PS LA 2009/3 - Indirect taxes: time limit on recovery

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PS LA 2009/3
Indirect taxes: time limit on recovery

This Law Administration Practice Statement sets out when the Commissioner may recover indirect taxes outside the four-year time limit.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

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1. What this practice statement is about

This practice statement will guide you in applying subsection 105-50(3) of Schedule 1 to the *Taxation Administration Act 1953* (TAA).[1] Under this subsection, we can recover unpaid amounts and overpaid refund amounts of indirect tax, outside the four year time limit imposed by subsection 105-50(1) within which the Commissioner must issue a notice.

This practice statement applies in situations where we need to recover an amount, and have not previously issued a notice of assessment, or received an activity statement. These include:

- compliance audits of the net amount the taxpayer reported in an activity statement
- routine lodgment and collection activity involving a taxpayer registered for GST who has not lodged an activity statement for a particular period but is not the subject of an indirect tax audit, and
- miscellaneous unpaid amounts, or overpaid refund amounts.

This practice statement does **not** cover:

- the recovery of established indirect tax debts, that is, where:
  - we have issued a notice of assessment that includes the payable amount, or
  - the taxpayer has lodged an activity statement that includes a payable amount
- net fuel amounts under the *Fuel Tax Act 2006*.

Section 105-50 only applies to payments and refunds (whether relating to tax periods or not) arising before 1 July 2012.

[1] All legislative references in this practice statement are to Schedule 1 to the TAA, unless otherwise stated.

2. The four-year limit: section 105-50

What are the limits on ATO's ability to recover an unpaid amount or overpaid refund amount?

Under subsection 105-50(1), any unpaid:

- net amount
- net fuel amount, or
- amount of indirect tax, that is:
  - goods and services tax
  - luxury car tax, or
  - wine equalisation tax,

ceases to be payable (together with any relevant general interest charge under the TAA) four years after it becomes payable by the taxpayer (commencing from the day after the date that the amount becomes payable).

Similarly, under subsection 105-50(2), any:

- amount paid to the taxpayer as a refund, or
- applied under the Running Balance Account (RBA) provisions

that exceeded the amount the taxpayer was entitled to receive ceases to be payable (together with any general interest charge under the TAA) four years after it became payable by the taxpayer (commencing from the day after the date the amount was paid or applied).

What are the exceptions to the four-year limit on recovering unpaid amounts and overpaid refund amounts?

Under subsection 105-50(3), the four-year time limit does not apply, and an unpaid amount or an overpaid refund amount will continue to be payable if:

- the Commissioner has given the taxpayer notice, within four years, that they are required to pay the amount, or

- the Commissioner is satisfied that the taxpayer avoided paying the amount by fraud or evasion, or the overpaid refund amount was brought about by fraud or evasion (paragraph 105-50(3)(b)).

If you suspect that an unpaid amount or overpaid refund amount has arisen from fraud or evasion, you must refer the matter to the Private Groups and High Wealth Individuals business line.[2] A formal determination must be made before you can rely on this exception.

There are three types of notices for the purposes of paragraph 105-50(3)(a):

- a notice of assessment
- a standard notice, usually issued as part of compliance audits, and
- a lodgment and payment demand notice issued as part of routine ATO lodgment and collection activities.

These are explained in more detail below.

3. Notifications resulting from compliance audits

The Commissioner may recover amounts outside the four-year time limit as a result of compliance audits on the net amounts reported in a taxpayer's activity statements, and also including:

- an amount of indirect tax paid on importation
- entities registered for GST that have not lodged activity statements when required, or
- unregistered taxpayers that are required to be registered for GST.

In every case, we must issue a notice within the four years, commencing from the day after the amount becomes payable by the taxpayer.

This section sets out guidelines on giving notice.

Notice of assessment

The best practice is to assess the amount, and issue a notice of assessment to the taxpayer. A notice meets the notification requirement under paragraph 105-50(3)(a) where:

- it is automatically produced by an ATO corporate processing system, or
- it is manually produced and uses the standard words of that notice.[3]

The notice should:

- state the unpaid amount or overpaid amount
- notify taxpayer that the amount has been applied to its account, and
- state that the amount must be paid.

Even if you do not have complete information before the end of the four year period, it may be more appropriate to issue an assessment based on available information than a standard notice, particularly if there has been a significant underpayment, or overpaid refund. Making an assessment in these circumstances both protects the revenue and provides the taxpayer with the opportunity to have the assessment reviewed under Part IVC of the TAA.

