PS LA 2011/10 - Waiver of tax-related liabilities in proceeds of crime matters

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SUBJECT: **Waiver of tax-related liabilities in proceeds of crime matters**

PURPOSE: **This practice statement provides guidelines for the exercise of the Commissioner's power to waive the Commonwealth's right to payment of tax-related liabilities, in appropriate cases, in order to facilitate proceedings undertaken by the Criminal Assets Confiscation Taskforce under the *Proceeds of Crime Act 2002***

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BACKGROUND

1. The *Proceeds of Crime Act 2002* (POCA) provides a comprehensive scheme to trace, restrain and confiscate the proceeds, instruments and benefits connected with crimes against Commonwealth law. The POCA provides for two streams of recovery action. The first method involves conviction-based recovery, which enables the recovery of assets associated with a crime after a conviction for that crime has been secured. The second method involves civil recovery, which allows the restraint and recovery of assets suspected of criminal origins without the necessity of securing a criminal conviction. The burden of proof required for civil forfeiture is lower than that of conviction-based recovery.

2. The POCA's objects include:

   - Depriving persons of the proceeds, instruments and benefits derived from Commonwealth offences and of 'unexplained wealth' amounts.
   - Punishing and deterring persons from breaching the laws of the Commonwealth.
   - Giving effect to Australia's obligations under various international agreements relating to proceeds of crime, money-laundering and other serious criminal offences.

TERMS USED

3. The following terms are used in this practice statement:

   Assets levied in execution – assets seized by a sheriff or bailiff under a warrant of seizure and sale for the purpose of satisfying the claim of a judgment creditor.

   Confiscation – the process by which property is seized from its owner and forfeited to the Commonwealth by way of court order or operation of statute, as a form of punishment.

   Conviction based recovery – confiscation of property predicated on its owner having been convicted of an indictable offence.

   Criminal Assets Confiscation Taskforce (CACT) – The Commonwealth multi-agency taskforce created to restrain and confiscate proceeds of crime. The Australian Taxation Office (ATO) is a member of the CACT which commenced operation as a permanent entity on 1 January 2012. From this date the CACT is responsible for all Commonwealth based proceeds of crime litigation, and the Commonwealth Director of Public Prosecutions (CDPP) has no formal role to play in the restraint and forfeiture of criminal assets.

   Pecuniary penalty order – an order of the court requiring the person against whom it is made to pay a specified amount to the State in respect of benefits derived from the commission of offences.

Restraining order – in this context is an order of the court which prohibits or restricts the disposal of or dealing with property.

Waiver – in the context of this practice statement, is a release from the obligation to pay a tax debt that the Commissioner may grant to a taxpayer in order to facilitate a tax-related POCA proceeding. The effect of a waiver is that the debt owed to the Commonwealth is extinguished so that the Commonwealth cannot pursue that debt at a later date.

POCA from a tax perspective

4. The POCA is important in the tax context for a number of reasons. In some tax fraud cases, the ATO's traditional recovery processes are essentially ineffective, whereas the POCA can provide the requisite solution for compelling an offender to forfeit the proceeds and benefits derived from their activities. Example of such cases include:

   - Where offenders have concealed their assets by setting up artificial ownership by family members or controlled structures such as companies or trusts, designed to defeat the operation of the tax laws.
   - Where an offender has endeavoured to defeat tax laws using a bankruptcy or family law arrangement (action under the POCA takes priority over both bankruptcy and family law proceedings).
   - Where evidence relating to a tax fraud is located in an overseas jurisdiction, and/or property required to satisfy a tax-related liability is located overseas (this is because many countries will provide assistance for the purpose of proceeds of crime laws but not for the purpose solely of recovery of tax-related liabilities).

5. The advantages of action taken under the POCA are as follows:

   - POCA action can target not only assets legally owned by an offender but also any assets which are subject to the 'effective control' of the offender (the test of 'effective control' is one of fact, not law).
   - The effective control provisions are enhanced by an ability under the POCA to conduct compulsory examinations of spouses, company directors, trustees and any other relevant person regarding the affairs and property arrangements of a suspected offender.
   - Restraining orders can be obtained to preserve the targeted assets under the offender's effective control pending conclusion of the POCA proceedings.
   - Pecuniary penalty orders can be made against a person under the POCA, not only in respect of benefits received by or payable to that person individually, but also benefits received by other entities or persons as a result of the first person's conduct.

