PS LA 2011/13 - Cross border recovery of taxation debts

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Practice Statement Law Administration

PS LA 2011/13

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This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1*. ATO personnel, including non-ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.*

SUBJECT: **Cross border recovery of taxation debts**

PURPOSE: **To outline:**

- **the options available to the Australian Taxation Office (ATO) for the recovery of tax-related liabilities where the tax debtor is located outside Australia, and**
- **how the ATO deals with a request received from another country for assistance in the recovery of a tax debt owing to that other country.**

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BACKGROUND

Overview of the Commissioner's recovery options

1. There are various options available to the Commissioner for the recovery of tax-related liabilities where the tax debtor is located outside Australia. For example, the Commissioner may:

   - require payment under section 255 of the *Income Tax Assessment Act 1936* (ITAA 1936)
   - require payment under section 260-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)
   - where insolvency proceedings have been commenced against the tax debtor, rely on the powers conferred on trustees and liquidators for the recovery of assets situated outside Australia in the debtor's name
   - rely on the provisions of the *Foreign Judgments Act 1991*
   - rely on mutual assistance in the collection of tax debts under:
     - the article in specific tax treaties between Australia and other countries that is modelled on Article 27 of the OECD Model Tax Convention on Income and on Capital and that provides for the mutual assistance between those countries for the collection of tax debts, or
     - section II of Chapter III of the joint Organisation for Economic Co-operation and Development (OECD)/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 protocol.

2. The decisions and actions taken by ATO personnel in the recovery of tax-related liabilities where the tax debtor is located outside Australia must be consistent with the commitments made by the ATO in the Taxpayers' Charter. ATO personnel are also expected to follow Corporate Management Practice Statement PS CM 2007/01 *Respecting clients' rights of review.*

TERMS USED

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

Action to preserve assets - refers to any action taken to prevent the dissipation of assets, including proceedings to prevent a debtor from moving the assets beyond the jurisdiction of a court so as to frustrate a potential judgment. An example of such an action is an application for an injunction.

Assistance in collection article – refers to the article that is included in tax treaties between countries that provides for the mutual assistance between those countries for the collection of tax debts. The substance of the article is modelled on Article 27 of the 2010 OECD Model Tax Convention on Income and on Capital.

Competent authority – refers to the Commissioner or an authorised representative of the Commissioner in Australia, and equivalent persons in the foreign state. The competent authority is, generally, the representative of the taxation authority for the purposes of the assistance in collection article.

External administration matter – is defined in section 580 of the *Corporations Act 2001* as a matter relating to:

- winding up, under Chapter 5 of the Corporations Act, a company or a Part 5.7 body which concerns the winding up of certain bodies other than companies
- winding up, outside Australia, a body corporate or a Part 5.7 body, or
- the insolvency of a body corporate or of a Part 5.7 body.

Foreign revenue claim – is a claim that has been made in accordance with section 263-15 of Schedule 1 to the TAA, as an essential part of a request by a foreign state for the collection of an amount and/or the commencement of action to preserve assets to ensure the collection of an amount, on behalf of that foreign state, from a debtor that owes a tax debt to that foreign state.

Memorandum of Understanding (or Mode of Application) – refers to an agreement between the two signatories to a tax treaty. The agreement contains terms and conditions that govern the administration of collection actions to which the assistance in collection article applies. These terms and conditions operate within the framework of the article and the legislation that facilitates it.

Multilateral Convention – refers to the joint OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 protocol.

OECD – refers to the Organisation for Economic Co-operation and Development.

STATEMENT

A – Commissioner's powers to require payment

Section 255 of the ITAA 1936

4. Section 255 of the ITAA 1936 requires a person (which includes a company) having the receipt, control or disposal of money belonging to a non-resident to:

   - when required by the Commissioner, pay the tax[1] due and payable by the non- resident
   - retain so much of any such money coming to that person on behalf of the non-resident as is sufficient to pay the tax which is, or will become due, by the non-resident.

5. Under subsection 255(2) of the ITAA 1936, if a person is liable to pay money to a non-resident, they are deemed to be a person 'having the control of money belonging to the non-resident'. In addition, all money so due by that person is deemed to be money which comes to them on behalf of the non-resident.

6. This person is personally liable only to the extent of any amount which they have retained, or should have retained. The person is also indemnified for all payments they made under the ITAA 1936 or in accordance with any requirement of the Commissioner.

7. The power under section 255 of the ITAA 1936 will only be effective if there are moneys belonging to the non-resident that are received by, controlled by, or at the disposal of a person situated in Australia. Where this is not the case, the ATO may have recourse to one of the other options for recovery.

8. As section 255 of the ITAA 1936 is not self-executing, in order to utilise this provision it is necessary to issue a notice to the person having receipt, control or disposal of the money advising them of their obligations. The person does not need to have receipt, control or disposal of money belonging to the non-resident at the time of service of the notice. The person's obligations under the notice issued will be triggered if and when the person, subsequent to service of the notice, has that receipt, control or disposal.

