PS LA 2009/3 - Time limit on recovery by the Commissioner

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Practice Statement Law Administration

PS LA 2009/3

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SUBJECT:	**Time limit on recovery by the Commissioner**
PURPOSE:	**This practice statement sets out the circumstances in which the ATO may recover indirect taxes outside the four-year time limit under the exceptions set out in section 105-50 of Schedule 1 to the *Taxation Administration Act 1953.***

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BACKGROUND

1. Subsection 105-50(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)[1] states that any unpaid net amount, net fuel amount or amount of indirect tax (together with any relevant general interest charge under the TAA) ceases to be payable four years after it became payable. 'Indirect tax' refers to any of the goods and services tax (GST), luxury car tax, and wine equalisation tax. In this practice statement, amounts covered by subsection 105-50(1) are generally referred to as 'unpaid amounts'.

2. Subsection 105-50(2) provides that:

   - if an amount was paid as a refund or applied under the Running Balance Account (RBA) provisions, and
   - that amount exceeded the amount (if any) that the entity was entitled to be paid or have applied,

   the amount of the excess (together with any relevant general interest charge under the TAA) ceases to be payable four years after it became payable by the entity. Such amounts are referred to in this practice statement as 'overpaid refund amounts'.

3. There are two exceptions to the general four-year limit provided for in section 105-50. An unpaid amount or an overpaid refund amount does not cease to be payable if:

   - within four years the Commissioner has required payment of the amount or the amount of excess by giving a notice to an entity (paragraph 105-50(3)(a)), or
   - the Commissioner is satisfied that the payment of the amount was avoided by fraud or evaded, or the overpaid refund amount was brought about by fraud or evasion (paragraph 105-50(3)(b)).

4. The administration provisions in relation to indirect taxes were previously contained in Part VI of the TAA. Part VI of the TAA was repealed and replaced by Part 3-10 from 1 July 2006. As a result, section 105-50 replaced former section 35 of the TAA. Transitional provisions ensure that a notice given prior to 1 July 2006 requiring payment of the unpaid amount will be effective for the purposes of section 105-50.

5. Section 105-50 was amended to ensure that the four-year limit on recovery applies where a refund is overpaid to a taxpayer. The amendments apply from 1 July 2008 and are applicable to refunds overpaid before 1 July 2008, unless the Commissioner issued a notice in writing before 1 July 2008 that the overpaid amount must be repaid. Notices issued before 1 July 2008 are not invalidated by the change to the law.

[1] Legislative references are to provisions found in Schedule 1 to the TAA, unless otherwise indicated.

6. An entity's entitlement to an input tax credit for a creditable acquisition (which, under section 93-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), would otherwise expire after a four year period) will be preserved beyond that four year period where:

   - the Commissioner has provided a section 105-50 notice requiring payment of an amount and the input tax credit arises out of the same circumstances that gave rise to that amount;[2] or
   - the Commissioner is able to recover an unpaid amount or overpaid refund amount after four years on the basis that paragraph 105-50(3)(b) (fraud or evasion) applies and the input tax credit arises out of the same circumstances that gave rise to the amount the Commissioner is able to recover.[3]

7. An entity's entitlement to an input tax credit for an acquisition of a 'thing' will not, however, be preserved beyond the relevant four-year period if:

   - the GST on the supply (to the entity) of that thing has ceased to be payable by the supplier (for a reason other than the supplier has paid it); and
   - at the time of the cessation, the entity did not hold a tax invoice for the acquisition.[4]

8. From 1 July 2012 a self assessment system applies for indirect tax laws. Under self assessment there is unlimited time to recover a debt raised in an assessment. This means that section 105-50 only applies to payments and refunds (whether relating to tax periods or not) arising before 1 July 2012.[5]

SCOPE

9. This practice statement deals with the application of section 105-50 in the following circumstances:

   - Indirect tax audits – compliance activity that involves an entity that is the subject of an indirect tax audit to review the net amount it has reported in an activity statement, or an amount of indirect tax paid on an importation. It also includes an indirect tax audit of a GST-registered entity that has not lodged an activity statement when required, or of an unregistered entity that is required to be registered for GST.
   - Routine lodgment and collection activity – compliance activity that involves a GST registered entity (with or without any obligations for luxury car tax or wine equalisation tax) that has not lodged an activity statement for a particular period but is not the subject of an indirect tax audit.
   - Miscellaneous unpaid amounts or overpaid refund amounts – where it becomes known to the ATO that an entity not subject to audit has an unpaid amount or has received an overpaid refund amount. For example, a miscellaneous unpaid amount includes a situation where, in the course of considering a private ruling or other correspondence, it becomes apparent that an entity has been incorrectly treating taxable supplies as GST-free.

