PS LA 2011/17 - Debt relief, waiver and non-pursuit

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PS LA 2011/17
Debt relief, waiver and non-pursuit

This Law Administration Practice Statement provides guidance about the:

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

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 determine not to pursue a debt considered not economical to pursue (in which case it can be re-raised later).
- The Commissioner may permanently extinguish a debt that is irrecoverable at law.
- The Commissioner may permanently release particular liabilities in the case of serious hardship.
- The Finance Minister may waive amounts owing to the Commonwealth.

In making this decision, you must follow the principles set out in this Practice statement and the law. The relevant facts and circumstances of each case must be considered.

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

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

The Commissioner will generally not pursue a debt if he is satisfied that the debt is:

- not economical to pursue, or
- irrecoverable at law.[1]

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.

3. Determining that a debt is not economical to pursue

Relevant considerations in determining whether a debt is not economical to pursue include:

- whether the anticipated cost of future recovery is likely to exceed the amount of the debt
- the age of the debt
- the type of debt involved, for example, a superannuation guarantee charge 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

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

- advice from a trustee or administrator of a deceased estate that the estate has insufficient assets to satisfy the debt.

None of the factors in section 3 of this Practice statement are definitive on their own. All considerations relevant to a taxpayer's circumstances should be considered.

We 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.

4. Determining that a debt is not legally recoverable

Situations where we consider a debt to be effectively extinguished 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[2]
- 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*[3]
- 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 we have agreed not to pursue under a deed of compromise or settlement *after* the debtor has complied with all the terms of the deed
- has been released as described as follows, or waived by the Finance Minister.

[2] A debt that is irrecoverable at law may 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.

[3] 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.

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

5. Application of the release provisions

The law[4] allows for an individual to be partially or fully released from particular liabilities if we consider that payment would result in serious hardship.[5] 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.

The particular liabilities for which release may be granted include[6]:

- 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
- some penalties and interest charges associated with these debts.

Where we have previously determined that a liability will not be pursued[7], we may still consider whether that liability should be released on the basis of serious hardship.

[4] Section 340-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

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

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

[7] For example, where the liability is subject to administrative arrangements such as being written off as not economical to pursue, a due date has been deferred or a payment arrangement is in place.

6. Release application process

Taxpayers are to apply for release by using the form and instructions provided on ato.gov.au.[8] An application for release will not be determined unless:

- all relevant information has been provided to us
- income tax and activity statement lodgments are up to date
- there are no outstanding amendment requests or unresolved tax disputes
- any outstanding insurance, compensation or damages claims have been finalised.

If a taxpayer discloses that they have an outstanding insurance, compensation or damages claim, we should ask them for more information about it before making any decision.

7. Recovery of debts pending the outcome of a release application

The decision to continue recovery action of an amount for which the taxpayer has sought release must be based on the risk management principles outlined in Law Administration Practice Statement PS LA 2011/6 *Risk management in the enforcement of lodgment obligations and debt collection activities.*

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

8. 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 reasonable education.

We have tests to apply in helping you decide 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.

[8] See ato.gov.au/General/Financial-difficulties-and-serious-hardship/In-detail/Release-from-your-tax-debt/.

These tests are:

- the income/outgoings test
- the assets/liabilities test
- other relevant factors.

9. Income/outgoings test

The purpose of the income/outgoings test is to assess a taxpayer's capacity to meet their tax liability from their current income. We take into account household income and expenditure along with the taxpayer's ability to provide the necessities for family members or others for whom they have responsibility. In addition, the following are relevant considerations:

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

10. 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 reasonable nature and include:

- ownership of, or interest 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
- 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, multiple or luxury motor vehicles or boats, life insurance or annuity entitlements, shares and other investments, and collections for trading, investment or hobby purposes.

11. Other relevant factors

We are not bound to grant release even if a taxpayer can demonstrate serious hardship may be caused by payment of their liability. However we are obliged to act reasonably and not arbitrarily.