9. It is also necessary to ensure that an assessment of the tax in question is issued to the non-resident prior to the issue of the section 255 of the ITAA 1936 notice (section 255 notice). This follows from the High Court decision in *Bluebottle UK Limited v. Deputy Commissioner of Taxation* [2007] HCA 54 which ruled that it is a prerequisite to the issue of a section 255 notice that an assessment of the relevant tax be issued. In this regard, the expression 'or *will become due* by the non-resident' refers to tax which, although assessed, is not yet due for payment.

10. Any decision to issue a section 255 notice must be based on the best information available. The ATO can legally utilise all the information in its possession to determine whether a particular case lends itself to the use of section 255 of the ITAA 1936.

11. Some matters that may be taken into account when deciding whether or not to issue a section 255 notice in respect of Australian tax which is or which will become due by a non-resident include:

    - the quantum of tax owed by the non-resident debtor
    - the availability of other assets in Australia belonging to the debtor

[1] Section 255 of the ITAA 1936 applies to the general interest charge (GIC), additional tax and the shortfall interest charge in the same way as it applies to tax – see subsection 255(2) of the ITAA 1936.

- the availability of other options for recovery against the debtor, given its foreign residency, or
- whether other proceedings have, in fact, been commenced in a foreign state against the debtor for the recovery of the tax, and the nature and progress of those proceedings.

12. The use of section 255 of the ITAA 1936 may be available as a course of action for recovery in circumstances in which the non-resident tax debtor has little or no other assets in Australia. This is particularly so in light of the complexity of recovery action in a foreign state.[2]

Section 260-5 of Schedule 1 to the TAA

13. Broadly, section 260-5 of Schedule 1 to the TAA empowers the Commissioner to collect tax debts from third parties who owe or may later owe money to a tax debtor without having to proceed to judgment and execution of the judgment. The power may be exercised by issuing a notice under this section that is similar, in effect, to garnishee orders that an ordinary creditor can obtain through a court process. A more comprehensive discussion of this power is contained in Law Administration Practice Statement PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts*.

14. This power is effectively limited to moneys held within the Australian jurisdiction. However, where amounts of tax are owed by a tax debtor residing in a foreign country, the power in section 260-5 of Schedule 1 to the TAA may be used by the Commissioner to recover those amounts from a third party present in Australia who owes money to the foreign tax debtor.

15. Apart from the factors listed in PS LA 2011/18, further considerations may be taken into account in deciding whether to issue a notice under section 260-5 of Schedule 1 to the TAA in respect of a debt owing by a non-resident tax debtor. They include the following:

- the availability of other options for recovery against the tax debtor, given its foreign residency and, that often, recovery proceedings in general are more complicated and expensive where action is required to be taken in jurisdictions outside Australia, or
- in the event that proceedings have in fact commenced in a foreign state against the tax debtor for the recovery of the debt, the nature and progress of those proceedings.

16. As these debtors are resident in foreign states, and (very often) have few or no assets in Australia, the options available for the recovery of debts in such cases are limited. This is both a relevant and significant consideration when deciding whether to exercise the powers under section 255 of the ITAA 1936 or section 260-5 of Schedule 1 to the TAA, in the event that there are assets that may fall within the scope of those provisions.

17. However, these considerations form only a part of the broader range of factors that may be taken into account in the exercise of these powers.

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[2] Note: while an assistance in collection article (see in paragraphs 40 to 55 of this practice statement) may provide a further avenue for collection for the Commissioner, it is only operative in respect of participating countries which have adopted the model article in tax treaties with Australia or its equivalent under the Multilateral Convention.

The use of section 255 of the ITAA 1936 and section 260-5 of Schedule 1 to the TAA powers

18. Prior to making a request of the foreign state to assist in the collection of a tax debt, the ATO will consider the use of its powers under section 255 of the ITAA 1936 and section 260-5 of Schedule 1 to the TAA for the recovery of tax owing by non-residents. This is because the assistance in collection article contemplates that all reasonable measures of collection or any action to preserve assets, should be pursued under the laws of the state prior to making a request of the foreign state.

19. For the recovery of amounts from a third party, section 260-5 of Schedule 1 to the TAA allows the recovery of a broader range of tax liabilities than those covered under section 255 of the ITAA 1936. Section 260-5 of Schedule 1 to the TAA also applies to a broader category of taxpayers than section 255 of the ITAA 1936, which is restricted to apply only in respect of tax due, or which will become due, by non-resident debtors. Therefore, unless there are exceptional circumstances, the ATO will ordinarily use section 260-5 of Schedule 1 to the TAA in preference to section 255 of the ITAA 1936 as a tool for the recovery of amounts from a third party.

B – Powers of trustees and liquidators

Trustees in bankruptcy

20. As part of bankruptcy proceedings commenced against a debtor, the trustee in bankruptcy may pursue investigations in a foreign country into the affairs of the debtor to:

    - recover assets situated in a foreign country, and/or
    - commence proceedings to prevent the dissipation of such assets.