Standard notice

You can also recover an amount beyond the four year limit where the ATO has required the taxpayer to pay by issuing a specific paragraph 105-50(3)(a) notice within the 4 year limit. Notices of this type, usually issued as part of compliance audits, are referred to as 'standard notices'.

To be valid, the notice must[4]:

- contain sufficient information on how the amount arose
- require payment from the taxpayer
- specify each and every tax period to which it relates.

You should not include any tax periods where no unpaid amount or overpaid refund amount relates to that period.

To be valid, a standard notice only need to require payment but does not have to specify a dollar amount.[5] Where a standard notice had been issued without specifying the amount, the law does not stipulate a time limit in which you must finalise the issue to which the notice relates or specify the amount the taxpayer needs to pay. However, you should endeavour to finalise the issue as soon as possible.

When and how should you issue a standard notice?

During an indirect tax audit you may issue a standard notice if you reach the view that a taxpayer has:

- not reported liability in an activity statement, or
- an over paid refund amount, and

[2] Refer to PS LA 2008/6 and CEI 2014/05/09.
[3] *Cyonara Snowfox Pty Ltd v. Federal Commissioner of Taxation* [2012] FCAFC 177; 2012 ATC 20-362; (2012) 89 ATR 122.
[4] MT 2009/1.
[5] *Copperart Pty Ltd v. Federal Commissioner of Taxation* 93 ATC 4779; (1993) 26 ATR 327 at ATC 4793; ATR 342.

the four year limit is approaching and you are unable to determine the total of the unpaid amount or overpaid refund amount.

You may issue a standard notice, before making an assessment, if one or more of the following conditions have been satisfied:

(i) you and the taxpayer agree that it is more appropriate to issue a standard notice before making an assessment

(ii) a technical issue needs to be resolved, or an expert opinion or valuation needs to be obtained and it is your view that a standard notice is appropriate, or

(iii) you requested the taxpayer to provide information necessary to make an assessment for a tax period before the end of the four year limit, and allowed reasonable time comply to with your request but the taxpayer either did not provide the information or did not provide enough information.

Before you issue a standard notice, it must be approved by an officer at the Executive Level 2 (EL2) level or above.

Where the above conditions are not satisfied, but you consider that the unique facts of the case justifies issuing a standard notice, you must escalate the matter to the Taxation Administration specialists in the Indirect Tax business line for consideration. If the officer considers that a notice should be issued, the decision must be approved by an SES.

When should you not issue a standard notice?

You should not issue a standard notice merely because an audit was not concluded at the end of the four year limit solely due to deficiencies in the ATO's management of the audit.

You should not issue a standard notice if you can calculate the unpaid amount or overpaid refund amount. In this situation, an assessment should be made for the quantifiable amount within the four year period.

However, if it is subsequently determined that the amount payable is more than what was assessed, you may do one of the following:

- issue an amended assessment, or
- recover the difference by issuing a standard notice within the relevant four-year period.

What do you need to do after issuing a standard notice?

You need to issue a notice of assessment within three months after giving the taxpayer a standard notice. If you have not done so, you must revoke the standard notice in writing unless there are exceptional circumstances that warrant an extension.

Exceptional circumstances may include the following:

- litigation is in process that may clarify the law and it is more appropriate to issue a standard notice as an alternative to assessment.
- the ATO requested information necessary to make an assessment and the request was timely and reasonable, however the taxpayer did not provide information or provided insufficient information.
- the exact sum of taxpayer's unpaid amount or overpaid refund amount can only be determined by the resolution of a complex factual or technical issue, and it is unreasonable to expect the issue to be resolved within 3 months.

Where there are exceptional circumstances, only a SES officer can approve a decision to extend the effective date of a standard notice.

You will need to advise the taxpayer of the decision to extend the standard notice beyond 3 months.

At the end of the extended period, the standard notice must be revoked unless there are exceptional circumstances where further extension is necessary.

Is the taxpayer still entitled to claim input tax credits after four years?

The taxpayer remains entitled, after the four year period, to input tax credits that arise from the same circumstances that resulted in the type of unpaid or overpaid amounts covered in this practice statement.

However, the taxpayer will not be entitled to:

- input tax credits for creditable importations, and
- decreasing adjustments that form part of taxpayer's net amount for a tax period.

However, the entitlement to input tax credits is not preserved beyond the four year period to the extent that this would give rise to a refund, unless appropriate notification has been given under section 105-55.