[2] This is providing that the Commissioner gave the section 105-50 notice to the entity not later than four years after the end of the tax period to which the input tax credit would be attributable under subsections 29-10(1) or (2) of the GST Act (see subsection 93-10(1) of the GST Act).
[3] Subsection 93-10(2) of the GST Act.
[4] Section 93-15 of the GST Act.
[5] Section 105-50 will be repealed from 1 January 2017

10. The recovery of established indirect tax debts are not within the scope of this practice statement. That is, the practice statement is not concerned with the recovery of an amount where the Commissioner has already issued a notice of assessment including the relevant amount, or an entity has lodged an activity statement including the relevant amount.

11. This practice statement does not apply to net fuel amounts in relation to the *Fuel Tax Act 2006*.

STATEMENT

12. When conducting compliance activity, providing advice or guidance, or processing activity statements ATO personnel must consider the implications of section 105-50 in respect of unpaid amounts or overpaid refund amounts as covered by this practice statement.

13. The purpose of section 105-50 is to give certainty and finality after a period of time to entities that lodge their activity statements and genuinely attempt to comply with the indirect tax laws by reporting and paying what they understand to be the correct amount.

14. In relation to an indirect tax audit, it is expected in most cases that the ATO will have conducted its compliance activities so that the audit is finalised and any notice of assessment is issued before the four-year time limit expires. In such cases, it will not be necessary to consider the issue of a specific notice for the purposes of section 105-50.

Key principles

15. Subject to subsection 105-50(3), subsection 105-50(1) limits the time the Commissioner may recover unpaid amounts to a four-year time period commencing on the day after the tax became payable.

16. Subject to subsection 105-50(3), subsection 105-50(2) applies to amounts paid (or applied under the RBA provisions) as a refund or credit that exceeded the amount the entity was entitled to be paid (or have applied). The four-year time period in relation to overpaid refund amounts commences on the day after the time that the amount became payable.[6]

17. Paragraph 105-50(3)(a) provides that the four-year limit to recovery of unpaid amounts and overpaid refund amounts does not apply where the Commissioner has given the entity a notice in writing requiring payment of unpaid amounts, or repayment of the overpaid amount within the four-year period. The notice alerts an entity to their liability and their obligation to pay.

18. To be valid, the notice under paragraph 105-50(3)(a) must require payment but does not have to specify a specific dollar amount.[7]

[6] Subsection 35-5(2) of the GST Act provides that an amount that is paid to an entity (or applied under the RBA provisions) as a refund 'under' subsection 35-5(1) will, to the extent that the amount exceeds the amount the entity is properly entitled to, be treated as if it were GST that became payable by the entity at the time the amount was paid or applied. The four year time period in which the Commissioner can recover an overpaid refund amount of this type will therefore commence on the day after the date the amount was paid or applied.

[7] *Copperart Pty Ltd v. Federal Commissioner of Taxation* 93 ATC 4779 at page 4793, 26 ATR 327 at 342.

19. The ATO view is that the following will constitute notice for the purposes of paragraph 105-50(3)(a):

- a notice of assessment
- a standard notice issued under paragraph 105-50(3)(a) that meets the conditions in paragraphs 31 to 34 of this practice statement. This would include notices issued in respect of miscellaneous unpaid amounts. The notice must state the reason why an amount is considered to be underpaid or a refund considered to be overpaid in terms which provide sufficient detail for the entity to understand the nature of the unpaid amount and how the unpaid amount relates to particular tax periods, or
- a lodgment and payment demand notice issued as part of routine ATO lodgment and collection activities.

