PS LA 2011/17 - Debt relief

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This document has changed over time. This version was published on *14 April 2011*

Generated on: 27 November 2026, 02:40:46 AM

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2011/17

FOI status: may be released

This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs, tax officers must follow their business line's escalation process.

SUBJECT: **Debt relief**

PURPOSE: **To provide guidance on debt relief situations including:**

- **the Minister for Finance and Deregulation's power to waive a tax debt**
- **the Commissioner's power to grant individual taxpayers release from their obligation to pay certain tax-related liabilities, and**
- **the Commissioner's delegation not to pursue recovery of tax debts.**

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SCOPE

1. This practice statement provides guidelines for the provision of debt relief where:

   - a debtor has applied to have a tax debt waived
   - a taxpayer has applied for release from their obligation to pay certain tax-related liabilities
   - the Commissioner has made a decision not to pursue the recovery of a tax debt.

TERMS USED

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

   Waiver – is a special concession granted to a person or organisation by the Minister for Finance and Deregulation (Minister) that expunges the debt owed to the Commonwealth. That is, the debt is completely wiped out so that the Commonwealth cannot pursue the debt at a later date.

   Applications without merit – are applications for release, release objections or release appeals that:

   - have been lodged to delay recovery proceedings
   - disclose considerable assets or other information such that the person's alleged inability to pay is contrary to the matter disclosed, or
   - are second or subsequent applications where there is no change to the person's circumstances.

   Disputed debt – is a term used for convenience to describe a tax-related liability which is the subject of an objection, a tribunal review or an appeal. In this context, 'disputed debt' also includes other related components that may arise from the making of the assessment increasing the liability of the taxpayer to tax. These related components include tax shortfall penalty and the general interest charge (GIC) calculated from the date the correct amount of tax should have been paid up until the date the assessment is made but does not include GIC imposed for late payment.

   Releasable liabilities – are liabilities to which the release provisions apply.

STATEMENT

3. The Minister has the power to waive a debt due to the Commonwealth. Such a waiver expunges the debt, such that the legal right to pursue and recover that debt is irrecoverably abandoned.

4. The Minister has not delegated this power to the Commissioner. There is no equivalent power expressly conferred upon the Commissioner in taxation legislation, or elsewhere, to waive tax debts. However, the Commissioner can approve release from payment of some tax debts on the grounds of serious hardship.

5. Division 340 of schedule 1 to the *Taxation Administration Act 1953* (TAA) provides for an individual or the trustee of the estate of a deceased person to be released from paying certain liabilities if payment of the liability will cause serious hardship. The person's application must be in the form required by the Commissioner, and the onus is on the applicant to furnish sufficient information to satisfy the Australian Taxation Office (ATO) that payment of the liabilities would entail serious hardship and that release would be appropriate.

6. A decision not to pursue a debt is the method of clearing a debt where the amount is either irrecoverable or uneconomical to pursue.

7. A decision not to pursue a debt does not absolve the debtor from ever having to pay the liability except if the amount was not pursued because it was irrecoverable at law. A debt that was not pursued due to it being uneconomical to pursue may be re-raised and action to collect the debt can recommence, if the circumstances which led to the decision not to pursue the debt change, for example, the financial position of the debtor, improves.

A – Waiver of tax debts

8. Taxpayers have a right to apply to the Department of Finance and Deregulation or the Minister for a waiver of their debt. Under the *Financial Management and Accountability Act 1997* (FMA Act), the decision maker has a very broad discretion to consider each request for a waiver on a case by case basis. The most common condition under which a waiver may be granted is where, due to the particular circumstances of the case, the decision maker concludes that there is a moral obligation, rather than a legal obligation, on the Commonwealth to extinguish the debt due to equity or ongoing financial hardship considerations. Finance Circular 2009/09 outlines three broad categories of applications that are commonly considered in relation to waiver of Commonwealth debts. These categories are:

    - Applications based on the ATO's actions or omissions in administering the tax laws where those actions or omissions have caused the taxpayer to incur unintended debts to the Commonwealth. Note: this statement does not deal with acts or omissions that may warrant the payment of compensation.
    - Applications based on the operation of the tax laws themselves, in that the relevant Act has caused the taxpayer to incur an unintended debt to the Commonwealth, the recovery of which would produce an anomalous or inequitable result.
    - Applications for waiver of Commonwealth debt on the ground that repaying the debt will cause genuine and significant financial hardship.

