PS LA 2011/21 - Offsetting of refunds and credits against taxation and other debts

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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:	**Offsetting of refunds and credits against taxation and other debts**
PURPOSE:	**This practice statement provides guidance as to when the Commissioner will exercise his discretion not to offset and details the offsetting treatment of specific credit amounts**

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BACKGROUND

1. The Commissioner maintains a system of accounts for taxpayers, recording their obligations, payments and credit entitlements under the various tax laws. For example, the Commissioner currently maintains an account for the activity statement obligations of a taxpayer and another account for their assessed income tax obligations.

2. This practice statement details the circumstances in which credits and refunds will be offset against tax debts and the factors that may influence the Commissioner to refund, rather than offset those amounts in situations where the tax law provides the Commissioner with a discretion not to offset.

3. 'Offsetting' is a term generally used throughout this practice statement to describe when an amount owed to a taxpayer by the Commissioner is applied or allocated in accordance with Division 3 of Part IIB to the *Taxation Administration Act 1953* (TAA) to reduce, in whole or in part, the taxpayer's tax debt.

4. Offsetting may occur within an account, or between the accounts belonging to a taxpayer. For example, a credit balance on the account which maintains the record of a taxpayer's assessed income tax obligations can be offset against a debit balance on the taxpayer's activity statement account.

5. The offsetting of amounts is supported by tax law, specifically section 8AAZL in Division 3 of Part IIB to the TAA. This Division sets out how the Commissioner must treat payments, credits and running balance account (RBA) surpluses. The Commissioner may first allocate a payment or credit to an RBA (Method 1) or apply these amounts against a non-RBA tax debt (Method 2).

6. The process of offsetting a payment or credit amount against a tax debt owed by an entity using Method 1 or Method 2 is mandatory, except in limited circumstances where the Commissioner has discretion to refund the amount to the taxpayer.

7. In certain circumstances the Commissioner may be required to pay tax refunds to other Commonwealth agencies. For example, the Child Support Registrar may, under section 72 of the *Child Support (Registration and Collection) Act 1988* (CS(R&C)A 1988), require the Commissioner to pay to the Child Support Registrar any amount that would otherwise be refunded to the taxpayer.

TERMS USED

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

   Additional charges, or the ***GIC*** – means the general interest charge worked out in accordance with Division 1 of Part IIA to the *Taxation Administration Act 1953* (TAA) that a person is liable to pay when a provision of an Act of which the Commissioner has general administration makes the person liable. For example, a person is liable to pay the charge if an amount that the person must pay to the Commissioner is not paid on time.

   BAS – stands for the business activity statement.

   BAS amounts – means any debts or credits that arise directly under the BAS provisions.

BAS provisions – means:

- Part VII of the *Fringe Benefits Tax Assessment Act 1986*
- the indirect tax law (within the meaning of subsection 995-1(1***)*** of the ITAA 1997, or
- Parts 2-5 and 2-10 of schedule 1 to the TAA (which are about the PAYG system).

Contributing member – is an entity that was a subsidiary member of a consolidated group for at least part of the period to which the group liability relates.

Contribution amount – in respect of a particular group liability is the amount allocated to a TSA contributing member under a tax sharing agreement.

Credit – includes an amount that the Commissioner must pay to a taxpayer under a tax law, whether or not described as a credit. For example, goods and services tax (GST) law often refers to a net amount for a tax period that is less than zero, which the Commissioner must pay to an entity, as a GST refund.

Excess non-RBA credit – will exist when a payment or credit is greater than the non-RBA tax debt to which it has been applied.

Excise claims – include applications for refunds or drawbacks by entities that conduct business activities with controlled commodities. More specifically:

- refunds occur where excise duty has been overpaid and the taxpayer is entitled to a refund of the amount of overpaid duty, and
- drawbacks occur where excise duty has been paid and the goods have been exported and the taxpayer is entitled to a refund of the amount of duty paid.

Excise fuel payment schemes – include fuel sales grants, product stewardship (oil) benefits, energy grants (on-road credits and off-road credits) and cleaner fuel grants.

Family Assistance Office debt – is an amount payable under *A New Tax System (Family Assistance) (Administration) Act 1999* including family tax benefit debts from any year and child care benefit debt determined after 1 July 2006.

Fuel tax credit – is an amount payable by the Commissioner under the *Fuel Tax Act 2006*

Group liability – is one of the tax-related liabilities referred to in subsection 721-10(2) of the *Income Tax Assessment Act 1997* (ITAA 1997). A group liability includes a PAYG instalment and an annual income tax assessment.

IAS – stands for the Instalment Activity Statement.

Incapacitated entity – is defined to be:

- an individual who is a bankrupt
- an entity that is in liquidation or receivership, or
- an entity that has a 'Representative' (refer to the definition below).