20. There is an additional exception to the four-year limit in respect of fraud or evasion. ATO personnel who suspect that an unpaid amount or overpaid refund amount has arisen due to fraud or evasion should refer to Law Administration Practice Statement PS LA 2008/6 Fraud or evasion. A formal determination by appropriately authorised ATO personnel must be made prior to making any assessment which relies on this exception to the four-year time limit.

21. The procedures in respect of section 105-50 that ATO personnel should follow vary according to the nature of the compliance activity being undertaken. The procedures are explained below in relation to indirect tax audits (paragraphs 27 to 44 of this practice statement) and routine lodgement and collection activities (56 to 62 of this practice statement). Where an entity is identified as having an unpaid amount or an overpaid refund amount, but there is no tax audit, the same procedures as for indirect tax audits should be applied.

EXPLANATION

Section 105-50

22. The four-year limit in subsection 105-50(1) commences from the day after the date that the unpaid amount became payable by the entity. The time that a net amount or an amount of indirect tax becomes payable is prescribed in Division 33 of the GST Act. For example for the tax period ending in June 2005, the four-year limit expires on 21 July 2009 if the entity lodges their activity statement monthly. Where the payer is a GST instalment payer or has an annual tax period election in effect the net amount is payable in accordance with sections 162-110 or 151-50 of the GST Act.

23. The four-year limit in subsection 105-50(2) commences from the day after the date that the overpaid refund amount became payable by the entity.[8]

[8] Subsection 35-5(2) of the GST Act provides that an amount that is paid to an entity (or applied under the RBA provisions) as a refund 'under' subsection 35-5(1) will, to the extent that the amount exceeds the amount the entity is properly entitled to, be treated as if it were GST that became payable by the entity at the time the amount was paid or applied. The four year time period in which the Commissioner can recover an overpaid refund amount of this type will therefore commence on the day after the date the amount was paid or applied.

Exception under paragraph 105-50(3)(a) – recovery where a notice is given

24. Paragraph 105-50(3)(a) provides that recovery of an unpaid amount, or an overpaid refund amount can be made beyond the four-year limit where the Commissioner has required payment of the amount by giving a notice to the entity within the four-year limit.

25. A notice of assessment under section 105-20 that is automatically produced by a ATO corporate processing system, or one that is manually produced and incorporates the standard words of that notice, meets the notification requirements of paragraph 105-50(3)(a). Such a notice states the net amount or the amount of indirect tax payable on an importation, and notifies the entity that the amount has been applied to its account and that it must pay any debit balance.

26. The best practice is to make an assessment and give a notice of that assessment before the expiry of the four-year period. Making an assessment is usually preferable to issuing a standard section 105-50 notice if it is discovered that an entity has an unpaid amount, or an overpaid refund amount and the monetary amount is known.

27. The ATO considers that the following documents also constitute notices under paragraph 105-50(3)(a):

- a 'standard section 105-50 notice' issued where the unpaid amount, or overpaid refund amount is discovered during an indirect tax audit or via miscellaneous activities of the ATO
- a lodgment and payment demand issued by the ATO for a tax period as part of its routine lodgment and collection activities where the activity statement has not been lodged.

Standard notices under paragraph 105-50(3)(a) issued in indirect tax audits

28. In the course of an indirect tax audit, ATO personnel may reach the view that an entity has a liability that it has not reported on its activity statement or a refund that it has claimed in excess of its entitlement. If the four-year limit is approaching and the quantum of the unpaid amount or overpaid refund amount cannot be readily or reasonably ascertained, consideration should be given to whether a specific section 105-50 notice should be issued. Notices of this type are referred to as 'standard section 105-50 notices' to differentiate them from notices of assessment under section 105-20 and lodgment and payment demand notices.

29. It may be appropriate to give a 'standard section 105-50 notice' as a precursor to making an assessment where one or more of the following conditions are satisfied:

(i) the ATO and the entity agree that it is more appropriate to give a notice under paragraph 105-50(3)(a) before making an assessment

(ii) a technical issue needs to be resolved (including where litigation has commenced that is testing the technical issue), or an expert opinion or a valuation needs to be obtained and it is considered by the ATO that it is appropriate to rely on the giving of a notice under paragraph 105-50(3)(a) before finalising the matter by making an assessment, or

(iii) the ATO requested the entity to provide information necessary to make an assessment for a tax period before the four-year limit expired, and gave the entity reasonable time to comply with the request having full regard to the entity's circumstances, but the entity did not provide the information or provided insufficient information.