9. There is no form of application specified by legislation, but it is expected an applicant will provide sufficient information to enable a decision to be made (for example, details of the amount for which a waiver is sought, how the liability arose, the grounds for the application, details of assets and liabilities/income and expenditure and any other relevant information that will assist the Minister to reach a decision). To assist, the Department of Finance and Deregulation has provided a form titled *Application for the Waiver of Debt owed to the Government* at their website. (A link to this is provided in the 'Other References' section of this practice statement).

10. Generally, where the application is sent directly by the debtor to the Department of Finance and Deregulation, the department will notify and consult the ATO about the case before briefing the Minister or relevant delegate on the request.

11. In cases where an application for waiver is received directly by the ATO, the request should be referred to Debt Hardship in the first instance. If no solution can be found within the ATO and referral to the Department of Finance and Deregulation is appropriate, to the extent that the relevant confidentiality provisions permit the disclosure of taxpayer information in this situation, the ATO should, upon request, provide the Department of Finance and Deregulation with sufficient information to enable an informed assessment of the case including, as appropriate:

    - details of the debt(s) and any other relevant information in relation to the debt, that is, how the debt arose, action taken to recover the debt, whether there is any dispute in relation to the debt, offers of payment and the ATO decision in relation to those offers
    - specific details of the Commonwealth's role, if any, that may have directly contributed to the debtor's situation
    - any history/background to the case, including any available information on the person's assets, income, future income earning capacity, other debts, health and family circumstances
    - any other information that may be relevant to the decision maker's consideration of the particular circumstances
    - a recommendation, either supporting or not supporting the application and the reasons for adopting that stance.

12. Where advice is received from the Department of Finance and Deregulation that it is in receipt of a waiver request, the information detailed above should be provided, to the extent that the disclosure of the taxpayer information is permissible under the relevant confidentiality provisions.

13. Although confidentiality provisions in the TAA would generally prevent the disclosure of taxpayer information, such information may sometimes be divulged where it occurs in the course of the performance of an officer's duties. Disclosure of information to either the Department of Finance and Deregulation or to the Minister pursuant to an application for waiver is considered as being within the performance of an officer's duties as it has a direct effect on the amount of tax recoverable by the ATO.

14. Although the wording of some confidentiality provisions creates an absolute prohibition on disclosure of information to Ministers, where the FMA Act requires the Minister to consider applications, this specific requirement of the FMA Act overrides the general prohibition on disclosure to Ministers created by the confidentiality provisions.

15. The debtor should be provided with a copy of any information, comments or recommendation provided by the ATO to the Department of Finance and Deregulation to afford them the opportunity to provide an alternative view to the Minister.

16. Action to recover an amount for which the debtor has sought a waiver may not necessarily be stayed while the application is being considered. A decision in this regard will need to be made in light of the particular circumstances of the case. The Department of Finance and Deregulation should be advised of these developments.

17. Department of Finance and Deregulation guidelines state that waiver claimants will be provided with adequate information regarding the details of the decision of their application including a summary of reasons for the Commonwealth's acceptance, partial acceptance, or rejection of their claim. The Department has also stated that a copy of the letter advising the claimant of the decision will also be forwarded to the relevant agency for information and action.

B – Release from payment of some tax debts

18. Types of liabilities to which release provisions apply

(i) income tax

(ii) a pay as you go (PAYG) instalment

(iii) fringe benefits tax

(iv) a fringe benefits tax instalment

(v) medicare levy

(vi) medicare levy surcharge

(vii) withholding tax (as at section 128B of *the Income Tax Assessment Act 1936* (ITAA 1936))

(viii) mining withholding tax (as at section 128V of the ITAA 1936)

(ix) managed investment trust withholding tax (as at section 840-805 of the *Income Tax Assessment Act 1997* (ITAA 1997))

(x) interest amounts under section 102AAM of the ITAA 1936, and

(xi) penalties and charges associated with the above liabilities, including:

- additional tax, for example, section 93 or 112B or Part VIII of the *Fringe Benefits Tax Assessment Act 1986*
- administrative penalty in relation to fringe benefits tax or income tax (as at Part 4-25 in schedule 1 to the TAA and includes failure to lodge penalty relating to lodgment of income tax returns)
- GIC, for example, section 5-15 in the ITAA 1997, section 45-80 or 45-620 in schedule 1 to the TAA, former sections 163AA or 170AA, former subsections 204(3) or 221AZMAA(1) of the ITAA 1936
- shortfall interest charge
- penalty (as at section 163A of the ITAA 1936).