6. The POCA is also important in the tax context where criminal and POCA investigations, which do not start off as tax-related investigations, end up having significant tax implications. For example, investigations into cash 'structuring' and other money-laundering arrangements by the Australian Federal Police (AFP) may uncover significant understatement of income to the ATO. In such matters, the criminal investigation and associated POCA proceedings would generally have been commenced before any tax implication is uncovered by the ATO as a result of subsequent investigative or audit action.

7. Given the importance of the POCA in the tax context, it is imperative that in all of the types of cases outlined above, the POCA and the tax processes work together effectively and do not come into conflict.

Difficulties in administering POCA matters

8. The Commissioner's basic duty is to administer taxation laws. This duty includes assessing and collecting taxes and delivering entitlements arising under those laws. The general rule is that the Commissioner does not forego tax properly payable and will seek to collect the full amount of that tax unless there is a legislative basis for not doing so.

9. Accordingly, wherever possible, the Commissioner will utilise the traditional debt recovery processes as the first option to enforce collection of tax-related liabilities and it is only where such avenues of collection are not available or feasible that cases are considered for POCA action.

10. Once POCA action is commenced, the Commissioner has limited discretions under the law to refrain from either raising assessments or taking action to fully enforce a tax-related liability.

11. These limitations created difficulties for the CDPP in effectively managing POCA matters, especially where defendants sought assurances that they would not be subject to the double punishment of both proceeds of crime and tax enforcement actions. As the Commissioner's legal obligations preclude him from giving such assurances, settlement discussions stalled and were compromised, in some instances, resulting in the CDPP having to seek alternative outcomes.

12. In October 2006, amendments were made to the *Proceeds of Crime Regulations 2002* to confer status on the ATO as an enforcement agency under the POCA. The conferral of the POCA investigative powers on the ATO meant that in addition to the obligations under the taxation laws, the Commissioner was also obliged to give effect to the objects of the POCA.

13. To address the above difficulties, Division 342 was inserted into Schedule 1 to the *Taxation Administration Act 1953* (TAA). These provisions empower the Commissioner to exercise his discretion in appropriate cases, to waive the right to payment of a tax-related liability in order to facilitate the conduct of POCA proceedings.

14. Division 342 of Schedule 1 to the TAA is not intended to either act as a crediting provision to bring to the tax account an amount of payment received under the POCA or to alleviate the notion of double punishment. The object of the provision is to facilitate the conduct and resolution of POCA proceedings and thereby to achieve the objects of the POCA rather than tax recoveries. Therefore it is open to the Commissioner, in appropriate circumstances, to waive all or part of a tax-related liability if the waiver of that tax-related liability would facilitate the POCA proceedings. For example, the Commissioner could waive an amount of tax-related liability equal to the amount collected under the POCA. By way of contrast, in some circumstances it may be appropriate for the Commissioner to waive an amount of tax-related liability that exceeds the amount collected under POCA action.

15. Division 342 of Schedule 1 to the TAA applies to POCA proceedings that:

- start, or propose to start, on or after the commencement of Division 342, or
- started, and have not ended, before the commencement of Division 342.

16. Division 342 of Schedule 1 to the TAA applies whether the tax liability was incurred before, on or after the commencement of the Division.

SCOPE

17. The tax assessment process may be implemented in POCA matters at any time. In some cases, the tax assessments may be issued either prior to the instigation of the POCA proceedings or during the proceedings. In other cases, issue of the tax assessments may be deferred pending finalisation of the proceedings.

18. The Commissioner may waive the right to payment only after the liability has arisen, but may do so whether or not the liability is due and payable. Consequently, this practice statement only applies to cases where the relevant tax-related liability has been raised.

19. Cases where the tax-related liabilities connected with the POCA proceedings have not been raised or are incapable of being raised are outside the scope of this practice statement.