30. The standard notice under paragraph 105-50(3)(a) issued during an indirect tax audit must be approved by an officer at the Executive Level 2 (EL2) level or above.

31. The scenarios in subparagraphs 29(i) to (iii) of this practice statement are the only ones where it is envisaged that the issue of a standard section 105-50 notice would be appropriate in an audit context. Nevertheless, it is possible that other rare and unusual circumstances may arise where, after taking into account all the relevant factors, ATO personnel consider that the unique facts of the particular case justify the issue of a standard section 105-50 notice. If this occurs, ATO personnel must escalate the matter to the Taxation Administration specialist area in the Indirect Tax (ITX) business line for further consideration. If the specialist area considers that the issue of a notice is warranted, the decision to issue a notice must be approved by an officer at the SES level. However, it would be inappropriate to issue a standard section 105-50 notice merely because an audit was not concluded at the end of the four-year period solely due to deficiencies in the ATO's management of that audit.

32. The Commissioner's view of what constitutes a notification for the purposes of section 105-55 is set out in Miscellaneous Taxation Ruling MT 2009/1 Miscellaneous taxes: notification requirements for an entity under section 105-55 of Schedule 1 to the *Taxation Administration Act 1953*. ATO personnel should ensure that standard 105-50 notices as a minimum meet the same standards as required in MT 2009/1 in respect of notifications by entities.

33. A standard section 105-50 notice must be both specific and informative. It must set out the nature of the unpaid amount or overpaid refund amount and how it arose. Most importantly, it must require the payment of the unpaid amount or overpaid refund amount.

34. The standard notice must specify each and every tax period to which it relates. It should not refer to a broad range of tax periods without relating how the unpaid amount or overpaid refund relates to each of the relevant tax periods. ATO personnel should not include within the notice a particular tax period if it is considered that no part of the unpaid amount or overpaid refund amount relates to that period.

35. The standard notice should contain sufficient information about the nature of the unpaid amount, or overpaid refund amount so that, even if the ATO does not immediately know the monetary amount, the notice provides the entity with sufficient information to be able to understand the nature of the underpayment or overpaid refund amount. Essentially, the notice should bring to the entity's attention the basic factual and legal basis for the Commissioner's position.

36. Prior to 12 May 2009, when preparing a standard notice, ATO personnel needed to consider whether to include notification of a related entitlement to a refund or credit. Such a notification would have preserved an entity's entitlement to a refund or credit (an entitlement which, without the notification, may have ceased to exist at the end of the relevant four-year period)[9] For example, where a taxpayer treated a supply as input taxed, which the ATO considered was taxable, a notification could have referred to the entity's entitlement to input tax credits for acquisitions related to making the relevant supply.

[9] Subsection 105-55(1)(b).

37. From 12 May 2009, newly inserted subsection 93-10(1) of the GST Act ensures that an entity will continue to be entitled (after the relevant four-year period) to input tax credits that arise out of the same circumstances that gave rise to the amount referred to in a section 105-50 notice (that is, an amount that the Commissioner has required payment of).[10] In most cases, subsection 93-10(1) will negate the need for staff to consider (when preparing a standard notice) whether to include notification of a related entitlement to a refund or credit. Subsection 93-10(1), however, only applies in relation to input tax credits for creditable acquisitions. It does not apply to input tax credits for creditable importations, nor does it apply in relation to decreasing adjustments that form part of an entity's net amount for a particular tax period (and may contribute towards an entitlement to a refund in relation to that tax period). Accordingly, from 12 May 2009, in limited instances ATO personnel may, when preparing a standard notice, still need to consider whether to include a notification of a related entitlement to a refund or credit (that would not be preserved under subsection 93-10(1)). Whether it is appropriate for a notification to cover such a refund or credit entitlement will depend on whether the Commissioner has sufficient information about the potential refund or credit concerned in the circumstances of the case.