Examples of situations in which we 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
- a taxpayer appears to have disposed of funds or assets without giving consideration to their tax liability
- release would not alleviate hardship, such as where the person has other liabilities or creditors
- a taxpayer has paid other debts (either business or private), in preference to their tax debt
- the taxpayer, without good reason, has not pursued debts owed to them
- serious hardship is likely only to be short term[9]
- the taxpayer has a poor compliance history
- the taxpayer is unable to show that they have planned for future debts
- 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)
- the taxpayer has delayed lodgment of returns resulting in the accumulation of a large debt that they are unable to pay.

12. Decision as to whether to grant release

The outcome of the tests outlined in this Practice statement 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 general remission guidelines.[10]

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.

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

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

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

Section 63 of the *Public Governance, Performance and Accountability Act 2013* provides that the Finance Minister may waive amounts owing to the Commonwealth.

A waiver permanently extinguishes a debt owed to the Commonwealth. The Commonwealth cannot pursue the debt at a later date if the financial circumstances of the person or organisation which received the waiver improve.

The Commissioner does not have the power to grant a waiver.

The waiver power is generally a remedy of last resort. Waiver will only be granted once all other available options have been considered and determined to be inappropriate to address the specific circumstances of the matter.

14. Waiver application process

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. The information we provide is used to assist the Minister in progressing a waiver application.

[9] 'Short term' is to be determined on a case-by-case basis.

[10] PS LA 2011/12 *Remission of General Interest Charge*.

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

- details of the debt 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
- specific details of the Commonwealth's role, if any, that may have directly contributed to the taxpayer's situation
- 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
- any other information relevant to the decision maker's consideration.

A recommendation, either supporting or not supporting the application and the reasons for adopting that stance will also be provided. The recommendation will consider the merits of a person or organisation having a debt waived that the Commonwealth has a legal right to recover.

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

15. Determine if another viable remedy is available

If you determine that there may be an alternative solution to alleviate the taxpayer's circumstances, you will need to discuss this with them and ask if they wish to withdraw the waiver application. Alternative solutions include, but are not limited to:

- release on the basis of serious hardship
- a decision that the debt is not economical to pursue
- entering the taxpayer into a payment arrangement
- a decision to compromise undisputed tax-related liabilities and other amounts payable to the Commissioner
- remission of GIC, if applicable.

16. When a recommendation for waiver may be supported

A recommendation to waive may have regard to some of the following circumstances including, but not limited to, where:

- the taxpayer has no other debt management options
- the law as it applies to the applicant's circumstances results in an outcome that is inequitable
- the taxpayer meets the requirement for serious hardship but the debt in the waiver application falls outside of the liabilities that can be released under section 340-10 of Schedule 1 to the TAA
- the taxpayer's debt arose due to actions of the Commonwealth
- the taxpayer provides a service that is beneficial to the broader community.

17. When a recommendation for waiver may not be supported

There are some circumstances where the debt would be unlikely to be waived including, but not limited to, where:

- an alternative viable remedy is available
- the taxpayer's debts have been established by a judicial decision of a court, for example, judgment debts
- the taxpayer's debts owed to the Commonwealth will be paid on to third parties, for example, superannuation guarantee charge debts
- the taxpayer's debts have arisen through deliberate fraudulent or other illegal actions
- requests are submitted by companies on the grounds of financial hardship[11]
- an amount owing to the Commonwealth is not certain or ascertainable
- the taxpayer's financial situation and the merits of them being allowed to retain money that the Commonwealth has a legal right to recover.

18. If the taxpayer is dissatisfied

Before a decision is made, the taxpayer is given an opportunity to comment on our submission. For procedural fairness, we are required to provide a complete copy of the submission to the taxpayer at the same time it is sent to DoF.

[11] This is because the companies, rather than the individuals involved, are liable for the debts.

19. 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.

20. 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*
- Chief Executive Instruction *Respecting Clients' Rights of Review CEI* (link available internally only)
- Release from your tax debt
- Information for applicants – waiver of debt

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