21. In order to investigate the financial affairs of the bankrupt in a foreign country to recover assets situated outside Australia, or to prevent the dissipation of such assets, the trustee may rely on the court's power under subsection 29(4) of the *Bankruptcy Act 1966* to issue a 'letter of request' for assistance to a court/competent authority in a foreign jurisdiction.

22. This process has been used by a court, for example, to seek assistance from another court in a foreign state to obtain control of a bankrupt's interest in an estate located in that foreign state: *Ayres v. Evans* (1981) 39 ALR 129.

23. In practice, letters of request issued under subsection 29(4) of the Bankruptcy Act will only be effective if the foreign courts to which they are sent will give effect to them. Australia only has reciprocal arrangements in place with nine foreign countries to ensure assistance in a bankruptcy or liquidation.[3] These countries are:

    - United Kingdom
    - Canada
    - New Zealand
    - Jersey
    - Malaysia
    - Papua New Guinea

[3] See subsection 29(5) of the Bankruptcy Act and regulation 3.01 of the *Bankruptcy Regulations 1996*.

- Singapore
- Switzerland
- United States of America.

24. Although the existence of such reciprocal arrangements is not a pre-requisite to the issue of a letter of request, Australian courts are reluctant to issue the request unless the foreign court is likely to give effect to it. Therefore, while a letter of request may also be issued to other countries other than those nine countries listed in paragraph 23 of this practice statement, it will be necessary to consider the extent to which reciprocal co-operation is likely to occur. This may depend on matters such as the history of the co-operation, if any, between Australia and the other country, and whether the legal system in the other country is sufficiently similar to the Australian system for reciprocity to function.

Liquidators

25. A liquidator, like a trustee in bankruptcy, may wish to commence investigations in a foreign country into the affairs of the company, to recover assets situated in the foreign country and/or to commence proceedings to prevent the dissipation of such assets.

26. Section 581 of the Corporations Act provides that all courts having jurisdiction in matters under the Corporations Act must act in aid of, and be auxiliary to, each other in all external administration matters.

27. Subsection 581(2) of the Corporations Act provides that in matters of external administration, the court *must* act in aid of, and be auxiliary to, the courts of the external Territories and the courts of 'prescribed countries' that have jurisdiction in ***external*** administration matters; and may act in aid of, and be auxiliary to, the courts of other (non prescribed) countries that have jurisdiction in external administration matters.

28. A liquidator may be able to obtain assistance from foreign courts through the issue of a letter of request to such courts seeking assistance in a matter relating to the winding up of a company.

29. The 'prescribed countries' referred to in subsection 581(2) of the Corporations Act, are prescribed under regulation 5.6.74 of the *Corporations Regulations 2001*. These countries are the same countries as those nine countries listed in paragraph 23 of this practice statement.

Proceedings by insolvency practitioners

30. The Commissioner, as a creditor in the insolvency administration, will be advised by the liquidator or trustee of the possibility and viability of commencing proceedings in a foreign country against a debtor, including the likely costs and the prospects of success. The Commissioner may be asked to help fund any such recovery action.

31. The policy in relation to the provision of indemnities for trustees and liquidators by the Commissioner is contained in Law Administration Practice Statement PS LA 2011/16 *Insolvency – collection, recovery and enforcement issues for entities under external administration*. In addition to the various considerations listed in PS LA 2011/16, it may be necessary to take into account the possible complexity and costs involved in proceedings taken outside Australia and the possibility of lengthy timeframes involved. It is expected that these factors will be considered by the liquidator or trustee, and that their assessment of these matters will be provided in their advice to creditors.

C – The *Foreign Judgments Act 1991*

32. The *Foreign Judgments Act 1991* allows for the registration, and subsequent enforcement, in Australian courts of civil judgments obtained from certain foreign countries.

33. Under the Foreign Judgments Act, a creditor in a foreign state may:

- apply to register, in an Australian court, a judgment obtained from a foreign court, and
- then seek to enforce that judgment in Australia.

34. The Foreign Judgments Act is part of a foreign judgments enforcement system that recognises, and gives effect to, judgments obtained from foreign states.

35. The Foreign Judgments Act also provides for the issue of certificates of judgments obtained in Australian courts to a judgment creditor who wishes to enforce that judgment in a foreign court.

36. The countries to which the Foreign Judgments Act applies are listed in the *Foreign Judgments Regulations 1992*, and include New Zealand, Canada and the United Kingdom, among others. (Note this scheme has very limited application in respect of tax debts – only the counterparts of the Foreign Judgments Act in New Zealand and Papua New Guinea have application to tax debts.)

37. In appropriate circumstances, the ATO may seek to rely on the cross-border enforcement arrangement under the Foreign Judgments Act and other reciprocal Acts enacted by participating countries. Before seeking the collection of debt through foreign courts under this arrangement, it is necessary to obtain a judgment for the debt in an Australian court.