Must you notify the taxpayer of their continued entitlement?

You do not need to notify the taxpayer of their entitlement to input tax credits for creditable acquisitions.

4. What should you do if the amount that arose was the result of fraud or evasion?

Under paragraph 105-50(3)(b), if you are satisfied that:

- the payment of an amount was avoided by fraud or evasion, or
- the excess amount provided to the taxpayer was brought about by fraud or evasion,

the four year recovery limit does not apply.

The reasons for this decision must be documented by the delegate or an authorised person, as defined in Taxation Authorisations Guidelines. The decision should set out the following information:

- all material facts relevant to the decision, and
- factors taken into consideration to arrive at this decision.

Generally, you should advise the taxpayer before you make the decision, and allow them a reasonable opportunity to respond and provide argument. However, there may be circumstances where providing prior notice would be inappropriate; such as where ATO is investigating the taxpayer with other Commonwealth agencies.

See further: PS LA 2008/6: *Fraud or evasion*.

Input tax credits where amounts are retained or obtained through fraud or evasion

A taxpayer remains entitled to input tax credits for a creditable acquisition if:

- the ATO is able to recover an unpaid amount or overpaid refund amount outside of the 4 year time limit as a result of fraud or evasion, and
- the input tax credit results from the same circumstances that gave rise to the unpaid amount or overpaid refund amount, or
- the credit is taken into account in calculating the unpaid amount or the overpaid refund amount the ATO is able to recover.

5. Notices issued as part of routine lodgment and collection activities

Before the four year limit expires, the ATO will issue a lodgment and payment demand notice as part of routine lodgment and collection activities. These are internal processes to monitor and enforce timely lodgments and payment of taxes where taxpayers have failed to lodge an activity statement and pay any unpaid net amount that may be outstanding.

These demand notices have fewer procedural requirements than standard notices under paragraph 105-50(3)(a). For the purpose of section 105-50, it is sufficient for a demand notice to require a taxpayer who is registered for GST to do the following:

- lodge activity statements, and
- pay any amount owing.

However, if there is no unpaid amount for the tax period, the demand notice will not be considered to be sufficient notice for the purpose of paragraph 105-50(3)(a) to alter the 4 year time limit.[6]

Once the taxpayer lodges the activity statement to which a demand notice relates and pays the net amount disclosed on it, you cannot rely on the demand notice to collect any further unpaid amounts not disclosed on that activity statement. However, you may rely on the demand notice to collect the unpaid amount if the lodged activity statement reports a net amount of zero and it is later discovered that there is an unpaid net amount for that period.

Are input tax credits included in working out an unpaid net amount?

An unpaid net amount for a relevant tax period may include input tax credits attributable to the tax period, irrespective of whether the four year period limited has expired, provided:

- the input tax credits arose from the same circumstances that gave rise to the unpaid net amount, and
- in the case of any given credit, you have issued the taxpayer with a demand notice not later than four years after the end of that tax period to which the credit would be attributable under subsections 29-10(1) or (2) of the *A New Tax System (Goods and Services Tax) Act 1999*.

Activity statements and fraud or evasion

In instances where a taxpayer did not lodge an activity statement and pay an amount owing within the four year period limit, you may need to consider whether the failure to lodge and pay was an act of fraud or evasion.

If the omission was the result of fraud and evasion, then you can rely on both:

- the standard notice rule (paragraph 105-50(3)(a)), or

[6] *North Sydney Developments Pty Ltd v. Federal Commissioner of Taxation* [2014] AATA 363; 2014 ATC 10-365; (2014) 92 ATR 740.

- the fraud and evasion exception (paragraph 105-50(3)(b)),

to recover unpaid amounts.

If you are relying on paragraph 150-50(3)(b) to recover an unpaid amount in the course of routine lodgment and collection activity, the formal decision that the amount was avoided by fraud or evasion must be made before initiating any formal debt recovery action.

However, if you consider the omission was not due to fraud and evasion, then you may issue a demand notice to request lodgment and recover the correct amount. Once again, the notice must be issued within the 4 year limit.

6. More information

For more information, see:

- MT 2009/1 *Miscellaneous taxes: Notification requirements for an entity under section 105-55 of Schedule 1 to the Taxation Administration Act 1953*
- PS LA 2008/6 *Fraud or evasion*
- Taxation Authorisation Guidelines
- CEI 2014/05/09 *Tax Crime and External Fraud* (link available internally only)

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