38. Finally, if the Commissioner can quantify an unpaid amount or overpaid refund amount then an assessment should be made for that amount within the four-year period and the Commissioner should not use a standard section 105-50 notice. The amount assessed is the amount that the Commissioner may seek to recover outside the four-year period in accordance with section 105-50. However, if the Commissioner subsequently concludes that the amount payable is more than that assessed, the Commissioner would need to issue an amended assessment or another valid section 105-50 notice within the relevant four-year period in order to be able to collect the additional amount.

39. Where the Commissioner has issued a standard section 105-50 notice that does not specify the unpaid amount or overpaid refund amount, the provision does not provide a time limit in which the Commissioner is required to finalise the matter referred to in the notice or to specify the amount to be recovered.

40. Indirect tax audits should be finalised as expeditiously as possible and assessments issued quantifying the amount. However, circumstances can arise which can legitimately cause delays in quantifying the amount and in finalising the matter.

41. To ensure that matters are concluded and brought to finality in a timely fashion the Commissioner will undertake the administrative approach explained in the following paragraphs.

42. Before three months elapses from the issue of a standard notice under paragraph 105-50(3)(a), consideration should again be given to whether it is now appropriate to issue a notice of assessment in relation to the relevant amount.

[10] This is providing that the Commissioner gave the notice to the entity not later than four years after the end of the tax period to which the credit would be attributable under subsections 29-10(1) or (2) of the GST Act. Additionally, subsection 93-10(1) does not apply in relation to an input tax credit an entity is entitled to for an acquisition of a 'thing' if:

- the GST on the supply (to the entity) of that thing has ceased to be payable by the supplier (for a reason other than the supplier has paid it); and
- at the time of the cessation, the entity did not hold a tax invoice for the acquisition.

43. If within three months of the date of a standard notice under paragraph 105-50(3)(a) issuing, a notice of assessment of the net amount for the tax period has not been given to the entity, the notice under paragraph 105-50(3)(a) will be revoked in writing unless there are exceptional circumstances that warrant its extension.

44. Consideration of exceptional circumstances should take into account all relevant factors. Without limiting the range of circumstances, they may include:

- Litigation that is likely to clarify the law and the issue is sufficiently doubtful or contentious that it is more appropriate to give a notice under paragraph 105-50(3)(a) as an alternative to making an assessment until the law is settled
- the ATO made a request for information necessary to make an assessment and the request was timely and reasonable in the light of the entity's circumstances. However, the ATO is unable to make the assessment within the three month period because the entity has not provided the information or provided insufficient information
- the entity is considered to have an unpaid amount or overpaid refund amount for a tax period, but exact quantification of the amount is contingent upon the resolution of a complex factual or technical issue, and it is unreasonable to expect that those facts or the technical issue will be resolved within three months.

45. Where there are exceptional circumstances, the decision to continue to proceed under the standard notice under paragraph 105-50(3)(a) after three months must be made by an officer at the SES level. The notice will remain effective for the further period determined by the officer at the SES level. The entity will be advised of the decision to extend the notice beyond three months. At the end of that further period the notice will be revoked unless, at that time, there are exceptional circumstances that warrant its further extension. If a notice under paragraph 105-50(3)(a) is revoked, it must be done in writing.

Standard notices under paragraph 105-50(3)(a) issued prior to the publication of this practice statement

46. On publication of this practice statement, case officers should review all section 105-50 notices that have been issued to entities prior to the date of publication, except where the notices have been followed by an assessment for the tax periods covered by the notices, or where the notices have been formally revoked.

47. The circumstances that gave rise to the notice should be reviewed by an officer at the EL2 level or above, and a decision made as to whether an unpaid amount or overpaid refund amount exists. ATO personnel should then make a decision whether the continued application of the notice is warranted in accordance with the guidelines set out in this practice statement.

48. Notices that have been issued consistently with the guidelines in this practice statement but before the practice statement was finalised will remain in place provided that they meet the administrative process as set out paragraphs 43 to 45 of this practice statement.

Exception under paragraph 105-50(3)(b) – recovery as a result of fraud or evasion

49. Paragraph 105-50(3)(b) provides for the recovery of an unpaid amount, or overpaid refund amount where the Commissioner is satisfied that the payment of the amount was avoided by fraud or evaded, or the amount of the excess or credit was brought about by fraud or evasion.