38. In deciding whether it would be appropriate to rely on this arrangement, consideration needs to be given to various factors:

- whether the foreign court concerned is part of the foreign judgment enforcement regime, and in particular whether revenue debts are enforced
- the general circumstances and risk assessment of the case, including:
  - the size and nature of the debt
  - whether the options available for execution in Australia have been exhausted, and the likelihood of successful future execution in Australia, and
  - the extent and value of assets in the foreign country that are owned by the debtor
- the detail in the relevant legislation and laws of the foreign state and, in particular, any limitations on recovery as prescribed by these laws

- the general likelihood of recovery in the foreign state using this process, and
- the time and costs involved in the process.

39. In examining the possibility of commencing action under this arrangement, the ATO will weigh the expected benefits against the expected costs of the proceedings (including time and complexity of the recovery process involved). In most cases, it is unlikely that the option will be exercised if it is anticipated that the likelihood of recovery is minimal, and the amount to be recovered does not outweigh the expected costs.

D – Mutual assistance in the collection of tax debts

Bilateral treaties

40. Article 27 of the 2010 OECD Model Tax Convention on Income and on Capital provides for mutual assistance between countries for the collection of tax debts. This is known as the 'assistance in collection article'.

41. The assistance in collection article has been adopted and included in some bilateral treaties signed between Australia and other countries. It is anticipated that the article will be incorporated into some new or revised bilateral treaties as they are being progressively entered into.

42. Generally, the assistance in collection article allows for:

- action to preserve assets, including measures such as injunctions, and
- recovery action,

to be taken in respect of tax debts owed to the Commissioner, by the relevant taxation authority in the foreign state and on behalf of the Commissioner. This article allows for recovery of tax debts owed to the Commissioner by debtors who are either resident in that foreign state, or who hold assets in that foreign state.

43. Conversely, the foreign state may also make a request for action to preserve assets and recovery action to be commenced in Australia and through the ATO, in respect of tax debts owed to the taxation authority of that foreign state.

44. Both the TAA and the *Income Tax Assessment Act 1997* (ITAA 1997) contain provisions that facilitate this article, providing a legislative framework to allow the Commissioner to collect a taxation debt on behalf of a taxation authority of a foreign state, and to take action to preserve assets in relation to that debt.

45. The article is supplemented, under each treaty, by a Memorandum of Understanding (or Mode of Application) to cover various administrative arrangements between jurisdictions.

46. Some memoranda may contain a condition that domestic debts will be given priority over foreign revenue claims.

The Multilateral Convention

47. Similar articles for the provision of mutual assistance in the collection of tax debts and the commencement of action to preserve assets are contained in the Multilateral Convention, to which Australia is a signatory.

48. The Multilateral Convention also allows for:

- action to preserve assets, including measures such as injunctions, and

- recovery action,

to be taken in respect of tax debts owed to the Commissioner, by the relevant taxation authority in the foreign state on behalf of the Commissioner. The articles in the Multilateral Convention allow for recovery of tax debts owed to the Commissioner by debtors who are either resident in that foreign state, or who hold assets in that state. The obligations under the convention are mutual and accordingly, any other foreign state that is a signatory to the convention may also make a request of the Commissioner for action to preserve assets and for the recovery of tax debts owed to that state.

49. The provisions in the TAA and the ITAA 1997 that facilitate the assistance in collection article in some of our bilateral treaties also apply to our assistance in collection obligations under the Multilateral Convention.

50. The obligations under the Multilateral Convention are generally assumed by the signatories to the convention in respect of each other signatory. Therefore, broadly speaking, as a party to the Multilateral Convention, Australia's obligation for the recovery of foreign tax debts extends to all other parties to the convention. Conversely, each other party to the convention has a similar obligation in respect of a request made by Australia for action to preserve assets and for recovery action in respect of Australian tax debts. Note, however, that some parties may choose to reserve the right under the convention not to provide assistance in the recovery of any tax claim, or of any particular type of tax.

51. The mutual obligations extend to countries that are existing signatories to the Multilateral Convention, as well as those which later become signatories to the convention from the date the convention comes into effect in that country.

52. The ATO will seek to establish Memoranda of Understanding with each of the parties to the Multilateral Convention. A separate Memorandum of Understanding needs to be settled with each individual party to the Multilateral Convention.

53. The Memoranda of Understanding establish the basic terms and conditions under which each of the taxation authorities will operate when making and receiving a request for action to preserve assets or collection under the convention. They cover administrative matters such as the form in which the request must be made for each country, and other administrative requirements that each country may wish to prescribe as preconditions for accepting a request.

54. There may be instances in which a request for recovery is made by a country with which Australia does not have a Memorandum of Understanding. Conversely, there could be a case in which Australia may wish to make a request of another country for which no Memorandum of Understanding has yet been established. The obligations of each signatory to the Multilateral Convention do not depend on the existence of a Memorandum of Understanding as between the countries. Consequently, recovery action in respect of these requests will be undertaken in close collaboration with the competent authority of the other country to establish a general agreement on the submission of the request and administration of the recovery action.

