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

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PS LA 2011/13
Cross border recovery of taxation debts

This Law Administration Practice Statement outlines the options available in relation to recovering a tax debt where the debtor is outside Australia, and how we deal with a request received from another country for assistance in the recovery of a tax debt owing to that other country.

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.

1. What this practice statement is about

This practice statement outlines the options available to us to recover tax debts incurred in Australia where the debtor is outside Australia.

The possible actions to be taken, as outlined in this practice statement, would generally only be appropriate where the taxpayer:

- has been correctly notified of the liability
- has been given clear opportunity but failed to pay by the due date, and
- has not engaged with the Commissioner to manage the debt after being given clear opportunity to do so.

Where you have a complex case, for example one that involves a high risk to revenue, you should bring the case to the attention of your team or technical leader to determine when it would be appropriate to take the possible actions outlined in this practice statement.

This practice statement covers:

- our ability to require payment under domestic tax legislation
- the ability of trustees and liquidators to recover debts in a foreign jurisdiction and how we assist them
- our ability to obtain judgment in a foreign jurisdiction to recover debts in that jurisdiction
- our ability to request assistance from foreign jurisdictions.

This practice statement also outlines our ability to recover tax debts on behalf of foreign jurisdictions under international treaties.

2. Our ability to require payment under domestic tax legislation

We have the ability to require payment from a debtor who is overseas under:

- our general garnishee power[1]
- our non-resident garnishee power.[2]

These two powers should always be considered before considering the other options outlined in this PSLA. This is because recovery proceedings are often more complicated and expensive where action is required to be taken in a foreign jurisdiction.

Our general garnishee power

Our general garnishee power allows us to collect tax debts from third parties who owe, or may later owe, money to a debtor.

Law Administration Practice Statement PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts* outlines what factors you should consider when making a decision to issue a general garnishee notice.

In addition, if proceedings have commenced in a foreign jurisdiction against the debtor, you also need to consider the nature and progress of those proceedings to ensure that you are not issuing the garnishee for the same amount.

[1] Section 260-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).
[2] Section 255 of the *Income Tax Assessment Act 1936* (ITAA 1936).

Our non-resident garnishee power

Under this power if a person (which can include a company) situated in Australia has receipt, control or disposal of money that belongs to a non-resident debtor, who derived income, profits or capital gains from a source in Australia, we can require the person:

- either pay the tax[3] which is due and payable by the debtor, or
- retain an amount which is sufficient to pay the tax which will be due by the debtor.

In making a decision on whether or not to issue a notice under this section, you need to consider all the information available. Some factors you may consider include the amount of tax owed by the debtor and the availability of other assets in Australia belonging to the debtor.

Once you have made the decision to issue a notice under this section, you should consider the following:

- An assessment must have been issued to the debtor before you issue a notice to the person who has the receipt, control or disposal of the money.[4] The debtor must be a non-resident at the time the notice is issued.
- The person needs to have receipt, control or disposal of the money at the time you issue the notice, or, there is an expectation by the Commissioner that the person will in the future have actual receipt, control or disposal of funds owing to the taxpayer.
- The person will become personally liable for any amount which they have retained or which they should have retained after receiving the notice.
- The person does not have to pay the amount from an Australian source.

Which garnishee power should you use?

You should determine which power is most appropriate to use based on the facts of the case, as both notices serve different purposes and apply to different circumstances. When making your decision, you should note that:

- the general garnishee power allows for the recovery of a broader range of tax liabilities and applies to a broader category of taxpayers than those covered under the non-resident garnishee power.
- the non-resident garnishee power provides that the recipient is immediately personally liable[5] whereas a court order is required to make the recipient personally liable under the general garnishee power.
- the reference to 'money' in the non-resident garnishee power [6] is not confined to Australian currency, but extends to foreign currency.[7] The definition of 'money' in the general garnishee power is confined to Australian currency.

In addition, there is no restriction on your ability to issue both notices concurrently if the facts of the case indicate that it is appropriate to do so.