19. Amounts to which the release provisions do not apply include:

(i) amounts which have been incorrectly refunded or overpaid (such as incorrect refunds or overpayments arising from administrative errors – also referred to as 'non-tax' debts)

(ii) amounts of tax instalment deductions, prescribed payments, reportable payments or PAYG withholding that have not been remitted or paid to the Commissioner

(iii) interest on judgment costs

(iv) legal costs

(v) provisional tax and quarterly provisional tax and instalments of provisional tax

(vi) instalments of company tax

(vii) sales tax

(viii) indirect taxes (goods and services tax (GST), wine equalization tax, luxury car tax)

(ix) higher education contributions

(x) student financial supplement scheme

(xi) child support payments

(xii) court imposed fines and costs, including reparation orders

(xiii) director liabilities arising under former Division 9 of Part VI of the ITAA 1936 and director penalties arising under Division 269 in schedule 1 of the TAA.

(xiv) pre-sequestration debts

(xv) any debts raised by the superannuation provisions in the:

- *Superannuation Contributions Tax (Assessment & Collection) Act 1997*
- *Superannuation Contributions Tax (Members of Constitutionally Protected Funds) Assessment & Collection Act 1997*
- *Superannuation Guarantee (Administration) Act 1992*
- *Termination Payments Tax (Assessment & Collection) Act 1997*

(xvi) debts resulting from overpayments or advances of grants resulting under the *Diesel and Alternative Fuels Grants Scheme Act 1999*

(xvii) debts resulting from overpayments or advances of grants resulting under *Product Grants and Benefits Administration Act 2000*

(xviii) debts resulting from overpayments of credits under the *Fuel Tax Act 2006*, and

(xix) failure to lodge penalty related to lodgment of activity statements.

Release application

20. Under subsection 340-5(3) of schedule 1 of the TAA, the only taxpayers eligible for release from particular tax liabilities are individuals or trustees of the estate of deceased individuals.

21. Applications are considered in the first instance by the ATO. Dissatisfied applicants are entitled to make an objection, which is then determined by an internal ATO review. Applicants have further recourse to a merits review by the Administrative Appeals Tribunal, sitting as the Small Taxation Claims Tribunal or they may appeal to the Federal Court. The ATO will pay the lodgment fees incurred by taxpayers who wish to have their release case reviewed by the Small Taxation Claims Tribunal.

22. A person has a right to apply for release. Where the debt is an eligible debt and it is believed that the application will have a reasonable prospect of success (see paragraphs 36 to 41 entitled 'Release decision – determining serious hardship' of this practice statement), the ATO will suggest to the taxpayer that the lodgment of a release application should be considered.

23. A person should apply for release on the form approved by the Commissioner. It is in the person's best interests to provide all relevant information required by the form so that the ATO can make a proper decision.

24. The ATO may require a person to supply further information, or answer questions that would be relevant for the consideration of the person's application for release. Where that additional information is not supplied and/or the application for release is incomplete, provided there are no reasonable grounds for failing to supply the information, for example, where the person is sick and others are unable to supply the information on the person's behalf, the application may not be considered and the application form may be returned to the person.

25. If the person wishes the ATO to consider the application they should submit an application form with all the information required. Meanwhile, normal action to recover the debt may be continued.

26. Generally, when considering an application for release, the ATO requires that income tax and activity statement lodgments are up to date. This is because an assessment may result in a refund that could reduce the debt or alternatively, the assessment may result in additional debt the ATO should consider for release. On receipt of the application for release, the ATO will check the lodgments and request any returns and/or statements that are outstanding be lodged. Where the outstanding returns and/or statements are not subsequently lodged and, provided there are no reasonable grounds for failing to lodge, the application for release may not be considered and the application form may be returned to the person.

27. If the person wishes the ATO to consider the application they should submit an application form with all the outstanding lodgments. Meanwhile, normal action to recover the debt may be continued.

28. Where there is a disputed debt, the final liability of the person is not certain and consequential hardship implications can only be speculated upon. Therefore, the ATO will generally not consider an application for release until the dispute is resolved and the application form may be returned to the person.

29. Once the dispute is finalised, if the person wishes the ATO to consider the application they should resubmit an application form. Meanwhile, normal action to recover the debt may be continued. (Refer to Law Administration Practice Statement PS LA 2011/4 Recovering disputed debts).

30. Unresolved insurance, compensation or damages claims make it impossible to properly evaluate the person's true longer-term position. Therefore, the ATO will generally not consider an application for release until the claims are resolved, and the application form may be returned to the person.

31. Once the claim is finalised, if the person wishes the ATO to consider the application, they should again submit an application form. Meanwhile, normal action to recover the debt may be continued.