50. The procedures in relation to fraud or evasion are set out in PS LA 2008/6, and ATO personnel should have regard to that practice statement if they consider that paragraph 105-50(3)(b) may be applicable.

51. Where the fraud or evasion exception to the time limit applies, it is important that the delegate or authorised person[11] document the reasons that led to forming of the opinion. The determination should set out all the material facts relevant to the decision and the factors that have been taken into consideration to be satisfied that the payment of the amount was avoided by fraud or evaded, or the amount of the excess or credit was brought about by fraud or evasion.

52. As a general rule, the ATO will advise the entity before the determination is made that it proposes to take such action and give the entity a reasonable opportunity to respond with any argument to the contrary. However, the ATO cannot give an undertaking that prior notice will be given in every case. There may be circumstances where it would be inappropriate to provide prior notice, for example, if the ATO is involved in a joint investigation of the entity with other Commonwealth agencies.

53. An entity's entitlement to an input tax credit for a creditable acquisition is preserved if the Commissioner is able to recover an unpaid amount or overpaid refund amount outside the four year time limit as a result of fraud or evasion and:

- the input tax credit arises out of the same circumstances that gave rise to the unpaid amount or overpaid refund amount,[12] or
- the credit is taken into account in calculating the unpaid amount or the overpaid refund amount the Commissioner is able to recover.[13]

The application of section 105-50 during routine lodgment and collection activity

What is routine lodgment and collection activity?

54. Routine lodgment and collection activity refers to the internal processes of the ATO to monitor and enforce the timely lodgment of returns and other documents that are required to be lodged with the ATO, and the payment of any associated tax-related liabilities by the time they are due to be paid.

55. Routine lodgment and collection activities are distinguished from indirect tax audit activities for the purposes of how the ATO will administer section 105-50.

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[11] The delegate or authorised person is set out in the Taxation Authorisations Guidelines.

[12] Subsection 93-10(2) of the GST Act. Note that subsection 93-10(2) does not apply in relation to an input tax credit an entity is entitled to for an acquisition of a 'thing' if:

- the GST on the supply (to the entity) of that thing has ceased to be payable by the supplier (for a reason other than the supplier has paid it); and
- at the time of the cessation, the entity did not hold a tax invoice for the acquisition.

[13] Paragraph 105-55(1)(c).

56. Routine lodgment and collection activity includes 'BAS non-lodgment' cases which involve ATO personnel making contact with entities with a view to encouraging them to voluntarily lodge their outstanding activity statements.

Procedures for applying section 105-50 to routine lodgment and collection activity

57. Routine lodgment and collection activity is taken in cases where entities have failed to meet their obligation to lodge an activity statement and pay any unpaid amount that may be outstanding.

58. For routine lodgment and collection cases the ATO will issue, before the four-year limit expires, a notice that requires the lodgment of the activity statement and the payment of any amount owing on the activity statement.

59. These lodgment and payment demand notices are not constrained by the conditions for issuing a standard notice under paragraph 105-50(3)(a) during tax audits. It is considered that a notice requiring an entity that is registered for GST to lodge its activity statement and pay any amount owing thereon is sufficiently informative to be a notice for the purposes of section 105-50.[14] This is because the notice advises the entity that it has not complied with its obligation to disclose transactions attributable to the relevant tax period, requires it to lodge an activity statement (hence disclosing those transactions) and requires it to pay any amount owing.

60. Once the activity statement to which the lodgment and payment demand notice relates has been lodged and the tax disclosed on it has been paid, then the Commissioner will not rely on the notice to collect any further unpaid tax not disclosed on that activity statement.

61. In working out their unpaid net amount for the relevant tax period, an entity may be able to take into account input tax credits attributable to the tax period; irrespective of whether the four-year time limit for claiming these credits would otherwise have expired. This is providing that:

- the input tax credits can properly be said to have arisen from the same circumstances that gave rise to the unpaid net amount (this circumstance being the failure to lodge a GST return for the tax period);[15] and
- in the case of any given credit — the Commissioner gives the entity the lodgement and payment demand notice not later than four years after the end of the tax period to which the credit would be attributable under subsections 29-10(1) or (2) of the GST Act.