Non-RBA tax debt – a primary or secondary tax debt, but does not include an RBA deficit debt. Examples of non-RBA tax debts include a debit assessment for income tax or a debit net amount in respect to a tax period for the goods and services tax and the GIC payable as a result of paying these amounts after they are due for payment.

Offsetting – is a term used throughout this practice statement to describe when an amount owed to a taxpayer by the Commissioner is applied or allocated in accordance with Division 3 of Part IIB to the TAA to reduce, in whole or in part, the taxpayer's liability to tax.

Personal insolvency agreement (PIA) – is a hybrid agreement introduced by the *Bankruptcy Legislation Amendment Act 2004* in June 2004. It incorporates elements into one form of each of the three pre-existing types of Part X of the *Bankruptcy Act 1966* (Bankruptcy Act) arrangements, that is, a deed of assignment, a deed of arrangement, or a composition.

Primary tax debt – any amount due to the Commonwealth directly under a tax law, including any such amount that is not yet payable. Primary tax debts are usually allocated to an RBA where they are combined with other primary tax debts, payments and credits to form the balance of that RBA. For example, a primary tax debt includes a debit assessment for income tax and the GIC that would accrue as a result of paying this amount after it is due for payment. An RBA deficit debt is also a primary tax debt.

RBA – a running balance account established under section 8AAZC of the TAA to keep account of the primary tax debts, payments and credits allocated to that RBA. For the purposes of establishing an RBA, GIC that has accrued in relation to non-RBA tax debts or an RBA deficit debt cannot be allocated to an RBA. Note: an RBA deficit debt is subject to GIC under section 8AAZF of the TAA.

RBA deficit debt – a balance on an RBA in favour of the Commissioner, where the total amount of due and payable primary tax debts allocated to the RBA are greater than the payments and credits allocated to that RBA.

RBA surplus – a balance on an RBA in favour of the entity, where the primary tax debts allocated to the RBA are less than the payments and credits allocated to that RBA.

Refundable tax offset – those tax offsets listed in Division 67 of the ITAA 1997 and include:

- franked distributions tax offset
- private health insurance tax offset
- films tax offset
- research and development tax offset
- first child (baby bonus) tax offset
- life insurance company's subsidiary joining consolidated group tax offset
- no-TFN contribution income taxed at 46.5% tax offset.

Representative – (of an incapacitated entity) is defined as:

- a trustee in bankruptcy
- a liquidator
- a receiver

- a controller (within the meaning of section 9 of the *Corporations Act 2001*)
- an administrator appointed to an entity under Division 2 of Part 5.3A of the Corporations Act
- a person appointed, or authorised, under an Australian law to manage the affairs of an entity because it is unable to pay all its debts as and when they become due and payable, or
- an administrator of a deed of company arrangement executed by the entity.

Secondary tax debt – an amount that is not a primary tax debt, but is due to the Commonwealth in connection with a primary tax debt. For example, an amount due to the Commonwealth under an order of a court made in a proceeding for recovery of a primary tax debt.

Serious financial hardship – is where a taxpayer cannot meet the basic necessities of life.

Tax debt – a primary tax debt or a secondary tax debt. It does not include scheme debts under the *Products Grants and Benefits Administration Act 2000* (PGBAA).

Tax-related liability or liability – is a term used to define any pecuniary liability to the Commonwealth arising directly under a tax law (including a liability the amount of which is not yet due and payable). It thus includes all types of taxes, penalties and additional charges for late payment (including amounts previously defined under the ITAA 1936 as 'tax' and amounts defined under the *Superannuation Guarantee Administration Act 1992* as 'superannuation guarantee charge'). A table which lists the tax-related liabilities is found at section 250-10 of schedule 1 to the TAA. This table includes excise and diesel fuel rebate debts administered under the provisions of the *Excise Act 1901,* diesel fuel rebate debts administered under the 'diesel fuel rebate Customs provisions' of the *Customs Act 1901* and both grant scheme debts administered under the provisions of the *Diesel and Alternative Fuel Grants Scheme Act 1999* and the PGBAA.

TSA contributing member – is a contributing member that is party to a tax sharing agreement.

STATEMENT

General principle

9. As a 'general principle', and consistent with good business practice, the Commissioner will offset credits or payments belonging to a taxpayer against any tax debt that they owe. This applies to all tax debts and all credits.

10. In limited circumstances, however, the tax law provides the Commissioner with the discretion to refund a payment or credit entitlement rather than offsetting the amount against a tax debt.