32. Applications for release may be regarded as warranting a decision to defer recovery during the time in which the application remains undetermined. In certain circumstances, however, it may appear that the deferral of recovery action is not appropriate, such as where the facts of the case indicate a risk to recovery action or where the application for release is considered to be frivolous or without merit (see paragraph 56 entitled 'Applications without merit' of this practice statement).

33. In cases where the person dies after lodgment of an application for release, the application lapses. The trustee of the estate of a deceased person may lodge an application for release if payment of the amount of the releasable liabilities would cause serious hardship for the dependants of the deceased person.

Release liability

34. In order to determine the amount of releasable liability, the ATO might need to determine which of a person's liabilities have been paid. This will require payments to be matched against particular tax liabilities that existed at the time of the payment.

35. It should not be assumed that payments would be applied on a pro-rata basis across outstanding liabilities. A person would be expected to remit to the ATO amounts collected on behalf of the ATO, for example, tax withheld from employees' wages and GST, before paying their own personal liabilities, for example, their own PAYG instalments.

Release decision – determining serious hardship

36. It is recognised that the payment of tax may require a degree of restraint in regard to expenditure on other goods or services. However, payment of tax at the prescribed rate will not usually create a situation of hardship. In some circumstances, however, financial losses or other adverse factors may limit a person's capacity to pay to such an extent that the impact of payment of the tax will amount to serious hardship.

37. The term 'serious hardship' is not defined at law and must be given its ordinary meaning. The ATO determines whether serious hardship exists by applying several tests which are designed to ascertain whether payment of the tax would produce unduly burdensome consequences for the person such that they would be deprived of necessities according to normal community standards.

38. Thus, serious hardship would be seen to exist where payment of a tax liability would result in the person being left without the means to achieve reasonable acquisitions of food, clothing, medical supplies, accommodation, education for children and other basic requirements. On the other hand, elements of hardship may be regarded as marginal or minor – rather than serious – if the consequences of payment of tax are seen, for example, as limitation of social activities or entertainment, or loss of access to goods or services of a more luxurious nature or standard.

39. As a first step in considering an application for release, the ATO must determine the person or persons to be included in his assessment of hardship factors. The assessment of hardship is not limited only to the person's present circumstances; it may also consider the future prospect of an inability to provide food and clothing, for family members or others for whom the person has responsibility.

40. Conversely, although a person's immediate situation may suggest inability to meet the combined total of the tax debt and family expenditures, that factor will not indicate hardship if the income or asset positions of other members of the family are such as to suggest that the person cannot reasonably be regarded as responsible for all relevant outgoings. For example, the separate earnings, allowances or benefits received by other family members will be relevant to an assessment of the person's overall financial circumstances.

41. Subject to the general considerations above, the steps by which the ATO evaluates the merits of individual cases can be addressed in three segments:

- Income/Outgoing Tests
- Assets/Liabilities Tests
- Other Factors.

Income/outgoing tests

42. These tests are concerned with quantifying the person's capacity to meet the tax liability from their current income. The tests in sequence are:

(i) What is the person's capacity to pay, as measured by the income and outgoings stated in the application or supporting documents, that is, what net income remains after deducting total outgoings from total income?

(ii) Does the ATO accept that the income and outgoings stated are accurate and that the outgoings are necessary, or is there scope to increase the net income available or to reduce outgoings to meet the tax debt without serious detriment to living standards?

(iii) If there is a margin by which available income exceeds reasonable outgoings, is it sufficient to allow the liability to be met within an acceptable time frame?

43. In relation to the second test in subparagraph 42(ii) of this practice statement, the appearance of claims that a person incurs above-average expenditure on food, clothing or services, a high level of private travel or entertainment expenses, or payments for leisure goods such as caravans, boats and higher-priced motor vehicles would usually lead the ATO to a conclusion that capacity to pay exists. Within this test, the ATO also seeks to determine whether there are optional expenditures which could be reduced or deferred to improve capacity to pay the tax debt.

44. For the purposes of the third test, the ATO generally takes a two to three year payment span as an initial yardstick. Capacity to pay at a limited rate which would not see the debt cleared in two to three years would be a factor indicating that granting of partial release may be appropriate.

Assets/liabilities tests

45. The tests within this segment are concerned primarily with determining whether the person's equity in assets is indicative of capacity to pay the tax debt. As a secondary consideration, the ATO may also need to address whether the acquisition of assets has unreasonably been put ahead of meeting tax liabilities.

