PS LA 2011/17 - Debt relief, waiver and write off

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PS LA 2011/17
Debt relief, waiver, and write-off

This Law Administration Practice Statement provides guidance about the:

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

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. Overarching principles

The Commissioner has a statutory obligation to pursue the recovery of tax debts. However, a tax debt will not be pursued in certain situations. The Commissioner may permanently release particular liabilities in the case of serious hardship. The Finance Minister may waive amounts owing to the Commonwealth. Alternatively, the Commissioner can determine not to pursue a debt considered uneconomical to pursue (in which case it can be re-raised later), or permanently extinguish a debt that is irrecoverable at law. Such decisions must be consistent with both the law and the principles set out in this practice statement.

A. PERMANENT RELEASE OF AN INDIVIDUAL FROM THE PAYMENT OF PARTICULAR LIABILITIES ON THE BASIS OF SERIOUS HARDSHIP

2. Applicability of the serious hardship provisions

Section 340-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) enables an individual to be partially or fully released from particular liabilities if the Commissioner considers that payment would result in serious hardship.[1] The provision also applies to the trustee of a deceased estate where the dependants of the deceased individual would suffer serious hardship if the trustee paid the liability.

[1] The provision is considered to extend to an individual who has incurred personal liability in their capacity as a trustee of a trust or superannuation fund in respect to an eligible liability.

The particular liabilities for which release may be granted include:[2]

- income tax
- pay as you go instalments
- fringe benefits tax or a fringe benefits tax instalment
- medicare levy or medicare levy (fringe benefits) surcharge
- withholding taxes on dividends, interest or royalties
- mining withholding tax
- managed investment trust withholding tax, and
- some penalties and interest charges associated with these debts.

3. Serious hardship application process

Taxpayers are encouraged to apply for release by using the form and instructions provided on our website. An application for release cannot be determined unless:

- all relevant information has been provided
- income tax and activity statement lodgments are up-to-date
- there are no outstanding amendment requests or unresolved tax disputes, and

[2] Refer section 340-10 of Schedule 1 to the TAA.

- all outstanding insurance, compensation or damages claims have been finalised.

4. Recovery of debts pending the outcome of a hardship application

The decision to continue recovery action of an amount for which the debtor has sought release must be based on the risk management principles outlined in Law Administration Practice Statement PS LA 2011/6. This decision must be made on a case-by case-basis applying the above mentioned principles to the facts of the case. Generally, recovery action will be deferred unless the claim is considered frivolous, is not considered to have merit, or there is a serious risk to recovery. General interest charge (GIC) continues to accrue until the application is determined.

5. Definition of serious hardship

'Serious hardship' is given its ordinary meaning. We consider serious hardship to exist where the payment of a tax liability would result in a person being left without the means to afford basics such as food, clothing, medical supplies, accommodation, or education.

Tests are applied to determine whether serious hardship exists. The object of the tests is to determine whether the consequences of paying the tax would be so burdensome that the person would be deprived of what are considered necessities according to normal community standards.

Three tests are used to determine the merits of a serious hardship application:

- the income/outgoing test
- the asset/liabilities test, and
- other relevant factors.

6. Income / outgoings test

The purpose of the income/outgoing test is to assess a taxpayer's capacity to meet their tax liability from their current income. It is necessary to identify and consider individuals who are dependent on the taxpayer and the degree of responsibility, together with the taxpayer's partner. In particular, the following factors are considered relevant:

- the taxpayer's capacity to pay in a reasonable timeframe on the basis of their income and outgoings[3]
- scope for the taxpayer to increase their income
- whether all expenditure could be considered reasonable and consideration of any discretionary components, and
- whether the taxpayer has made attempts to defer or reschedule other financial commitments.

[3] A 'reasonable timeframe' depends on the size of the debt and other relevant circumstances in each case.

7. Assets/liabilities tests

The purpose of the asset/liabilities test is to assess a taxpayer's equity in, or access to, assets which may be indicative of their capacity to pay. Consideration is given to any property owned wholly or jointly by the taxpayer and their partner, privately or within a business structure.