55. A foreign state that is a signatory to the Multilateral Convention may also be one with which Australia has a bilateral treaty that includes an assistance in collection article. In such cases, either country is able to make a request for recovery on the basis of either the assistance in collection article in the bilateral treaty or the equivalent article in the Multilateral Convention.

Collecting debts on behalf of a foreign country

56. The following paragraphs apply to requests made pursuant to the mutual assistance articles in either the bilateral treaties or the Multilateral Convention for the recovery of tax debts.

Registration of foreign revenue claims

57. A foreign state may formally request the Commissioner to collect an amount (in Australian dollars) and/or take action to preserve assets to ensure the collection of an amount, on behalf of that foreign state, from a debtor that owes a tax debt to that foreign state (a 'foreign country debtor').

58. To be accepted as a 'foreign revenue claim', the request must comply with the various requirements as prescribed in section 263-15 of Schedule 1 to the TAA.

59. Under section 263-15 of Schedule 1 to the TAA, a request for assistance must:

- be made by or on behalf of an entity that is, under the relevant international agreement, the competent authority
- be consistent with the provisions of that agreement
- be made in the approved form
- specify the amount owed by the debtor in Australian currency (calculated as at the day the claim is made), and
- be accompanied by a declaration by the competent authority stating that the claim fulfils the requirements of that agreement.

60. If the Commissioner is satisfied that all the requirements to qualify as a foreign revenue claim have been met, the Commissioner must register the claim on the Foreign Revenue Claims Register (Register) within 90 days of receiving the claim.

61. Both foreign revenue claims requesting the commencement of action to preserve assets and recovery action are registered on the Register. However, if a debt has already been registered for recovery action, a later foreign revenue claim for action to preserve assets in relation to that debt will not result in a doubling-up of that liability as the Register will only record one debt in this situation.

62. When the Commissioner registers a foreign revenue claim on the Register, the debt becomes a pecuniary liability to the Commonwealth and a tax-related liability under section 255-1 of Schedule 1 to the TAA.[4] This has the effect that the debt may be recovered in the same way as other debts owed to the Commissioner. The debt may be allocated to a running balance account, being a primary tax debt.

Service of notice on the debtor

63. The amount of the foreign revenue claim only becomes due and payable 30 days after service of a notice of the particulars of the foreign revenue claim on the debtor, or at a later date specified in the notice.

64. If the debtor fails to pay the amount after it becomes due and payable, GIC applies on any unpaid amounts.

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[4] See subsections 250-10(2) and 263-30(1) of Schedule 1 to the TAA.

65. Although the foreign revenue claim does not become due and payable until a period after the notice has been served on the debtor, the debt is a pecuniary liability to the Commonwealth when the claim is registered. Therefore, the ATO can, for example, invoke the garnishee powers under Subdivision 260-A of Schedule 1 to the TAA once the claim is registered.[5]

General debt collection

66. Upon registration of the claim the ATO has the full breadth of its recovery powers, and must observe the general rules and limitations that govern these powers, in respect of the debt. The ATO will recover the debt in the same manner in which domestic tax debts are recovered.

67. It follows that the ATO may add the foreign revenue claim amount to other tax-related liabilities owing by the debtor in any proceeding commenced for recovery against the debtor. There are some specific requirements that must be observed when undertaking recovery action on a foreign revenue claim, and these are examined in further detail in paragraphs 69 to 91 of this practice statement.

68. If the foreign revenue claim is for action to preserve assets, the ATO may commence such proceedings as are available under Australian laws, for example, a Mareva injunction. Australia presently has no special rules for action to preserve assets in relation to tax debts.

Arrangements to pay by instalments

69. Before an arrangement is entered into with a debtor for the payment by instalments of a foreign revenue claim, the ATO will, as a matter of course, discuss this with the competent authority of the foreign state. All arrangements entered into must be made in accordance with the principles outlined in Law Administration Practice Statement PS LA 2011/14 *General debt collection powers and principles*.

70. If an arrangement is entered into between the debtor and the foreign state itself for the payment of the debt by instalments to that foreign state, the foreign state may be required to inform the Commissioner of the arrangement under the terms of the Memorandum of Understanding (or Mode of Application), and collection action in Australia for the foreign revenue claim may be suspended until further notification from the foreign state.

Compromise of debts

71. The power to compromise a tax debt, and the policy guidelines established for the exercise of this power, are contained in Law Administration Practice Statement PS LA 2011/3 *Compromise of taxation debts*.

72. It will be necessary to inform the competent authority of the foreign state if an application for compromise is made by the tax debtor.

5 Note: A garnishee notice may be issued in respect of a debt despite the fact that the debt may not yet be due and payable at the time the garnishee notice is issued.