46. There are several types of assets which the ATO would generally regard as normal and reasonable possessions, and which would not be expected to be surrendered or sold to meet revenue debts. Subject to the proviso that values are modest rather than extravagant, those assets include:

- ownership of, or equity in, a residential property which is the person's home
- a motor vehicle
- furniture and household goods
- tools of trade, and
- cash on hand or bank balance sufficient to meet outgoings for necessities or other reasonable expenditures, for example, funds put aside by aged persons to cover funeral expenses.

47. Other assets such as caravans (except where a caravan serves as the person's residence), holiday homes, luxury motor vehicles, boats, substantial life assurance or annuity entitlements, shares and other investments will generally be regarded by the ATO as indicating capacity to pay, through either disposal or use as security for borrowings, without involving serious hardship.

48. As a general proposition, the ATO would also seek to reach conclusions as to whether assets have been valued realistically, and liabilities are accurately recorded. Where doubts arise in relation to these aspects, the ATO may seek clarification of the basis of valuation, or of other information. However, certified valuations from professional valuers will not normally be required.

49. In relation to liabilities, the ATO's evaluation of the circumstances of the person may in some cases require consideration of whether deferment or rescheduling of commitments is a viable option. Where a person's asset position indicates untapped borrowing capacity, the likely quantum of repayments arising will, in turn, have a bearing on the outcome of the income/outgoings tests discussed earlier.

Other factors

50. Apart from the financial factors discussed in preceding paragraphs, various additional factors may require consideration during the ATO's evaluation of cases. Some could have a bearing on the ATO's decision while others, though offered as grounds warranting release, are not relevant.

51. If the ATO decides that payment of a releasable liability will cause serious hardship, it will then move to a second decision making process to decide whether or not to grant a release. If serious hardship is established, the ATO is not bound to grant release (*Corlette v. Mackenzie* 96 ATC 4502; (1996) 32 ATR 667). Nevertheless, it is clear that the ATO is obliged to act reasonably and responsibly, and should not act arbitrarily or capriciously. Examples of situations in which the ATO may decide against granting release, even though implications of serious hardship may be drawn, are:

- where it appears that the person has, questionably or otherwise, disposed of funds or assets without making proper provision to meet tax liabilities

- where the granting of release would not result in reduction of hardship, such as where the person has other liabilities or creditors to such an extent that release from the tax debt will not relieve hardship
- where the person has used available funds to discharge debts due to other private creditors in preference to debts due to the ATO
- where the person has used available funds to discharge debts due to other business creditors where those payments are not considered reasonably necessary to maintain the viability of the business and could be considered as unfair preference payments to the detriment of the ATO
- where the person, for less than adequate reasons, has failed to pursue debts due to them, or to seek possible contributions from insurers, or persons with joint responsibilities for debts
- where serious hardship is associated with a single event or short term outcome, such as might be encountered in the more speculative or seasonal business undertakings, the effects of which can be expected to abate within a short term
- where the person has a poor compliance history, and
- where the person is unable to demonstrate that they have made provision for future debts.

The Commissioner's decision

52. The tests and procedures outlined above usually enable the Commissioner to determine whether or not he can be satisfied that serious hardship is likely and the extent, if at all, to which he should grant release. The Commissioner may decide not to grant a release, or to grant a partial release, or he may decide to grant a full release. Release from the full amount of the liability would not generally be appropriate where partial release is sufficient to avert hardship. If the Commissioner decides payment will not cause serious hardship, then he cannot grant release.

Partial release – allocation of credit

53. Where partial release is granted, the ATO will determine the allocation of the release credit.

GIC

54. The GIC will continue to accrue on the amounts subject to an application for release. Where the ATO refuses to grant release from GIC or the liabilities on which GIC has accrued, the applicant continues to have the right to apply for a remission of GIC under the normal guidelines (see Law Administration Practice Statement PS LA 2011/12 Administration of general interest charge (GIC) imposed for late payment or under estimation of liability).

Judgment interest and costs

55. Although the ATO cannot grant release from judgment interest or associated legal costs, these amounts will be written off if a full release is granted from the liabilities which are the subject of the associated judgment debt. If there is only a partial release from those liabilities, or if the judgment debt also includes liabilities from which release may not be granted (for these liabilities, see paragraph 18 of this practice statement), the ATO will write off a proportion of the judgment interest that corresponds to the proportion of the judgment debt for which release was granted. Where it is clear that the ATO will not continue recovery action in respect of any amounts that are the subject of the judgment debt, the ATO will write off all amounts of judgment interest and costs that relate to that debt.