There are several types of assets which are regarded as normal and reasonable possessions. These would not be expected to be surrendered in order to pay a tax debt, provided they are of a modest nature and include:

- ownership of, or equity in, a residential property which is the taxpayer's home
- a motor vehicle
- furniture and household goods
- tools of trade
- cash on hand or bank balances sufficient to meet immediate day-to-day living expenses, and
- funds put aside by aged persons to cover funeral expenses.

All other significant assets need to be scrutinised to determine capacity to pay (either by sale or used as security for a loan). These assets include other real estate, luxury motor vehicles or boats, life insurance or annuity entitlements, shares and other investments, and collections for trading, investment or hobby purposes.

8. Other relevant factors

The Commissioner is not bound to grant release even though a taxpayer may demonstrate serious hardship. However the Commissioner is obliged to act reasonably and responsibly, and should not act arbitrarily or capriciously. Examples of situations in which the Commissioner may decide against granting release, even though implications of serious hardship may be drawn are:

- where a taxpayer appears to have unreasonably acquired assets ahead of meeting their tax liabilities
- where a taxpayer appears to have disposed of funds or assets without giving consideration to their tax liability

- where release would not result in reduction of hardship, such as where the person has other liabilities or creditors
- where a taxpayer has paid other debts (either business or private), in preference to their tax debt
- where the taxpayer, without good reason, has not pursued debts owed to them
- where serious hardship is likely only to be short term[4]
- where the taxpayer has a poor compliance history
- where the taxpayer is unable to show that they have planned for future debts
- where the taxpayer has structured their affairs to place themselves in a position of hardship (for example, placing all assets in trusts or related entities over which they have control), and
- where the taxpayer has delayed lodgment of returns resulting in the accumulation of a large debt that they are unable to pay.

9. Decision as to whether to grant release

The outcome of the tests outlined above will usually enable a decision to be made as to whether serious hardship exists and the extent, if at all, to which release should be granted. You may decide not to grant a release, to grant a partial release, or to grant a full release. Release from the full amount of the liability would not generally be appropriate where partial release is sufficient to avoid serious hardship.

Release cannot be granted from judgment interest and associated legal costs. However, if you allow a full release of the liability relating to the judgment, we will not pursue the judgment interest or the costs. If partial release is allowed, we will not pursue the corresponding proportion of the judgment interest or costs.

If a decision is made not to fully grant release from the payment of GIC, the taxpayer can apply for remission pursuant to the Commissioner's general remission guidelines.[5]

A taxpayer who is dissatisfied with a decision not to grant release in full is entitled to lodge an objection against the decision. If they are dissatisfied with the result of the objection decision, they may seek further review by the Administrative Appeals Tribunal. We will pay any lodgment fees related to such a review. The taxpayer may also appeal to the Federal Court.

[4] 'Short term' is to be determined on a case-by-case basis.
[5] PS LA 2011/12 *Remission of general interest charge*.

A taxpayer is entitled to reapply for release if their circumstances change or they have new material to submit.

B. THE FINANCE MINISTER'S POWER TO PERMANENTLY WAIVE DEBTS

10. Exercise of the Finance Minister's power to waive tax debts

Section 63 of the *Public Governance, Performance and Accountability Act 2014* provides that the Finance Minister may waive amounts owing to the Commonwealth. A waiver is a special concession granted to a person or organisation that extinguishes a debt owed to the Commonwealth. The power has not been delegated to the Commissioner.

11. How to apply for waiver

Information about waiver, including the application process is available on the Department of Finance (DoF) website. Generally, the DoF will notify and consult with us before briefing the Minister or relevant delegate on the request.

Information that we provide to the DoF to progress a waiver application may include:

(a) details of the debt(s) and any other relevant information in relation to the debt, such as how the debt arose, action taken to recover the debt, whether there is any dispute in relation to the debt, offers of payment and our decision in relation to those offers

(b) specific details of the Commonwealth's role, if any, that may have directly contributed to the taxpayer's situation

(c) any history/background to the case, including any available information on the taxpayer's assets, income, future income earning capacity, other debts, health and family circumstances

(d) any other information relevant to the decision maker's consideration

(e) a recommendation, either supporting or not supporting the application and the reasons for adopting that stance.