73. The compromise of a debt that is a foreign revenue claim will have no impact on the existence of the debt in the foreign state. A successful application for compromise can only be in respect of the foreign revenue claim as a debt owed to the Commissioner, but the debt will continue to exist in the foreign jurisdiction. Tax debtors seeking a compromise of such debts should be made aware of this. It may therefore be preferable for a tax debtor to seek a compromise (or equivalent) in the foreign state – any reduction or extinguishment of the debt in the foreign state will be correspondingly reduced or extinguished in Australia.

74. When making a decision on the compromise of a debt that is a foreign revenue claim, it will be necessary to take into account the extent and value of assets owned by the tax debtor in a foreign country, as an additional factor in the decision of whether to allow the compromise.

75. A decision to compromise such debts should be exercised cautiously, given that the debts have arisen (in substance) from another jurisdiction.

Evidence

76. In proceedings for the recovery of a foreign revenue claim, the Commissioner may produce an evidentiary certificate pursuant to section 255-45 of Schedule 1 to the TAA. The evidentiary certificate may state several matters establishing the existence, amount and registration of the debt, and the particulars of any reduction of the debt, among other things.

77. An evidentiary certificate will be prima facie evidence of the matter in a proceeding to recover an amount or in an action to preserve assets. This means that once the Commissioner produces a valid evidentiary certificate, the onus is on the debtor to prove that the contents of the evidentiary certificate are incorrect.[6]

Dispute of liability

78. Generally, assistance in collection articles will provide that proceedings about the existence, validity or amount of a foreign revenue claim of a contracting state shall not be brought before the courts or administrative bodies of the other contracting state, for example, see Article 27(6) of the New Zealand Convention. Similar provisions exist in Article 23 of the Multilateral Convention.

79. Consequently, if the foreign country debtor considers that they have a legitimate legal argument that they are not required to pay the foreign tax debt, the matter must be litigated and resolved in the country in which the tax debt arose, under the laws of that country. Those arguments cannot be raised in proceedings in Australia for recovery of a registered foreign revenue claim.

Amending the claim and removal of details on the Register

80. The Commissioner has, in certain circumstances, powers to amend or remove the details of a tax debtor or a foreign revenue claim on the Register.

[6] Section 255-45 of Schedule 1 to the TAA.

81. Agreement must be obtained with the relevant foreign competent authority for the amendment of a claim on the Register in the following circumstances:

- where the Commissioner concludes that a foreign revenue claim on the Register should not be on the Register and the Commissioner wishes to remove that foreign country debtor from the Register.[7]
- where there is a minor administrative error in relation to the Register, for example, a name spelt incorrectly, and the Commissioner wishes to correct that error.[8]
- where the amount to be recovered from the debtor should be reduced[9] for example, where the debt that forms the basis of the foreign revenue claim has been partially satisfied by the debtor in the foreign state. Another example may be where the debt in that foreign state has been reduced as a result of an objection or appeal in that state.

82. If the Commissioner receives advice from the requesting foreign competent authority that the amount to be recovered from the foreign country debtor should be reduced, the Commissioner can reduce the amount accordingly in the debtor's account.[10] This is because the debtor will be entitled to a credit equal to the amount of the reduction.[11]

83. The debtor, after receiving the particulars of a foreign revenue claim, can apply to the Commissioner to have their particulars removed from the Register. If the Commissioner is satisfied with the debtor's application, the Commissioner may remove the foreign country debtor from the Register, without obtaining the agreement of the foreign competent authority.[12] An example of a situation in which this power may be exercised is where an individual has incorrectly been identified as a debtor.

84. Although the Commissioner has power under subsections 263-35(3) and 263-35(4) of Schedule 1 to the TAA to remove the debtor from the Register without the approval of the foreign competent authority, the power will very rarely be exercised without consultation or some discussion with the foreign competent authority.

85. In most cases, it is expected that removal of the debtor from the Register will instead be made pursuant to paragraph 263-35(2)(a) of Schedule 1 to the TAA, that is, with the agreement of the foreign competent authority (see paragraph 81 of this practice statement).

86. If the Commissioner removes the details of a debtor from the Register as a result of an application by the debtor or because the debtor should never have been registered, the debtor will be entitled to a credit equal to the amount removed and any GIC imposed on the amount.[13]

87. If all or a portion of a foreign revenue claim is paid by a debtor and the Commissioner subsequently either removes that debtor from the Register or reduces an amount included on the Register, such amount as was overpaid by the debtor will be subject to interest on any overpayments.[14]

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[7] Paragraph 263-35(2)(a) of Schedule 1 to the TAA.
[8] Subsection 263-35(1) of Schedule 1 to the TAA.
[9] Paragraph 263-35(2)(b) of Schedule 1 to the TAA.
[10] Paragraph 263-35(2)(b) of Schedule 1 to the TAA.
[11] Subsection 263-35(6) of Schedule 1 to the TAA.
[12] Subsections 263-35(3) and 263-35(4) of Schedule 1 to the TAA.
[13] Subsection 263-35(5) of Schedule 1 to the TAA.
[14] Sections 3C and 9 of the *Taxation (Interest on Overpayments and Early Payments) Act 1983.*

Remission of amounts to a foreign state

88. Amounts recovered from the debtor in satisfaction of the foreign revenue claim will be remitted to the foreign state. Where action by the ATO results in the recovery of the foreign revenue claim in full, this amount will usually be remitted in its entirety, in full satisfaction of the claim.