Applications without merit

56. In cases where it appears that the application for release is without merit or may have been lodged to delay recovery action, the matter will be referred to the relevant decision-maker with a request for an urgent determination. In such cases, action to recover the debt may be continued and the applicant will be advised accordingly.

Disputed release decisions

57. Where a person disputes the release decision (whether by objection or by appeal) and the ATO forms the view that the dispute is without merit, recovery action in respect of those liabilities may continue.

Credit entitlements

58. Any credit entitlements arising while the application is being determined will be treated in accordance with the ATO policy for allocating credits (see Law Administration Practice Statement PS LA 2011/20 Payment and credit allocation) and may be offset against the releasable debt.

Further release applications

59. A person's circumstances – including their tax liabilities – can change quite rapidly. Accordingly, a person is not prevented from applying merely because they have previously been unsuccessful or partially successful in seeking release, including release from the same liabilities. This applies even where a person has unsuccessfully objected to a decision or undertaken further appeals. However, it would be unusual for the ATO to consider another application lodged within six months of a previous application. The ATO will make exceptions in circumstances such as where:

- there are significant changes to the applicant's circumstances compared to those set out in the original application
- the applicant has fresh material to submit which is likely to materially affect the original finding, or
- the applicant shows that the decision made by the ATO was either misconstrued or inaccurate.

C – Deciding not to pursue recovery of taxation debts

60. Under the provisions of section 47 of the FMA Act, any debt must be pursued unless the Chief Executive is satisfied that an amount of tax is:

    (i) irrecoverable at law, or

    (ii) uneconomical to pursue.

    Subparagraph 60(ii) of this practice statement is interpreted as a combination of two grounds in the former section 70C of the *Audit Act 1901* namely uneconomical to pursue and irrecoverable because a debtor is without assets/funds and there is little chance of the financial circumstances improving.

Irrecoverable at law

61. The word 'recover' has a technical meaning in law, signifying to recover by action and by the judgment of the court.

62. A debt is irrecoverable at law:

    (i) when it cannot be recovered by action and by the judgment of the court, that is, the debt cannot be 'proved'

    (ii) when it forms part of the provable pre-sequestration debt of a discharged bankrupt

    (iii) when it represents the balance outstanding after an Official Receiver, trustee in bankruptcy or a liquidator notifies that either no dividend or a final dividend is to be, or has been paid. In a number of instances, an Official Receiver, trustee in bankruptcy or a liquidator may not be in a position to advise of the precise dividend for some considerable time. However, the essential cause of any decision not to pursue a debt is an insolvency which results in legal action for recovery no longer being possible, and the rights of the Commissioner to recover being converted into a right to prove in the estate/liquidation. Therefore, in these situations:

    - where the Official Receiver, trustee in bankruptcy or a liquidator advise the approximate dividend expected, the balance of the debt is to be treated under the 'irrecoverable at law' category as from when the proof of debt is lodged, or
    - where the Official Receiver, trustee in bankruptcy or a liquidator advises of a nil dividend or they are unable to quantify even an approximate dividend, the total debt is to be treated as non-pursuable under the 'irrecoverable at law' category as from when the proof of debt is lodged.

    (iv) when it represents the balance outstanding after a final dividend has been paid under an arrangement in terms of Part X of the *Bankruptcy Act 1966*

    (v) when it represents the balance outstanding after the debtor has discharged all the obligations under their debt agreement in terms of Part IX of the Bankruptcy Act

    (vi) when it represents the balance outstanding following the termination of a scheme of arrangement that has been sanctioned by the Court

    (vii) when it represents the balance outstanding following the finalisation of a deed of arrangement that has been approved by creditors under Part 5.3A of the *Corporations Act 2001,* or

(viii) when it represents the balance of an undisputed debt the Commissioner has agreed not to pursue under a deed of compromise or settlement after the debtor has complied with all the terms of the deed. Note: until such time as the debtor complies with all the terms under a deed, it would be inappropriate to treat the balance as irrecoverable at law. However, this fact should not preclude the identification of the portion of the debt the Commissioner has agreed not to pursue as 'doubtful' at the time of signing the deed.

63. In subparagraphs 62(iv), (v) and (vii) of this practice statement where, at the time of lodging the proof of debt, the Official Receiver, trustee or administrator indicates the anticipated dividend, the balance of the provable debt will generally be treated as being uneconomical to pursue. When these administrations draw to a successful conclusion, that is, after the debtor has adhered to all their obligations under the deed or agreement, the unsatisfied liabilities on the proof of debt will then be treated as being 'irrecoverable at law'.