Exceptions to general principle

Small amounts

11. The *Financial Management and Accountability Act 1997* (FMAA) requires the Commissioner to pursue all debts unless it is uneconomical to do so, or the debt is irrecoverable at law. It may be considered 'uneconomical to pursue' a debt where the costs associated with offsetting small amounts are excessive.

12. The Commissioner will not offset small refund amounts, or offset amounts against small debts, unless:

- the Commissioner has commenced legal recovery action
- the debt relates to the superannuation guarantee charge
- the credit entitlement and tax debt are located within the same account, for example, credit entitlements and debts notified on an activity statement will be offset against each other
- the credit entitlement and debt relate to the same tax type, even where these amounts are recorded on different accounts for the same taxpayer, for example, an income tax credit will be offset against an income tax debt, or
- the Child Support Registrar under section 72 of the *Child Support (Registration and Collection) Act 1988* (CS(R&C) Act) requires the Commissioner to pay any residual refund towards child support debts. The basis for this approach is that the taxpayer would, with the Commissioner's discretion to not offset small amounts, have their entire refund paid to the Child Support Registrar. The policy intent of the law involved in this circumstance is to pay the *residual* refund to the Child Support Registrar after all tax debts are extinguished.

13. The basis for not offsetting small amounts is that the administrative costs to the taxpayer and the Australian Taxation Office (ATO) would exceed the amount of a small offset, that is, it would be uneconomical to pursue.

14. With the improvement to the ATO information technology systems, to provide taxpayers with full details of all automated offsets undertaken, these administrative costs should reduce and the policy will be reconsidered. The advantages to taxpayers and the ATO of offsetting against small debts are clear, provided that there is effective communication of the process.

Commissioner's discretion to refund

15. In limited circumstances, the Commissioner has discretion not to follow the general principle and instead may refund an amount to a taxpayer (under subsection 8AAZL(3) of the TAA). These circumstances include where the amount owing is:

- due but not yet payable, or
- subject to an arrangement to pay the debt by instalments and the taxpayer is complying with that arrangement, or
- an amount to which the Commissioner has agreed to defer recovery proceedings.

16. An overriding principle in the application of the discretion is to adopt a fair and reasonable approach, balancing the collection of tax properly payable with the issues faced by taxpayers if an offsetting occurs. In deciding whether or not to offset, the Commissioner must also consider the impact on the wider community, including those taxpayers who have paid all their debts on time.

EXPLANATION

When the Commissioner may refund rather than offset

Where a tax debt is due but not yet payable

17. The Commissioner has the discretion to not offset an amount against a debt that is due, but not yet payable regardless of the type of the tax debt.

18. The Commissioner will usually offset an amount against a debt that is due, but not yet payable where both the credit and the payment relate to the same tax type or the debt is a BAS amount. For example, an income tax credit will be offset against an income tax debt, including a higher education contribution (HEC) assessment debt, compulsory repayment amount or a student financial supplement (FS) assessment debt, even if the debt is not yet payable. This has been the practice over a number of years where the income tax debt may be shown as 'other amounts payable' on an assessment notice.

19. If a credit that is available for offsetting is of a different revenue type to a debt that is not yet payable, the Commissioner will not usually offset those amounts unless the debt relates to BAS amounts or the compliance record of the taxpayer is unsatisfactory.

20. For example, if a taxpayer lodges their income tax return a considerable time before the due date for lodgment, and expects a debit assessment for that return, any credit (other than for income tax) that arises between the lodgment and the due date for payment would not normally be offset against that assessment. Where an offset has incorrectly occurred, the amount may be refunded on request provided there are no tax debts that are due and payable (unless the debt is a BAS amount).

21. However, as indicated in paragraphs 37 and 40 of this practice statement, where the Commissioner believes that a taxpayer is dissipating assets to avoid payment, or has a poor history of non-lodgment or non-payment, the Commissioner may offset a tax credit against a tax debt which is due but not yet payable.

22. The Commissioner will also offset a refund or credit against an amount that is due, but not yet payable, in cases where section 72 of the CS(R&C) Act requires the Commissioner to pay any residual refund owing to the taxpayer towards the taxpayer's child support debts.

Where a tax debt is the subject of a payment arrangement

23. The Commissioner will offset a credit or payment against a tax debt that is the subject of a payment arrangement unless the Commissioner has not advised the taxpayer in writing at the commencement of the arrangement that this would occur. In cases where offsets will occur, taxpayers should consider the effect that the offsetting of these amounts may have on their cash flow when negotiating the arrangement.

24. If, during the course of the payment arrangement, these offsets cause the taxpayer unexpected cash flow difficulties, they should approach the ATO with a view to seeking a temporary variation to that arrangement (refer to Law Administration Practice Statement PS LA 2011/20 Payment and credit allocation).