STATEMENT

20. As a general rule, once POCA proceedings have commenced, and there is a corresponding tax-related liability (and other pecuniary liabilities to the Commonwealth that arise directly under a taxation law) on foot, the Commissioner will take the appropriate steps to ensure no action is undertaken by the ATO that may prejudice or impede the POCA proceedings. In this context the Commissioner may decide to:

    - defer the time for payment of the associated tax-related liability
    - agree to defer recovery of the associated tax-related liability
    - remit penalties or interest charges associated with the POCA proceedings
    - waive the tax-related liability.

21. Through the enactment of Division 342 of Schedule 1 to the TAA, the Commissioner has been provided with an express power to waive tax-related liabilities in order to facilitate POCA proceedings. This power in combination with existing powers will allow the Commissioner to manage situations where his obligation to enforce tax laws and POCA proceedings might otherwise come into conflict.

22. Tax officers must follow the principles and guidelines outlined in this practice statement when exercising the Commissioner's powers under Division 342 of Schedule 1 to the TAA. It is noted however, that it is not possible to set out all the circumstances in which the powers may or may not be exercised. Each case has to be considered on its merits and on the basis of all the relevant facts. Tax officers must however, ensure that the pre-conditions prescribed for the exercise of the power are met and staff must take care not to consider irrelevant factors and must exercise their own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias. The decisions and actions taken by tax officers must be consistent with the commitments made by the ATO in the Taxpayers' Charter. Tax officers are also expected to follow Chief Executive Instruction (CEI) *Respecting Clients' Rights of Review CEI*.

EXPLANATION

Application of Division 342 of Schedule 1 to the TAA

Threshold conditions

23. Division 342 of Schedule 1 to the TAA makes it clear that the Commissioner's power to waive a tax-related liability (and other pecuniary liabilities to the Commonwealth that arise directly under a taxation law) only arises where the Commissioner is satisfied that two statutory pre-requisites[1] exist:

    - the tax-related liability is connected with the circumstances associated with the proceedings under the POCA, and
    - waiving the liability will facilitate the starting, conduct or ending (by settlement or otherwise) of the proceedings.

Tax-related liability connected with POCA proceedings

24. The question of whether a tax-related liability is connected with the circumstances associated with POCA proceedings needs to be determined by considering all the facts and circumstances of each case.

25. Generally a tax-related liability is connected with the circumstances associated with the proceedings under the POCA if the liability arose because of activities that could form the basis of POCA proceedings. For example, where POCA proceedings have been brought in respect of proceeds or benefits derived from alleged tax fraud, the conduct targeted in the POCA proceedings is likely also to give rise to a relevant tax-related liability. Another example would be the earning of income from drug trafficking (which is assessable income but often will not be declared to the ATO).

26. In some matters the entity that has the tax-related liability may be different to the entity targeted in the POCA proceedings (for example, where a company has the tax-related liability but the POCA proceedings target a natural person, the director). This does not prevent the tax-related liability from being connected with the circumstances associated with the POCA proceedings, if the underlying conduct is sufficiently connected. A typical example of this type of case is where an individual who conducts business through a corporate structure embarks on phoenix activities, thereafter leaving a series of insolvent corporate entities with tax-related liabilities that cannot be recovered. In these cases, the tax-related liabilities will be owed by the corporate entities whereas the POCA proceedings will target the individual.

27. In circumstances where part of the debt is clearly not connected to the POCA proceedings, the Commissioner cannot exercise his power to waive that portion of the tax-related liabilities and will be obliged to continue to pursue its recovery.

28. An officer exercising this power should also consider any information supplied by other Commonwealth agencies such as the AFP or the Australian Crime Commission (ACC).

[1] Subsection 342-10(1) of Schedule 1 to the TAA

Will waiver facilitate POCA proceedings?

29. The Commissioner must also be satisfied that waiving the tax-related liability will facilitate the starting, conduct or ending (by settlement or otherwise) of the proceedings under the POCA. It is clear from this wording that it is contemplated that an exercise of the waiver power may be considered and exercised prior to or during POCA proceedings. In particular the power may be exercised in order to facilitate the resolution of such proceedings.