89. Amounts recovered may also be remitted to the foreign state in stages, that is, periodically or by instalments as and when the amounts are received by the ATO.

90. The manner and frequency of remission will depend on the terms of the agreement between Australia and the foreign state. Usually this matter will be covered in a Memorandum of Understanding (or Mode of Application) between the states, or by way of agreement in discussions between the ATO and the relevant foreign competent authority.

91. The remission of amounts to the foreign state may include amounts of GIC and/or judgment interest that has accrued in respect of that claim. The Commissioner also has the power to remit to the foreign state any legal costs awarded by the court which are recovered from the tax debtor. Whether these amounts are remitted to the foreign state, and the extent of such amounts remitted, will depend on the terms of the particular arrangement between the Commissioner and the relevant foreign competent authority.

Making a request to a foreign state for the collection of taxes

92. Under the reciprocal terms of the assistance in collection article, the Commissioner may make a request of the foreign state with which the treaty is signed for the collection of tax debts on behalf of Australia.

93. The manner in which a request by Australia is actioned in the foreign state is dependent on that state and will therefore vary between countries. Each country has its own laws and regulations that govern the processes by which taxes are collected.

94. The assistance in collection article, however, contains certain rules in relation to a request for the collection of a tax debt.

95. The assistance in collection article in both the bilateral treaties and the Multilateral Convention contains general provisions regarding requests for the collection of debt that must be observed equally by both countries. Briefly, a request to a foreign state must comply with the following requirements, which are described in the context of a claim made by Australia:

- it must be made in respect of a ‘revenue claim’ (under the assistance in collection articles of bilateral treaties) or ‘tax claim’ (under the equivalent articles in the Multilateral Convention), that can include interest, administrative penalties, costs of collection or the costs of an action to preserve assets related to the claim. A ‘revenue claim’ is defined in the treaty and may be restricted to certain types of taxes. The term ‘tax claim’ as it appears in the Multilateral Convention is also specifically defined and includes a broad range of taxes.

- the revenue claim must be enforceable under Australian law. A revenue claim will be enforceable where the Commissioner has the right to collect the revenue claim. This means that the liability must be a debt due to the Commonwealth and payable to the Commissioner under the terms of section 255-5 of Schedule 1 to the TAA. It must be legally recoverable by the Commissioner. However, where an action to preserve assets is sought as a preliminary step to further recovery action, the revenue claim does not, at that stage, need to be enforceable, or be owed by a tax debtor who has a right to prevent its collection. An example is a tax-related liability that is not yet due and payable.
- if, prior to the collection and remission of the claim amount, the liability ceases to be enforceable, or ceases to be recoverable, for example, the debt is extinguished due to a successful objection or review, the foreign state must be promptly notified, and the request will either be suspended or withdrawn.
- the Commissioner must have ensured prior to the issue of a claim that all reasonable measures for recovery in Australia have been taken. Prior to making a request of the foreign state the ATO will, for example, consider the use of its powers under section 255 of the ITAA 1936 and section 260-5 of Schedule 1 to the TAA for the recovery of tax owing for non-residents.

96. In deciding whether to make a request, the ATO will consider the general circumstances of the case, including the following factors:

- the size and nature of the debt, and the risk assessment of the case in question
- whether all reasonable domestic recovery options have been pursued, and whether they have been exhausted
- the value of any assets owned by the debtor that are located in the foreign state
- whether the debt is subject to an objection or review
- the legal and administrative procedures in the foreign state applying to the collection of the Australian tax debt. It will be necessary to consider the general options available in that foreign state for the collection of the debt, as well as any legal or administrative impediments/ complications to the recovery of the debt in that state
- the likely time and costs involved in the collection of the debt
- the general likelihood of recovery of the relevant debt in light of the administrative and legal procedures available in that other state, and pursuant to any advice provided by the foreign competent authority of the other state
- any other relevant advice provided by the foreign competent authority, and
- any other particular or specific consideration relevant to the collection of the debt in question.

97. The manner in which a request is made and the rules governing the remission of collected moneys to the ATO will depend on the terms of the Memorandum of Understanding between Australia and the relevant foreign state, as well as the relevant laws and administrative practices of the foreign state.

98. Subject to the laws of the foreign jurisdiction, amounts remitted to the ATO in a foreign currency will first be converted to Australian dollars.

99. The rules in Part IIB of the TAA about payments and credits will apply to the money once it has been remitted to the Commissioner.