3. Powers of liquidators and trustees to recover debts

A trustee in bankruptcy or a liquidator may pursue investigations in a foreign jurisdiction to:

- recover assets of the debtor situated in a foreign jurisdiction
- commence proceedings to prevent the dissipation of such assets.

To do this, they can ask the court to issue a letter of request for assistance to a court or authority in a foreign jurisdiction.[8]

Australia has reciprocal arrangements in place with a number of foreign countries to ensure assistance in a bankruptcy or liquidation.[9] A list of these countries can be found in **Appendix A**.

The existence of a reciprocal agreement is not a prerequisite to a court issuing a letter of request. In the absence of such an agreement, the court will consider the extent to which reciprocal co-operation is likely to occur.

How this may affect us

We may be asked to indemnify recovery action taken by a liquidator or trustee in a foreign jurisdiction.[10]

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[3] This includes any general interest charge (GIC), additional tax and the shortfall interest charge.
[4] *Bluebottle UK Limited v Deputy Commissioner of Taxation* [2007] HCA 54.
[5] Subsection 255(1)(c) of the ITAA 1936.
[6] Subsection 255(1)(b) of the ITAA 1936.
[7] *Commissioner of Taxation v Resource Capital Fund IV LP & Ors* [2013] FCAFC 118.
[8] Subsection 29(4) of the *Bankruptcy Act 1966* or section 581 of the *Corporations Act 2001*.
[9] Subsection 29(5) of the *Bankruptcy Act 1966* and regulation 3.01 of the *Bankruptcy Regulations 1996*.
[10] The provision of an indemnity is discussed in Law Administration Practice Statement PS LA 2011/16

If you receive a request from a liquidator or trustee for an indemnity, you should bring the case to the attention of your team or technical leader.

4. Enforcing an Australian judgement in a foreign jurisdiction

The law allows us[11], once we obtain judgment for a debt in an Australian court, to register, enforce and collect the tax debt in certain foreign jurisdictions.[12]

Factors you should consider when deciding to register a civil judgment include:

- the size and nature of the debt
- the risk assessment of the case in question
- whether all reasonable domestic recovery options have been pursued, and whether they have been exhausted
- the extent and value of assets in the foreign jurisdiction that are owned by the debtor
- the likelihood of recovery, and whether the amount likely to be recovered outweighs the expected costs
- the likely time and costs involved in the collection of the debt.

5. Cross border insolvency

We may also use laws relating to cross border insolvency to assist recovery.[13]

Under the cross border insolvency laws, the insolvency proceedings commence in the foreign jurisdiction where the insolvent entity has its centre of main interest. This is to ensure that the distribution of an insolvent entity's assets takes place within a single system.

However, the law provides that we can take action to protect our interest if there is a risk that tax debts owed to us may not be enforceable in these proceedings. In this situation, we can apply to an Australian court to make orders requiring all the Australian assets of the company be paid to us. This will prevent the assets being remitted to the foreign jurisdiction to be distributed in the liquidation.[14]

You may want to consider this option if you have a relevant case and you believe there is a risk that the amounts owed to us by the insolvent foreign entity may not be enforceable in the proceedings in the foreign jurisdiction.

6. Exchange of information with foreign jurisdictions

We may also use an Exchange of Information (EOI) to assist domestic information gathering and to decide which recovery method to use. It is used when:

- we have no visibility over a debtor's offshore affairs, and
- we have exhausted domestic options to source the information or verify the debtor's claims.

We only exchange information where it is foreseeably relevant to the administration and enforcement of Australian tax laws.

What type of information can be exchanged under an EOI?

We can exchange information relating to intelligence and risk assessments, such as:

- aggressive tax planning enablers and promoters, and
- sham arrangements.

We can also exchange case-specific information, such as:

- confirming tax residency status
- identifying offshore assets
- identifying or verifying global supply chain arrangements
- bank account information
- immigration records
- birth death and marriage records
- tax returns
- trust and company records
- verifying GST transactions.