30. The question of whether waiver will facilitate POCA proceedings is one to be considered in the light of all the facts and circumstances of each case. In this context, it is relevant to have regard to information about the proceedings provided by other agencies involved in the POCA proceedings. As a general rule, it is likely that where the conduct which gave rise to the tax-related liability corresponds or overlaps with the conduct being targeted in POCA proceedings, waiver may be of assistance in facilitating those proceedings.

31. In cases where the ATO is the investigating agency, there may also be a need to communicate with other internal stakeholders who are involved in the conduct of the case.

32. Given that the power to waive a debt is specifically intended to facilitate the starting, conduct or ending of the POCA proceedings, it is relevant to take into account the extent to which the person subject to the POCA chooses to cooperate in the resolution of those proceedings and tax matters. For example, if that person fully contests the POCA proceedings it may not be appropriate for the Commissioner to waive the tax-related liability connected with the POCA proceedings.

Exercise of power

33. If the Commissioner is satisfied that the statutory pre-requisites have been satisfied, he must then consider the following two matters[2] in deciding whether to exercise the discretion to waive the tax-related liability in a particular case:

- The amount the Commonwealth will forgo as a result of the waiver and the time the Commonwealth could reasonably be expected to receive that amount apart from the waiver.
- The amount the Commonwealth could reasonably be expected to receive as a result of the proceedings and the time the Commonwealth could reasonably be expected to receive that amount.

Amount forgone versus amount expected to be received

34. The Commissioner is obliged to compare the amount of the tax-related liability proposed to be waived and the amount reasonably expected to be received as a result of the POCA proceedings. This requires a practical commonsense weighing of all the facts of the case. For example, if the expected recovery under the POCA is only a small amount and the associated tax liability is very large, waiver of the full amount of the tax-related liability may not be appropriate.

35. The comparison between the amount forgone and the amount expected to be received, needs to be carefully examined on a case by case basis without losing sight of the main objective of the law – to facilitate POCA proceedings.

[2] See subsection 342-10(2) of Schedule 1 to the TAA

Timing of recoveries

36. In addition to amounts collected and foregone, the Commissioner is required to have regard to the time when the Commonwealth could reasonably be expected to receive payment of a tax-related liability, compared to the time when the Commonwealth could reasonably be expected to receive an amount from POCA proceedings.

37. In this context, it may well be relevant to have regard to the extent to which the Commissioner's traditional civil and administrative recovery remedies have either been exhausted or were not available in the first place.

38. In many circumstances POCA proceedings will represent a more timely recovery mechanism than traditional tax civil enforcement options. For example, where the Commissioner's statutory garnishee powers are not available as a timely tax recovery option.

Other relevant factors

39. In deciding whether to exercise his discretion to waive a tax-related liability, the Commissioner may take into account any other factor[3] which is relevant in a particular case.

40. One factor which may be relevant in many cases is the Commonwealth's prospects of recovery of the liability in the absence of POCA proceedings. In many cases the Commonwealth's prospects of recovering a tax-related liability may be significantly lower than the prospects of recovery under the POCA. For example, it may be clear, given the taxpayer's financial circumstances and the value of the assets constituting the asset pool restrained by the CACT and offered towards a settlement, that there is no reasonable prospect of recovering the tax-related liability. As such, a full waiver of the tax-related liability may be appropriate.

41. Some other factors which may be relevant for the Commissioner to consider include but are not limited to the following:

- The CACT's assessment of the strength of the available evidence and the likelihood of success if the POCA case proceeds.
- The seriousness of the defendant's misconduct which gave rise to the alleged offence.
- The value of money or assets thought to have been derived by the person as a consequence of the activities that gave rise to the tax-related liabilities and the POCA proceedings.
- The total value of the assets potentially subject to confiscation action.
- The assets available to the person (including any assets outside Australia).
- Any amounts already paid by way of taxes, duties, excise or civil damages.
- The interests of third parties in the assets restrained.
- The likely cost to the Commonwealth (including legal costs and the commitment of staff and other resources) if the matter proceeds.