62. In cases where an entity fails to lodge an activity statement and pay an amount owing within the four-year period, the ATO would also consider whether the failure to lodge and pay was an act of fraud or evasion. If this is the case, the ATO may rely on both paragraphs 105-50(3)(a) and 105-50(3)(b) to recover unpaid amounts. If the ATO considers that the failure to lodge and pay was not the result of fraud or evasion, the ATO will rely on paragraph 105-50(3)(a) to recover the correct amount provided that the lodgment and payment demand notice was issued within the four-year limit.

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[14] In *Revlon Manufacturing Limited v. FCT* (1995) 63 FCR 535 at 564; 96 ATC 4031 at 4053, Wilcox J held that a notice issued under a similar provision in the sales tax law was invalid where it did not provide information about the relevant claim. However, in that case the taxpayer had already lodged returns in respect of the particular tax periods. In circumstances where the taxpayer has not lodged an activity statement, it is considered that a notice requiring lodgement and payment of any amount owing is sufficient for the purposes of section 105-50.

[15] Subsection 93-10(1) of the GST Act.

63. If the Commissioner is relying on paragraph 105-50(3)(b) to recover an unpaid amount in the course of routine lodgment and collection activity, the formal determination that an amount was avoided by fraud or evaded must be made before the initiation of any formal debt recovery proceedings.

The practical application of section 105-50 during an indirect tax audit

64. This practice statement addresses three scenarios in which an audit might be conducted. The application of section 105-50 to each scenario is listed below.

Scenario A – if the audit is reviewing an activity statement that has been lodged by the entity

65. If the unpaid amount or overpaid refund amount arises because an entity understated or did not report its liability, or claimed refunds or credits in excess of its entitlement in an activity statement that it has lodged, the Commissioner will normally make an assessment for the relevant tax period(s) under section 105-5, and issue the notice(s) of assessment before the expiration of the four-year limit.

66. A notice of assessment given under section 105-20 meets the notification requirements of paragraph 105-50(3)(a) and should always be the first option that is considered if it is discovered that an entity has an unpaid amount or overpaid refund amount and the amount is ascertainable.

67. However, in the course of an indirect tax audit in relation to a tax period for which the entity has lodged an activity statement, the ATO may be satisfied that an entity has an unpaid amount, or overpaid refund amount for the tax period but the amount cannot be readily or reasonably ascertained before the fourth anniversary of the date it was payable. It is appropriate to give a standard section 105-50 notice as a pre-cursor to giving a notice of assessment for that period if the requirements in paragraphs 29 or 31 of this practice statement are satisfied. The standard section 105-50 notice must be given to the taxpayer before the expiration of the fourth anniversary of the date it was payable.

68. The standard section 105-50 notice must be approved by an officer at the EL2 level or above and must be specific and informative, as discussed in paragraphs 32 to 35 of this practice statement. However, in some circumstances, the notice must be approved at the SES level (see paragraph 31 of this practice statement).

69. Even if the ATO is not in possession of complete information before the end of the four-year period, it may be more appropriate to issue an assessment based on the best information available, rather than issue a standard notice under paragraph 105-50(3)(a), particularly if there has been a significant underpayment or overpaid refund. The discussion in paragraphs 28, 29 and 38 of this practice statement should guide ATO personnel in deciding what the best course of action is in the particular case. The fact that the ATO's information is incomplete should not undermine the assessment provided that a genuine attempt is made to determine the net amount for the tax period based on the evidence available. Making an assessment in these circumstances not only protects the revenue, but it provides the entity with the opportunity to have the assessment reviewed under Part IVC of the TAA if it considers the net amount assessed to be incorrect.

70. If it is discovered that an entity understated or did not report an amount relating to a tax period for which the four-year limit has expired, ATO personnel should consider whether payment of the amount was avoided by fraud or evaded under paragraph 105-50(3)(b). If fraud or evasion is suspected, ATO personnel should consider PS LA 2008/6 and the procedures set out in paragraphs 49 to 53 of this practice statement.

Scenario B – if the entity subject to an indirect tax audit is registered for GST and has failed to lodge one or more activity statements

71. If an indirect tax audit is being carried out on an entity that:

- is registered for GST
- has not lodged an activity statement for a tax period that is still within the four-year limit
- has not received a lodgment and payment demand notice for that tax period,

the case officer should arrange for the issue of a lodgment and payment demand notice in relation to that period before the four-year limit expires.

