PS LA 2011/11 - Refunds of certain pay as you go withholding amounts

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Practice Statement Law Administration

PS LA 2011/11

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SUBJECT:	**Refunds of certain pay as you go withholding amounts**
PURPOSE:	**This practice statement details the obligations and rights of a payer, a recipient and the Commissioner where an amount has been withheld, in error, purportedly under the pay as you go withholding system. General information is also provided as to how a recipient may obtain a refund of incorrectly withheld amounts**

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BACKGROUND

1. The pay as you go (PAYG) withholding system requires an entity (the payer) to withhold an amount from certain payments made to, or received for, another entity (the recipient) and to pay the withheld amount to the Commissioner. This system also applies to non-cash benefits and to certain payments of personal services income.

2. Generally, the recipient will receive a credit, equal to the amount withheld when an assessment of their income tax in the relevant year has been made. If, on the other hand, the withholding is from a dividend, interest, royalty or a fund payment made to, or received for the recipient, and the recipient is a non-resident who has borne all or part of the amount withheld, the recipient is entitled to a credit equal to all or part of that amount against their non-resident or managed investment trust withholding tax liability.

3. Whilst complying with their obligations under the PAYG withholding system, a payer may withhold an amount in error or withhold an amount from a purported payment of paid parental leave[1] that was not lawfully payable. When this occurs, the recipient may request a refund of the amount withheld from the payer or from the Commissioner.

STATEMENT

4. Subdivision 18-B of Schedule 1 to the *Taxation Administration Act 1953* (TAA) contains the rules allowing amounts withheld or paid to the Commissioner in error, purportedly under any of the PAYG withholding provisions, to be refunded to recipients. It also contains rules allowing for amounts that were withheld from a purported payment of paid parental leave that was not lawfully payable to be refunded.

5. The recipient **may** obtain a refund from the payer or the Commissioner, depending upon the circumstances.

6. Alternatively, the entity entitled to a credit under Subdivision 18-A of Schedule 1 to the TAA may receive a refund of that entitlement to the extent that the purported PAYG withholding amount has not been refunded under Subdivision 18-B of Schedule 1 to the TAA.

Refunding of certain withheld amounts

7. The word error has its ordinary, broad meaning and includes an error of fact and an error of law. An error of fact is one where an error is made by a decision maker about the existence of a particular fact. An error of law is a misinterpretation or misapplication of a principle of law, or the application of an inappropriate principle of law to an issue of fact.

8. The following examples illustrate where an amount would be considered to have been withheld in error:

- an investor quotes his or her tax file number (TFN) to an investment body and that body fails to record the TFN, and later withholds from a payment of investment income, because a TFN has not been quoted
- an employer misreads the 'tax tables' when an amount is withheld from a payment of salary/wages paid to an employee and consequently withholds an amount at a much higher rate than is normally required
- an amount is withheld from certain payments that are exempt income or are not assessable and not exempt income in the hands of the recipient
- an amount is withheld from a payment to:
  - (a) an entity that is not entitled to an Australian Business Number (ABN), for example, the supply is made in the supplier's private capacity or in relation to a hobby
  - (b) a non-resident who derives it in carrying on business in Australia, at or through a permanent establishment, and the payment is a dividend or interest, or
  - (c) certain suppliers that are not carrying on an enterprise because they have no reasonable expectation of profit or gain.

[1] Parental leave pay means payments of parental leave pay under the *Paid Parental Leave Act 2010.*

- an amount is withheld from a recipient in one of the exception categories:

  (a) the total payment for the supply does not exceed $75 (exclusive of any goods and services tax (GST) payable on the supply). This is the amount currently specified in regulations in force for the purposes of subsection 29-80(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (subsection 12-190(4) of Schedule 1 to the TAA), or

  (b) the supply is wholly input taxed under GST,

- the wrong exchange rate is used in calculating an interest, unfranked dividend or royalty payment to a non-resident and an excess amount is subsequently withheld from these payments, or

- an incorrect (higher) withholding rate is used in calculating the amount withheld from a payment of an interest, unfranked dividend or royalty to a non-resident (for example, because they did not take account of the rate provided under an agreement or convention covered by the *International Tax Agreements Act 1953*). Subsequently, an excess amount is withheld from these payments.

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

   - where the payer withholds amounts correctly according to the facts at the time when the payment was made. It is the facts that apply at the time that payment is made that are relevant, as opposed to any facts that may apply at a different point in time.

   - a payer withholds 46.5% from a payment for a supply because the supplier had not quoted their ABN on an invoice, or some other document relating to the supply, or

   - an employee fails to complete a TFN declaration and the employer withholds an amount from the payments of salary/wages at the higher rate than that which applies to employees who have quoted a TFN.

Refunds from the payer

10. In accordance with section 18-65 of Schedule 1 to the TAA, the payer must refund to the recipient the amount withheld or paid to the Commissioner in error if either:

    - the payer becomes aware of the error, or

    - the recipient applies to the payer for the refund,

    before the end of the financial year in which the amount was withheld or paid to the Commissioner.

11. Where an amount has been withheld due to an error involving the quotation of a recipient's TFN or ABN, the payer may request the required information to enable the correction of their records before refunding an amount. If the recipient does not provide its TFN or ABN to the payer, or evidence of the basis on which the recipient is taken to have quoted it, the payer is not required to refund the amount.