64. Debts must satisfy the above criteria to be classified as 'irrecoverable at law'. It should be recognised that these debts can only be re-raised in very limited circumstances. An example of this may include the offsetting of:

- a payment that may later arise from the activities of a trustee, administrator or liquidator locating previously unknown assets
- a refund amount to be applied to an undisputed debt the Commissioner has agreed not to pursue, or
- a credit arising from a return lodged prior to the discharge of a bankrupt.

Uneconomical to pursue

65. A debt or an amount of revenue may not be treated as uneconomical to pursue unless a delegate is satisfied on all the facts that it is probable that the total costs of recovery action will exceed the return to the Commonwealth. The question of whether an amount is uneconomical to pursue will need to be decided on a case by case basis.

66. Some factors that should be taken into account by a delegate considering non-pursuit of amounts of revenue under this heading are:

(i) the amount of revenue involved

(ii) the length of time the amount has been outstanding, the steps taken to recover the debt to date and the costs to the ATO involved in those steps

(iii) whether adequate steps have been taken to locate or trace a debtor if the grounds for non-pursuit of the debt are that the debtor cannot be located

(iv) the likely cost of continuing action to recover the debt and the anticipated return from such action, including likely recovery of any costs awarded to the Commissioner (balanced against the need to maintain the integrity of the taxation system)

(v) advice provided by the ATO's solicitor where this has been sought, and

(vi) the type of revenue involved. For example, an unpaid amount of superannuation guarantee charge (SGC) and related GIC may be viewed differently to other revenue types because its collection directly affects the superannuation entitlements of the employees in respect of whom that SGC is owing. Whilst this does not preclude SGC amounts being viewed as 'uneconomical to pursue,' a delegate should bear the particular nature of SGC debts in mind when making a decision.

67. No one factor by itself is conclusive so all the factors relevant to a taxpayer's circumstances should be considered in determining whether the debt is uneconomical to pursue.

68. For example, in balancing the costs of recovery against the likely return to the Commonwealth, it will frequently be the case that the older the debt and the more steps taken and costs incurred, the more likely the conclusion that all available avenues for collection have been exhausted, and that the costs of any further action will exceed any possible return to the Commonwealth. However, while the size of the debt is only one factor, larger debts will necessarily warrant a higher degree of scrutiny by the tax officer to satisfy themselves that continued pursuit is not likely to be productive. Similarly, the more a delegate feels that all reasonable steps have been taken to locate or trace a debtor (without success), the more likely they are to approve non-pursuit. The more that the delegate feels there may be integrity concerns, the less likely they are to approve non-pursuit.

No assets/funds

69. Delegates exercising the delegations for non-pursuit of debts will frequently encounter debts where there are claims of no assets or funds and there is little chance of the debtor's financial circumstances improving. If the debt is not a potential relief case (see paragraphs 18 to 59 entitled 'Release from payment of some taxation debts' of this practice statement), a potential insolvency case, or one where payments by instalments (after a delayed commencement) is unlikely, consideration could be given to treating the debt as uneconomical to pursue if there are sufficient facts to support the claims concerning the debtor's assets and funds situation.

70. Where no further action to recover the debt is appropriate through:

    (i) the issue of a garnishee notice

    (ii) the issue of a notice under section 255 of the ITAA 1936 to a resident with the control of money belonging to a non-resident

    (iii) the continuation of legal action to bankruptcy/winding-up, or

    (iv) agreeing to accept payment of the debt by instalments (even for a lengthy period).

    a debt may be treated as uneconomical to pursue if:

    - the debtor has no assets, or a levy under a writ/warrant of execution has not been successful (and it is not possible or intended to pursue bankruptcy action)
    - a notification has been received from a trustee or administrator that the debtor's estate is without sufficient assets to satisfy the liability
    - the debtor is deceased and there are no assets to be distributed from the estate, or
    - a company has ceased operations and has no assets.

71. The ATO should ensure, to the extent possible:

    - in the event that a company has been deregistered, it had no assets at the date of deregistration
    - whether any assets owned by the company prior to deregistration were legally disposed of. If not, the tax officers need to consider whether such assets could be recovered by a liquidator in the event of a company's reinstatement and subsequent winding up

- the company actually did cease to trade (per telephone inquiry), and
- for debts due under a 'remittance provision' (for example, PAYG withholding amounts, group tax, deductions from prescribed payments), consideration has been given to initiating action against directors (*DFC of T v. Action Workwear Pty Ltd (Deregistered)* 96 ATC 4575; (1996) 33 ATR 61).

