment of a tax liability to his/her tax agent and such money has been misappropriated, the Commissioner may defer the time for payment of the particular tax-related liability, or permit payment to be made by instalments under an arrangement as circumstances warrant. However, the tax liability of that debtor will remain undischarged and the Commissioner would not be precluded from taking appropriate action to collect the liability concerned. The exception to this rule is where the payment was made by a cheque drawn in favour of the ATO or the Commissioner and that cheque has been utilised by the tax agent for the payment of another debtor's tax liability. In the latter situation, the Commissioner would be obliged to credit the taxpayer's account at the ATO with payment to the value of the cheque drawn (by transferring the incorrectly applied amount to the correct account).

General interest charge

61. In cases where the processing of a fresh income tax return or activity statement produces a credit balance, no GIC would be payable irrespective of the taxpayer's entitlement to a second refund. However, where the fresh income tax return produces a debit assessment, GIC would ordinarily accrue from the statutory due date to the issue date of the assessment and from the issue date of the assessment to the date of final payment.

62. As noted above, victims of fraud whose initial payment towards their liability under their authorised income tax return or activity statement has been embezzled may be faced with the prospect that their liability under their fresh income tax return or activity statement remains undischarged.

63. It is appreciated that such circumstances may cause taxpayers financial difficulties. In such cases, the ATO will give sympathetic consideration to granting arrangements to pay by instalments. In addition, where a taxpayer lodges a fresh income tax return or activity statement within the time prescribed at paragraph 37 of this practice statement, the ATO will generally remit the GIC which accrues between the due date of the relevant tax liability and 21 days after the date that the taxpayer becomes aware of their outstanding liability (whether by issue of an assessment notice or by lodgment of a fresh activity statement). This remission of the GIC will be granted on the basis that the late payment of tax was beyond the taxpayer's control, and that the taxpayer is entitled to a reasonable period of time after becoming aware of an outstanding liability to arrange payment.

64. Further remission of the GIC may also be appropriate in such cases and will be considered on a case-by-case basis, based upon the general policy considerations set out in Law Administration Practice Statement PS LA 2011/12 *Administration of general interest charge (GIC) imposed for late payment or underestimation of liability.*

65. In cases where the taxpayer has made no payment in anticipation of the receipt of an assessment and has therefore enjoyed the use of the funds, then the GIC will not be automatically remitted but the taxpayer may apply for remission under the GIC remission guidelines set out in PS LA 2011/12.

Recovery of fraudulent refunds

66. Refunds paid by the Commissioner on the basis of forged income tax returns or activity statements are considered to have been paid without lawful authority and are recoverable from the recipient.[9] The Commissioner is entitled to recover any unauthorised component of a refund from the perpetrator in civil proceedings in accordance with the following authorities:

    (a) the administrative overpayment regime provided for under section 8AAZN of the TAA

    (b) the 'Auckland Harbour Principle' which provides that any payment out of Consolidated Revenue made without Parliamentary authority is illegal and ultra vires, and the Crown has a common law right to recover the payment,[10] and

[9] See Law Administration Practice Statement PS LA 2011/5 for further details.
[10] See *Commonwealth v. Burns* [1971] VR 825, applying *Auckland harbour v. R* [1924] AC 318.

(c) money paid as a result of a causative mistake being recoverable on restitutionary principles, in an action for money had and received.[11]

Prosecution of perpetrators of fraud

67. Commonwealth agencies such as the ATO are expected to consider prosecution in appropriate circumstances, in accordance with *The prosecution policy of the Commonwealth* and the ATO policy as outlined in PS CM 2007/02. Criminal prosecutions are vital to deterring future instances of fraud and to educating the public generally about the seriousness of fraud. The ATO is committed to recovering losses caused by fraudulent activity through proceeds of crime and civil recovery processes and, in the absence of criminal prosecution, to applying appropriate civil, administrative or disciplinary penalties.

68. As an adjunct to the prosecution of the perpetrator, the Commonwealth Director of Public Prosecutions may seek a Reparation Order under section 21B of the *Crimes Act 1914*, which can subsequently be registered as a civil judgment and executed against the perpetrator of the fraud in the conventional manner.

69. Alternatively, it would be open to the Commonwealth Director of Public Prosecutions under the *Proceeds of Crime Act 2002*, to seek a restraining order from the Court over the assets which are under the effective control of the perpetrator with the view to realising those assets to satisfy a forfeiture or pecuniary penalty order against the perpetrator in payment to the Commonwealth for the amount of the refund payments fraudulently obtained.

70. Given the inherent risk posed by fraud, where a loss to the Commonwealth which was perpetrated by fraud is detected, the principles of the compliance model will be adopted in ensuring that appropriate action is taken in seeking restitution of the loss to the Commonwealth. Where such loss cannot be recovered through the proceeds of crime process, the Commissioner may consider pursuing civil recovery against the perpetrators of such fraud to bankruptcy, where appropriate.

[11] *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 175 CLR 353; *Commissioner of State Revenue (Vic) v. Royal Insurance Australia Limited* (1994) 182 CLR 51 at 67-8; *Roxsborough v. Rothmans of Pall Mall* (2001) 208 CLR 516 at 529.

Amendment history

Date of amendment	Part	Comment
17 December 2012	Various	1. To mandate the use of the "prescribed procedures" which have replaced the previous "end to end processes". 2. To update legislative references as a result of the GST move to self-assessment. 3. To prescribe the appropriate treatment for cases where a company is duly incorporated with ASIC for the sole purpose of committing fraud. (see para 35).
11 September 2008	Paras 65, 66, 67, footnote 6 & Related practice statements	References to PS LA 2006/11 removed.
	Other references	Link to the policy added.

Legislative references	ITAA 1936 164 ITAA 1936 167 ITAA 1936 170(2) ITAA 1936 251M ITAA 1997 995-1(1) TAA 1953 8AAZA TAA 1953 Part IIB Div 3 TAA 1953 Part IIB Div 3A TAA 1953 8AAZLF(1)(b) TAA 1953 8AAZLH TAA 1953 8AAZLH(2) TAA 1953 8AAZLH(2A) TAA 1953 8AAZLH(5) TAA 1953 8AAZN TAA 1953 155-10 in Schedule 1 TAA 1953 155-15 in Schedule 1 TAA 1953 284-25 in Schedule 1 TAA 1953 284-75 in Schedule 1 TAA 1953 Division 284 in Schedule 1 Proceeds of Crime Act 2002 Section 21B of the Crimes Act 1914
Related practice statements	PS CM 2007/02 (link available internally only) PS LA 2011/5 PS LA 2011/12 PS LA 2011/22
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File references	2007/12555
Date issued	26 June 2008
Date of effect	26 June 2008
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Section	Operational Policy, Assurance and Law