In the specific case of indirect taxes, see Practice Statement Law Administration PSLA 2016/6 *Exchange*

Insolvency – collection, recovery and enforcement issues for entities under external administration.

[11] *Foreign Judgments Act 1991*.

[12] Only New Zealand and Papua New Guinea have application to tax debts.

[13] Australia has incorporated the United Nations Commission on International Trade Law (UNCITRAL) Model Law into the *Cross-Border Insolvency Act 2008*.

[14] Article 22 of the UNCITRAL Model Law; see also *Akers (as joint foreign representative) v Saad Investments Company Limited; In the matter of Saad Investments Company Limited (in official liquidation)* [2013] FCA 738.

of information with foreign revenue authorities about indirect taxes.

Undertaking an EOI

Before you undertake an EOI you must:

- **Exhaust domestic avenues (except where disproportionate difficulties arise):** It is important that you undertake this as soon as possible to enable sufficient time for an EOI request to be completed.
- **Check for an effective treaty:** The treaty must cover the tax type and the period for which the information is being requested.
- **Check for publicly available information:** Many countries have relevant information that is publicly available (i.e. company records and registers of real property). If the information is publicly available, you do not need an EOI.
- **Establish the foreseeable relevance of the information being requested:** You may only request information which is relevant to the tax affairs of the debtor under investigation.

You should follow your business line procedures to undertake an EOI.

Responding to an EOI

All incoming EOI requests are received by the EOI unit. The EOI unit will check to ensure that the request from the foreign jurisdiction meets treaty requirements.

Where an EOI meets treaty requirements and debtor or third party contact is required, the EOI unit will refer the request to the appropriate business line for action.

7. International treaties

We can request assistance by foreign jurisdictions in regard to debt recovery through:

- bilateral treaties which allow for assistance with collection with individual jurisdictions, and
- the Multilateral Convention[15] to which multiple jurisdictions are a signatory.

Where a foreign jurisdiction is a signatory to the Multilateral Convention and also has a bilateral treaty with Australia, either country is able to make a request for recovery on the basis of either the bilateral treaty or the Multilateral Convention.

[15] The joint OECD/Council of Europe Multilateral *Convention on Mutual Administrative Assistance in Tax Matters*, as amended by the 2010 Protocol.

An 'assistance in collection article' has been included in some bilateral treaties signed between Australia and other countries.[16] A similar article for the provision of mutual assistance in the collection of tax debts is contained in the Multilateral Convention, to which Australia is a signatory. These articles allow for:

- action to preserve assets, and
- recovery action

to be taken in respect of tax debts owed to us, by the relevant taxation authority in the foreign jurisdiction on our behalf (known as the 'competent authority').

In order to take action under a bilateral treaty or the Multilateral Convention in a foreign jurisdiction, the debtor must either:

- be a resident in that foreign jurisdiction, or
- hold assets in that foreign jurisdiction.

Bilateral treaties and the Multilateral Convention use different terms to describe the tax debts for which we may make a request for assistance:

- Under a bilateral treaty we make a '**revenue claim**' and the bilateral treaty generally specifies which taxes that includes. The revenue claim must be enforceable which means that the liability must be legally recoverable by us. However, where we take an action to preserve assets as a preliminary step to further recovery action, the revenue claim does not, at that stage, need to be enforceable (for instance, a liability does not need to be due and payable). This action if the debt is not yet payable would need specific approval from an Assistant Commissioner based on the facts indicating a risk to ultimate collection if action was delayed.
- Under the Multilateral Convention we make a '**tax claim**'. The claim is restricted to taxes listed in the Multilateral Convention.

Both types of claims can include interest, administrative penalties, costs of collection or the costs of an action to preserve assets related to the claim.

8. Requesting assistance from a foreign jurisdiction for assistance

The manner in which we will request assistance from a foreign jurisdiction depends on:

- whether the request is made under a bilateral treaty or the Multilateral Convention
- whether there is an Memorandum of Understanding (MOU) in place

[16] Based on Article 27 of the *2010 OECD Model Tax Convention on Income and on Capital*.

- the laws of the particular state we are requesting assistance from.