[3] See subsection 342-10(3) of Schedule 1 of the TAA

- The amount of any tax-related liability that is not connected to the POCA proceedings and the tax debtor's capacity and/or willingness to make provision for payment of those debts.
- Any other individual circumstance or representation made by the tax debtor that may require special consideration (for example, grave illness).
- The level of resources which have been invested by the ATO, the AFP, the ACC or other Commonwealth agencies in the POCA proceedings.
- The resources which would be required for the ATO to commence and pursue traditional civil enforcement action and the relative prospects of success of such action.

Circumstances where it may be appropriate to waive a tax-related liability

42. Each case will need to be considered on its own merits having regard to all the relevant circumstances of the case. As a guide only, circumstances where it may be appropriate to waive a tax-related liability include the following:
    - The conduct which gave rise to the tax-related liability corresponds substantially, or at least in part, with the conduct targeted by the POCA proceedings.
    - The tax debtor or their associates have indicated a willingness to settle or consent to the POCA proceedings if an assurance is provided in relation to the relevant tax-related liabilities.
    - A proposed resolution of the POCA proceedings involves confiscation of all or a significant proportion of the tax debtor's available assets.
    - The proposed waiver is supported by other relevant Commonwealth agencies such as the AFP or the ACC.

Circumstances where it may be inappropriate to waive a tax-related liability

43. There are numerous circumstances where it may be inappropriate to waive a tax-related liability. Therefore, the individual circumstances of each case need to be assessed. Some of the relevant factors the Commissioner will consider when deciding not to exercise his discretion to waive a tax-related liability include:
    - POCA proceedings have not yet been commenced and:
        (i) the tax debtor holds assets in their own right that could be levied in execution should the ATO decide to enforce civil recovery proceedings
        (ii) there is a clear nexus for the Commissioner to exercise his garnishee powers under section 260-5 of Schedule 1 to the TAA to recover the tax-related liability
        (iii) there is no apparent advantage in embarking on POCA proceedings.
    - There are poor prospects of success in the POCA proceedings, or it is too early to assess the prospects of success.
    - The POCA proceedings were defended and the litigation did not require the facilitation of the proceeding by the waiver of the tax-related liability.

- The tax debtor's other taxation obligations are not up to date.
- The tax debtor refuses to unwind existing structures which gave rise to the tax mischief associated with the POCA proceedings.

Approval of waivers

44. The power to approve a waiver of tax-related liabilities is delegated only to certain senior tax officers.

Giving effect to a waiver

45. As a general rule, the Commissioner may agree to waive a tax-related liability on the understanding that the defendant will meet certain conditions prescribed in consent orders in the POCA proceedings or in a deed of settlement associated with the proceedings. In such cases, the waiver will be conditional on all of the conditions prescribed in the orders or deed of settlement being met. Provisions should be made in the orders or deed to ensure that the Commissioner is not prevented from pursuing recovery of the tax-related liability if the defendant is in default of their obligations under the orders or deed.

46. In some cases, it may be necessary for the Commissioner to be a party to the deed of settlement. Where this is considered necessary, the ATO's Review and Dispute Resolution Group will settle the requisite inclusions in the deed.

Amendment history

Date of amendment	Part	Comment
6 May 2020	Various	Updated CEI title name
	Other references	Updated Taxpayers' charter link
28 November 2013	Various Various	Revised to meet ATO Style guide requirements. Updated to provide detail of the transfer of the POCA function from the Commonwealth Director of Public Prosecutions to the Criminal Assets Confiscation Taskforce, a Commonwealth multi-agency Taskforce created to restrain and confiscate proceeds of crime.

References

Subject references	Debt waiver Deferral of legal action Illegal activities & transactions income Recovery of tax
Legislative references	TAA 1953 Sch1 260-5 TAA 1953 Sch1 Div 342 TAA 1953 Sch1 342-10(1) TAA 1953 Sch1 342-10(2) TAA 1953 Sch1 342-10(3) Proceeds of Crime Act 2002 Proceeds of Crime Act Regulations 2002
Related practice statements	Respecting Clients' Rights of Review CEI (link available internally only)
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