12. Where an amount has been withheld from a purported payment of paid parental leave that was not lawfully payable, the payer will be required to refund the amount withheld if either:

- the payer becomes aware that the paid parental leave was not lawfully payable, or
- the recipient applies to the payer for a refund,

before the end of the financial year in which the amount was withheld, or paid to the Commissioner.

13. The payer can offset a credit equal to the amount refunded to the recipient against future PAYG withholding liabilities to the Commissioner, provided the payer has already forwarded the 'incorrectly' withheld amount to the Commissioner. A payer is entitled, however, to recover the refunded amount from the Commissioner provided the amount is not recorded by the payer as offset against future withholding liabilities.

14. The payer must refund to the recipient the amount withheld in error if the payer becomes aware of the error before the end of the financial year in which the amount was withheld or paid to the Commissioner. If the recipient has not applied for a refund, or the payer does not otherwise become aware before the end of the financial year in which the amount was withheld or paid to the Commissioner, the payer is not required to refund under section 18-65 of Schedule 1 to the TAA. In such a case, the recipient will be entitled to claim a credit on assessment for the amount withheld in error (as is the case for amounts correctly withheld) or, if that is not appropriate, for example, because the recipient is not required to lodge an income tax return or the amount was withheld purportedly under Subdivision 12-F of Schedule 1 to the TAA, the recipient can apply to the Commissioner for a refund of the amount.

Refunds from the Commissioner

15. A recipient may apply to the Commissioner in accordance with section 18-70 of Schedule 1 to the TAA for a refund of:

- an amount withheld or paid to the Commissioner in error, or
- the amount withheld from a purported payment of paid parental leave that was not lawfully payable,

where:

- the recipient did not apply to the payer for a refund before the end of the financial year in which the amount was withheld, or paid to the Commissioner, in error, or
- the payer did not become aware of the error, or that the payment of paid parental leave was not lawfully payable, before the end of the financial year in which the amount was withheld, or paid to the Commissioner.

16. The Commissioner is required to refund the amount withheld in error if:

- the amount withheld or paid in error has been paid to the ATO
- the application specifies, either:
  - (a) the recipient's TFN
  - (b) the basis on which the recipient is taken to have quoted a TFN to the payer before the amount was withheld (where the recipient did not have a TFN), or

(c) the recipient's ABN (where the payment or non-cash benefit from which the withholding occurred was in respect of a Part VA investment)[2] made in the course or furtherance of an enterprise carried on by the recipient, and

- the Commissioner considers it 'fair and reasonable' to refund the amount.

Fair and reasonable

17. In determining what is fair and reasonable the Commissioner will have regard to:

- the circumstances that give rise to the withholding obligation (if any), or
- the circumstances that gave rise to the unlawful payment of the purported amount of paid parental leave
- the nature of the error, and
- any other matter the Commissioner considers relevant.

18. Generally, if the entity is required to lodge an income tax return for the income year in which the error or unlawful payment of paid parental leave was made, it is usually more expedient for the entity to lodge their return and claim the amounts withheld from payment to them under Subdivision 18-A of Schedule 1 to the TAA. In considering whether it would be 'fair and reasonable' to refund the amount, the Commissioner may also have regard to matters including whether:

- it is unlikely that the recipient will become entitled to a credit for the amount withheld in error or withheld from an unlawful payment of paid parental leave, before the end of the financial year after the one in which the amount was withheld. For example, the recipient is not required to lodge an income tax return, or is unable to lodge the return before the end of the financial year due to, for instance, delay in receiving relevant information from overseas; or the amount was withheld purportedly under Subdivision 12-F of Schedule 1 to the TAA, or
- the recipient will suffer hardship if the Commissioner does not refund the amount. In this context, hardship is where a recipient depends on using the amount of the payment from which an amount has been withheld in error, in order to meet their immediate basic living expenses or in order to maintain the viability of their business.

19. The Commissioner may consider that it is **not** 'fair and reasonable' to refund the amount under section 18-70 of Schedule 1 to the TAA if, on the basis of the recipient's application, and/or other relevant information, the nature of the payment subject to the withholding error is assessable income in the hands of a non-resident recipient in the relevant income year.

20. A person dissatisfied with a decision made under section-18-70 of Schedule 1 to the TAA may object against the decision in the manner set out under Part IVC of the TAA.

[2] Investment of a kind mentioned in section 202D of the *Income Tax Assessment Act 1936*.

AMENDMENT HISTORY

Date of amendment	Part	Comment
6 February 2014	Various	Included legislative references to align with the ATO Style guide.
	Paragraph 9	First dot point – further information added to clarify the context of the withholding.
	Paragraph 16	Included a footnote and additional information to clarify the withholding event.

Subject references	PAYG withholding refunds Refunds
Legislative references	TAA Pt IVC TAA Sch 1 Subdiv 12-F TAA Sch 1 12-190(4) TAA Sch1 Subdiv 18-A TAA Sch1 Subdiv 18-B TAA Sch1 18-65 TAA Sch1 18-70 ANTS(GST)A 1999 29-80(1) ITAA 1936 202D International Tax Agreements Act 1953 Paid Parental Leave Act 2010
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