Memorandum of Understanding

We may have a MOU with the party that we have a bilateral treaty with or with individual parties to the Multilateral Convention. The MOU covers prerequisite administrative requirements.

Recovery action can still be taken where a MOU does not exist. These requests will be undertaken in close collaboration with the competent authority of the foreign jurisdiction to establish general agreement on the submission of the request and administration of the recovery action.

Making the request

When deciding whether to make a request, you should consider the following factors:

- the size and nature of the debt
- whether the debt is in dispute or subject to an objection or review
- 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 jurisdiction
- the legal and administrative procedures in the foreign jurisdiction applying to the collection of the Australian tax debt
- the likely time and costs involved in the collection of the debt
- the likelihood of recovering the debt
- any advice provided by the foreign competent authority of the other state.

Reductions and increases in the claim

If the debt reduces after you make the request, you will need to inform the foreign jurisdiction of the reduction and the new balance of the debt owing.

If a debt is increased, you should work with the foreign jurisdiction to ascertain how the additional debt amount is to be claimed and treated.

9. Collecting debts on behalf of a foreign jurisdiction when requested

Foreign jurisdictions can also request assistance from us under a bilateral treaty or the Multilateral Convention.

If you receive a request for assistance (known as a 'foreign revenue claim') from a foreign jurisdiction there are a number of steps you must take in order to collect or enforce the debt. See **Appendix B** for these steps.

If you receive a request from a foreign jurisdiction to collect a debt, you should bring the case to the attention of your team or technical leader.

10. Costs of collection

Provisions as to the treatment of costs incurred by a state in collecting a foreign debt are usually contained in a MOU between the states.

Usually, the ordinary costs of collection are borne by the state collecting the foreign debt. Ordinary costs include internal administration costs (such as staff salaries and overheads) and minor external costs (such as court filing fees).

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

Appendix A

Australian reciprocal agreements

- United Kingdom
- Canada
- New Zealand
- Jersey
- Malaysia
- Papua New Guinea
- Singapore
- Switzerland
- United States of America.

Appendix B

Registration of foreign revenue claims

When a foreign jurisdiction makes a foreign revenue claim pursuant to the mutual assistance articles in either a bilateral treaty or the Multilateral Convention, you should check that it complies with the following requirements[17]:

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

If you are satisfied that these requirements are met, you must register the foreign revenue claim on the Foreign Revenue Claims Register ('Register') within 90 days of receiving it.

Once registered, the tax debt may be recovered in the same way as other debts owed to the Commissioner.[18]

Service of notice on the debtor

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

If the amount remains unpaid after that date, GIC accrues on any unpaid amounts.

General debt collection

Once the foreign revenue claim is registered we will recover any registered foreign revenue claim or take action to preserve assets in the same manner as domestic tax debts.

However there are some specific requirements that must be observed when undertaking recovery action on a foreign revenue claim, as set out below.

Evidence

In legal proceedings to recover a foreign revenue claim, the Commissioner may produce an evidentiary certificate[19] which is prima facie evidence of the matter in the proceeding. 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.[20]

Where the liability is disputed

Generally, proceedings about the existence, validity or amount of a foreign revenue claim cannot be brought before the courts or administrative bodies of Australia.[21]

Therefore, if the debtor disputes the debt, the matter must be litigated and resolved in the country in which the tax debt arose, under the laws of that country. They cannot raise those arguments in any proceedings in Australia for recovery of the foreign revenue claim.

Arrangements to pay by instalments

Before we accept an arrangement to pay a foreign revenue claim by instalments, we will need to discuss this with the competent authority of the foreign jurisdiction.[22]

We may also be notified by the foreign jurisdiction that an arrangement has been entered into between the debtor and the foreign jurisdiction itself for the payment of the debt by instalments to that foreign jurisdiction.

Compromise of debts

Because the debt originates in the foreign jurisdiction a debtor will usually seek to the compromise (or their equivalent of compromise) in the foreign jurisdiction. Any reduction in the debt in the foreign jurisdiction then correspondingly reduces the debt in Australia.