100. In the event that the debt is reduced (for example, due to payments made by the debtor directly to the ATO) it will be necessary to inform the foreign state of the reduction together with the new balance of the debt owing to the ATO. The manner in which the reduction of the debt will be dealt with in the foreign state is dependent on the particular laws and administrative practices in that state that govern the collection of the debt. For example, the laws of the state may provide for a corresponding reduction in the amount of the debt to be collected from the debtor in that state, by way of a credit to the debtor in the amount of the reduction, or by an amendment to the claim.

101. Therefore it will usually be necessary to ascertain the manner in which reductions will be treated by the foreign state, and the specific procedures that govern notification to the other state of any reductions in the debt. Usually this information will be obtained through discussions and/or by way of specific agreement with the foreign competent authority of the foreign state.

102. There may also arise situations in which the amount owing by the debtor to the ATO is increased (for example, due to an amended assessment or the addition of other tax-related liabilities) where a collection request in the original amount has already been made. In such cases, reference should similarly be made to the laws and administrative practices of the foreign state – or, if applicable, the provisions of a Memorandum of Understanding (or Mode of Application) or other agreement between Australia and the other state – that govern the way in which an increased or additional debt amount is to be claimed and treated in the foreign state.

103. For example, it may be that the additional liability must be made the subject of a further, separate request. Alternatively, any existing request made by Australia may simply be amended to include the additional amount. This in turn may be a relevant consideration in the ATO's decision as to whether to pursue the additional amount through the foreign state.

E – Costs of collection

104. Provisions as to the treatment of costs incurred by a state in collecting a foreign debt are usually contained in the Memorandum of Understanding (or Mode of Application) between the states.

105. Usually, the ordinary costs of collection are borne by the state collecting the foreign debt (requested authority). Ordinary costs include internal administration costs (such as staff salaries and overheads) and minor external costs (such as court filing fees). Costs which are recovered from the debtor should be kept by the requested authority.

106. Any extraordinary costs which cannot be recovered from the debtor by the requested authority should be borne by the state making the collection request (requesting authority). These include the cost of experts, external lawyers, translators and other legal fees such as external legal advice.

107. Extraordinary costs should be discussed between the competent authorities of the relevant states before they are incurred. This means that, usually, the ATO will inform the requested authority if it anticipates that extraordinary costs may be incurred, and if possible, indicate the estimated amount of such costs, so that the requesting authority may decide whether such costs should be incurred. There is a reciprocal obligation on the foreign state with respect to claims made by the ATO for the collection of tax debts in that state. This is usually a term contained in the Memorandum of Understanding (or Mode of Application) between the states.

AMENDMENT HISTORY

Date of amendment	Part	Comment
October 2013	Various	Update content to include references and amendments to take into account Australia's entry into the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (as amended by the 2010 Protocol)
	Various	Minor revisions including changes to meet Style guide requirements.

Legislative references	ITAA 1936 255 ITAA 1936 255(2) ITAA 1997 TAA 1953 TAA 1953 Pt IIB TAA 1953 Sch 1 250-10(2) TAA 1953 Sch 1 255-1 TAA 1953 Sch 1 255-5 TAA 1953 Sch 1 255-45 TAA 1953 Sch 1 Subdiv 260-A TAA 1953 Sch 1 260-5 TAA 1953 Sch 1 263-15 TAA 1953 Sch 1 263-30(1) TAA 1953 Sch 1 263-35(1) TAA 1953 Sch 1 263-35(2)(a) TAA 1953 Sch 1 263-35(2)(b) TAA 1953 Sch 1 263-35(3) TAA 1953 Sch 1 263-35(4) TAA 1953 Sch 1 263-35(5) TAA 1953 Sch 1 263-35(6) Bankruptcy Act 1966 29(4) Bankruptcy Act 1966 29(5) Corporations Act 2001 Corporations Act 2001 580 Corporations Act 2001 581 Corporations Act 2001 581(2) Foreign Judgments Act 1991 International Tax Agreements Act 1953 Sch 4 Taxation (Interest on Overpayments and Early Payments) Act 1983 3C Taxation (Interest on Overpayments and Early Payments) Act 1983 9 Bankruptcy Regulations 1996 3.01 Corporations Regulations 2001 5.6.74 Foreign Judgments Regulations 1992
Related practice statements	PS LA 2011/3 Compromise of taxation debts PS LA 2011/14 General debt collection powers and principles PS LA 2011/16 Insolvency – collection, recovery and enforcement issues for entities under external administration PS LA 2011/18 Enforcement measures used for the collection and recovery of tax related liabilities and other amounts PS CM 2007/01 Respecting clients' rights of review
Case references	Bluebottle UK Limited v. Deputy Commissioner of Taxation [2007] HCA 54; 2007 ATC 5302; (2007) 67 ATR 1 Ayres v. Evans (1981) 39 ALR 129; (1981) 56 FLR 235
Other references	2010 OECD Model Tax Convention on Income and on Capital OECD/Council of Europe - Multilateral Convention on Mutual Assistance in Tax Maters Taxpayers' charter
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