72. These lodgment and payment demand notices constitute a notice under paragraph 105-50(3)(a) and the Commissioner will be able to then raise assessments under section 105-5 to recover unpaid amounts payable for these periods even if the four-year limit expires.

73. If the entity does not receive a lodgment and payment demand notice for an outstanding activity statement for a tax period before the four-year time limit expired, the ATO cannot rely on paragraph 105-50(3)(a) to recover unpaid amounts payable in that period. It can then only recover those amounts if it is satisfied that payment was avoided by fraud or evaded, in which case it will rely on paragraph 105-50(3)(b).

74. If it is concluded that an entity has unpaid amounts because it has not lodged all or some of its activity statements, ATO personnel should consider whether the failure to lodge constitutes evasion. ATO personnel should refer to PS LA 2008/6 for procedures in relation to fraud or evasion.

75. If a formal determination has been made that payment of an amount by an entity was avoided by fraud or evaded and that determination has been documented, ATO personnel may proceed to assess the entity.

Scenario C – if the entity subject to an indirect tax audit is NOT registered for GST when it is required to be

76. If an entity is not registered although required to be, the ATO will register the entity for GST under Division 25 of the GST Act and in the majority of cases provide the entity the opportunity to lodge their activity statements. Should the entity fail to lodge their activity statements or have a shortfall, the ATO will issue assessments or standard 105-50 notices (as appropriate) for those tax periods within the four-year limit.

(a) For those tax periods beyond the four-year limit, the ATO will consider whether the entity has avoided paying an amount by fraud or evasion. ATO personnel should refer to PS LA 2008/6 for the procedures relating to fraud or evasion. If fraud or evasion is involved, once a formal determination is made and documented, assessments should be raised in relation to the relevant amounts.

Amendment history

Date of amendment	Part	Comment
9 April 2014	Contact details	Updated.
22 February 2013	Throughout	Updated to advise time limit on application. Updated to correct commencement dates for four year period
24 May 2011	Throughout	Tax Office references updated to ATO as per ATO Style Guide recommendations.
	New paragraph 6 and 7	Include entity entitlement to input tax credit under section 93-5 of the GST Act and 105-50 of Schedule 1 of the TAA.
	Old paragraph 13 and 20	Added RBA provisions.
	Old paragraph 21	Deleted.
	Old paragraph 34 and new paragraph 36	Updated to reflect amendments to GST effective from 12 May 2009.
	New paragraph 52	Added to claim to input tax credits perseverance by Commissioner.
	New paragraph 60	Included entity ability to take nito account input tax credits attributable to the tax period.
	Contact details	Updated.

Subject references	avoidance of tax by fraud or evasion recovery of unpaid indirect tax
Legislative references	ANTS(GST)A 1999 Div 25 ANTS(GST)A 1999 Div 33 ANTS(GST)A 1999 151-50 ANTS(GST)A 1999 162-110 TAA 1953 Pt 3-10 TAA 1953 Pt IVC TAA 1953 Pt VI (repealed) TAA 1953 35 (repealed) TAA 1953 Sch 1 105-5 TAA 1953 Sch 1 105-20 TAA 1953 Sch 1 105-50 TAA 1953 Sch 1 105-50(1) TAA 1953 Sch 1 105-50(2) TAA 1953 Sch 1 105-50(3) TAA 1953 Sch 1 105-50(3)(a) TAA 1953 Sch 1 105-50(3)(b) TAA 1953 Sch 1 105-55 TAA 1953 Sch 1 105-55(1)(b)
Related public rulings	MT 2009/1
Related practice statements	PS LA 2008/6 Fraud or evasion
Case references	Copperart Pty Ltd v. Federal Commissioner of Taxation 93 ATC 4779; 26 ATR 327 Revlon Manufacturing Limited v. FCT (1995) 63 FCR 535; (1995) 134 ALR 23; 96 ATC 4031; (1995) 32 ATR 48
Other references	Taxation Authorisations Guidelines
File references	09/1813
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Other business lines consulted	Operations, Law and Practice