[17] Section 263-15 of Schedule 1 to the TAA
[18] Section 255-1 of Schedule 1 to the TAA, see also Law Administration Practice Statement PS LA 2011/14 *General debt collection powers and principles.*

[19] Section 255-45 of Schedule 1 to the TAA
[20] Section 255-45 of Schedule 1 to the TAA.
[21] For example, see Article 27(6) of the New Zealand Convention. Similar provisions exist in Article 23 of the Multilateral Convention.
[22] All arrangements entered into must be made in accordance with the principles outlined in PS LA 2011/14.

However, we have the power to compromise tax debts.[23] Once a claim is registered, this power extends to foreign revenue claims.

As such, we can receive applications for compromise from the debtor. If this happens, you must inform the competent authority of the foreign jurisdiction.

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

If compromise is considered here, it will be necessary to take into account the extent and value of assets owned by the debtor in a foreign country, as an additional factor in the decision of whether to allow the compromise.

Amending the claim and removal of details on the Register

We have, in certain circumstances[24], powers to amend or remove the details of a debtor or a foreign revenue claim on the Register.

These circumstances are as set out below.

- Where we conclude, with agreement from the relevant foreign competent authority that a foreign revenue claim on the Register should not be on the Register and wish to remove that foreign country debtor from the Register.
- If we are satisfied with a debtor's application to remove their details, for example where an individual has incorrectly been identified as a debtor.
- Where there is a minor administrative error in relation to the Register and we wish to correct that error, and we have agreement from the relevant foreign competent authority.
- Where the amount to be recovered from the debtor should be reduced, for example, where the debt has been partially satisfied or reduced as a result of an objection or appeal in the foreign jurisdiction.
- If we receive advice from the requesting foreign competent authority that the amount to be recovered from the foreign country debtor should be reduced.

Remitting amounts to a foreign jurisdiction

Amounts recovered from the debtor in relation of the foreign revenue claim will be remitted to the foreign jurisdiction, either in full or in stages, as and when we receive the amounts.

The manner and frequency of remission will depend on the terms of the agreement between Australia and the foreign jurisdiction. Usually this matter will be covered in a MOU, or by way of agreement in discussions between us and the relevant foreign competent authority.

Date issued:

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[23] Law Administration Practice Statement PS LA 2011/3 *Compromise of undisputed tax-related liabilities and other amounts payable to the Commissioner*.

[24] Section 263-35 of Schedule 1 to the TAA.

Amendment history

Date of amendment	Part	Comment
15 August 2019	All	Updated to new LAPS format and style.
24 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.

References

Legislative references	ITAA 1936 ITAA 1936 255 TAA 1953 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 Bankruptcy Act 1966 Bankruptcy Act 1966 29(4) Bankruptcy Act 1966 29(5) Corporations Act 2001 Corporations Act 2001 581 Foreign Judgments Act 1991 Bankruptcy Regulations 1996 Bankruptcy Regulations 1996 3.01 Cross-Border Insolvency Act 2008 Cross-Border Insolvency Act 2008 6
Case references	Akers (as joint foreign representative) v Saad Investments Company Limited; In the matter of Saad Investments Company Limited (in official liquidation) [2013] FCA 738; (2013) 95 ATR 588 Ayres v Evans (1981) 39 ALR 129; (1981) 56 FLR 235 Bluebottle UK Limited v Deputy Commissioner of Taxation [2007] HCA 54; (2007) 232 CLR 598; 2007 ATC 5302; (2007) 67 ATR 1 Commissioner of Taxation v Resource Capital Fund IV LP & Ors [2013] FCAFC 118; (2013) 215 FCR 1; 2013 ATC 20-422; (2013) 95 ATR 816
Other references	OECD Model Tax Convention on Income and on Capital OECD/Council of Europe – Multilateral Convention on Mutual Assistance in Tax Maters
File references	
Related practice statements	PS LA 2011/3 PS LA 2011/14 PS LA 2011/16 PS LA 2011/18

ATO references

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