72. Before deciding not to pursue a company debt, action to wind up the company may be taken. Where it is considered uneconomical to take wind up action and the company has ceased trading, the Australian Securities and Investment Commission (ASIC) is to be requested to consider deregistering the company. Note: ASIC may not be in a position to deregister the company immediately because of the criteria laid down at section 601AB of the Corporations Act.

73. Directors of companies can be personally liable for the debts of a company if those debts were incurred when the company was trading while insolvent. Accordingly, it would be inappropriate to elect not to pursue the debt of a company whose directors (or persons acting in the management of the company) have a past history of being involved in failed companies without first exploring other avenues of action against, or recovery from the personal assets of those directors where insolvent trading is suspected. Non-pursuit should then only be considered if such enquiries subsequently indicate that there is little prospect of recovery from any director.

74. A debt may be re-raised for a variety of reasons. The most common is where new information becomes available that suggests recovery action is now viable, for example, the debtor's whereabouts have been traced or the debtor has identifiable assets or income, or a later tax return has been lodged. In the case of debts not pursued because:

    - they were uneconomical to pursue for some reason under either former section 70C of the Audit Act or section 47 of the FMA Act, or
    - because a debtor had no funds or assets under former section 70C of the Audit Act

    the situation may have improved and the debtor may be able to pay the debt in full, or be able to pay the debt by instalments over a period of time. Alternatively, legal recovery action may now be a viable option.

75. However, before re-raising a debt, consideration must be given to whether or not the debt can be legally re-raised. If the ground for non-pursuit was one of the following:

    (i) uneconomical to pursue under either former 70C of the Audit Act , or section 47 of the FMA Act, or

    (ii) the debtor had no funds or assets and there is no prospect of the financial situation improving, under former section 70C of the Audit Act

    then the total debt can be re-raised. For all taxes, the additional charges for late payment/GIC should also be updated and imposed. Where appropriate, remission of GIC should also be considered. See PS LA 2011/12 for further information on remission of GIC. Once the debt and any other relevant details have been updated, relevant recovery action may commence.

76. Re-raising the debt will ensure that the full debt will be shown on the account and, if there is a credit, the credit will be absorbed. If a debt is re-raised and, after the allocation of a subsequent credit there is still an amount outstanding, options for recovery of the remaining debt (for example, a payment arrangement) should be considered.

77. Where further recovery options are not viable, it may be considered appropriate to again decide not to pursue the balance. If this is the case, then the reason for non-pursuit must satisfy one of the grounds for non-pursuit.

Legislative references	ITAA 1936 102AAM ITAA 1936 Pt VI Div 9 ITAA 1936 128B ITAA 1936 128V ITAA 1936 163 ITAA 1936 163AA ITAA 1936 170AA ITAA 1936 204(3) ITAA 1936 221AZMAA(1) ITAA 1936 255 ITAA 1997 5-15 ITAA 1997 840-805 TAA Sch 1 45-80 TAA Sch 1 45-620 TAA Sch 1 Pt 4-25 TAA Sch 1 Div 269 TAA Sch 1 Div 340 TAA Sch 1 340-5(3) Audit Act 1901 70C Bankruptcy Act 1966 Pt IX Bankruptcy Act 1966 Pt X Corporations Act 2001 Pt 5.3A Corporations Act 2001 601AB Diesel and Alternative Fuels Grants Scheme Act 1999 FBTAA 1986 93 FBTAA 1986 112B FBTAA 1986 Pt VIII FMA Act 1997 FMA Act 1997 47 Fuel Tax Act 2006 Product Grants and Benefits Administration Act 2000 Superannuation Contributions Tax (Assessment & Collection) Act 1997 Superannuation Contributions Tax (Members of Constitutionally Protected Funds) Assessment & Collection Act 1997 Superannuation Guarantee (Administration) Act 1992 Termination Payments Tax (Assessment & Collection) Act 1997
Related practice statements	PS LA 2011/4 Recovering disputed debt PS LA 2011/12 Administration of general interest charge (GIC) imposed for late payment or under estimation of liability PS LA 2011/18 Enforcement measures used for the collection and recovery of tax related liabilities and other amounts
Case references	Corlette v. Mackenzie 96 ATC 4502; (1996) 32 ATR 667 DFC of T v. Action Workwear Pty Ltd (Deregistered) 96 ATC 4575; (1996) 33 ATR 61
Other references	Finance Circular 2009/09 Department of Finance Waiver Application Form
Date issued	14 April 2011
Date of effect	14 April 2011
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Section	Operational Policy, Assurance and Law