A copy of the information and recommendation you provide to the DoF is given to the taxpayer by DoF for comment before making a decision.

12. Recovery of debts pending the outcome of a waiver application

The decision to continue recovery action of an amount for which the taxpayer has sought waiver must be based on the risk management principles outlined in

PS LA 2011/6. This decision must be made on a case-by-case basis applying these principles to the facts of the case.

C. NOT PURSUING A TAX DEBT ON THE BASIS THAT IT IS EITHER NOT ECONOMICAL TO PURSUE OR NOT LEGALLY RECOVERABLE

13. When can you make a decision to not pursue a debt?

The Commissioner has the power to not pursue a debt if he is satisfied that the debt is:

- uneconomical to pursue, or
- irrecoverable at law.[6]

If a decision is made to not pursue a debt on the basis that it is uneconomical to pursue, the debt can be re-raised on a client's account at a future time. A debt that is irrecoverable at law is effectively extinguished.

14. Determining that a debt is not economical to pursue

Situations where the Commissioner will consider that it is not economical to pursue a debt may depend upon:

- whether the anticipated costs of future recovery is likely to exceed the amount of the debt
- the age of the debt
- the type of tax involved. Superannuation guarantee may be more likely to be pursued because its collection directly affects the superannuation entitlements of employees
- whether the taxpayer cannot be located. The debt may be re-raised when the taxpayer is located
- the asset position of the taxpayer
- whether a levy under a writ/warrant of execution has been unsuccessful and it is not possible or intended to pursue bankruptcy action
- whether a company has ceased to trade, and
- advice from a trustee or administrator of a deceased estate that the estate has insufficient assets to satisfy the debt.

None of the above factors are definitive in their own right and all considerations deemed to be relevant to a taxpayer's circumstances should be considered.

The Commissioner may decide to pursue a debt even though it may not be economical to do so if there are public interest considerations that support recovery action. An example of this may be where a taxpayer has a significant history of non-compliance.

15. Determining that a debt is not legally recoverable

Situations where a debt would be considered to be not legally recoverable include where the debt:

- cannot be recovered by action in a court
- forms part of the pre-sequestration debt of a discharged bankrupt
- represents the balance after a trustee in bankruptcy or a liquidator has advised that either no dividend will be paid, or the final dividend has been paid. In recognition that there may be a time delay in receiving this advice:
  - where it is advised that there will be a nil dividend or where an approximate dividend can't be quantified, the total debt can be treated as irrecoverable at law from when the proof of debt is lodged
  - where the approximate dividend expected has been advised, the balance can be treated as irrecoverable at law from when the proof of debt is lodged[7]
- represents the balance outstanding after the debtor has discharged all obligations under a debt agreement pursuant to Part IX or Part X of the *Bankruptcy Act 1966*[8]
- represents the balance outstanding following the termination of a scheme of arrangement which has been sanctioned by a court
- represents the balance outstanding following the finalisation of a deed of arrangement that has been approved by creditors pursuant to Part 5.3A of the *Corporations Act 2001*
- represents the balance of a 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.

[6] Rule 11 of the *Public Governance, Performance and Accountability Rule 2014*.

[7] A debt that is irrecoverable at law will be re-raised in very limited circumstances, for example, to absorb a dividend paid in an insolvency administration after the balance of the debt was determined to be irrecoverable.

[8] In these circumstances, the amount of the balance will generally be treated as uneconomical to pursue from the time of lodging the proof of debt, and treated as irrecoverable at law once the administration is concluded.

16. More information

For more information, see:

- PS LA 2011/6 *Risk management in the enforcement of lodgment obligations and debt collection activities*
- PS LA 2011/12 *Remission of general interest charge*
- PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax-related liabilities and other amounts*
- PS LA 2011/20 *Payment* and *credit allocation*
- CEI 2014/06/04 *Respecting clients' rights of review*
- Application for release from payment of some taxation liabilities
- Information for potential applicants – waiver of debt

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