25. The Commissioner will, however, offset a credit against an amount that is the subject of a payment arrangement (even where there was no prior advice that an offset would occur) in cases where the debt relates to the superannuation guarantee charge, or where section 72 of the CS(R&C) Act requires the Commissioner to pay any residual refund owing to the taxpayer towards the taxpayer's child support debts.

Where the Commissioner has agreed to defer recovery of a tax debt

26. The Commissioner will, in certain circumstances, agree to exercise the general powers of administration and defer the recovery of a tax debt. For

example, the Commissioner may defer recovery where the taxpayer has a genuine dispute with the assessability of an amount.

27. The decision to defer recovery is a deliberate step taken by the Commissioner and taxpayers will be advised if such a deferral has been granted. The mere fact that the ATO has not contacted a taxpayer for some time regarding the payment of a debt is not, and should not, be construed as a deferral of recovery.

28. It is important to note that the deferral of recovery action is quite different from an arrangement to pay a debt by instalments, or the deferral of the due date for payment of a debt (refer to Law Administration Practice Statements PS LA 2011/14 General debt collection powers and principles, PS LA 2011/15 Lodgment obligations, due dates and deferrals and PS LA 2011/20 Payment and credit allocation).

29. The Commissioner will not offset credits against a tax debt that is subject to a deferral of recovery action. If there is evidence, however, of an unreasonable risk to revenue going beyond what was known when the deferral of recovery was granted, the Commissioner will offset credits up to the full extent of the taxpayer's liability to tax.

30. The Commissioner will also offset any credit against an amount that is the subject of an agreement to defer recovery of the tax debt in cases where the Child Support Registrar under section 72 of the CS(R&C) Act requires the Commissioner to pay any residual refund owing to the taxpayer towards the taxpayer's child support debts.

Disputed tax debts

Mass-marketed tax schemes

31. The Commissioner will exercise his powers under subsection 8AAZL(3) of the TAA not to offset refunds or credits against disputed income tax debts for the 1998–99 income year and prior years of income arising from participation in mass-marketed tax schemes until after the appeals in relation to those schemes have been determined, or the taxpayer's debt is no longer disputed. The policy in relation to 'other disputed debts' applies to later years.

32. A credit or refund that has been offset since 1 July 2000 against these disputed scheme debts will be refunded on request, provided the taxpayer is acting in good faith and not taking action to avoid the payment of any debt that is, or eventually confirmed to be, payable.

Other disputed debts

33. The Commissioner will exercise his discretion available under subsection 8AAZL(3) of the TAA not to offset refunds or credits against disputed debts until the earlier of when the objection relating to that debt has been determined, or the taxpayer withdraws their objection.

34. If the debt is subject to an appeal and the taxpayer has entered into a 50/50 arrangement, the Commissioner will not offset any refund or credit against the remaining balance of the disputed tax, until the period of deferral under the arrangement has expired.

35. However, if the taxpayer has not entered a 50/50 arrangement in relation to a tax debt subject to an appeal, the Commissioner will offset refunds and credits up to the full extent of the taxpayer's liability to tax.

36. If a credit or refund is offset against a disputed debt contrary to this policy, the amount will be refunded immediately upon the taxpayer's request.

High compliance risk

37. The Commissioner will not exercise his discretion available under subsection 8AAZL(3) of the TAA not to offset where he determines that:

- there is an unreasonable risk to revenue, for example, evidence that the taxpayer is dissipating assets
- the taxpayer is a promoter of schemes, or
- the taxpayer has a poor compliance history in meeting their tax obligations.

Serious financial hardship

38. Although the Commissioner's general principle is to offset the credit entitlements of a taxpayer against any tax debts that they owe, where the Commissioner has legal authority to exercise a discretion not to offset the credit, the amount may be refunded if the taxpayer can demonstrate that the offset would cause serious financial hardship (see Terms Used).

39. The Commissioner has legal authority to exercise a discretion not to offset the following:

- a credit against a tax debt that is due but not yet payable
- a credit against a tax debt that is subject to a payment arrangement
- a credit against a tax debt that is subject to a deferral of legal action
- a credit payable under the PGBAA against a tax debt, for example a benefit in respect to product stewardship (oil), or
- a family tax benefit credit against a primary tax debt.

40. If the Commissioner has the discretion not to offset a credit and the taxpayer has shown that the offset will cause serious financial hardship, the credit will be refunded unless the Commissioner determines that:

- there is a risk to revenue, for example, evidence that the taxpayer is dissipating assets, or
- the taxpayer has a poor compliance history in meeting their tax obligations.

In these circumstances the Commissioner will generally offset credits up to the full extent of the taxpayer's liability to tax.

Taxpayer requests an offset of their taxation credit against the taxation debt of another taxpayer

41. Where a taxpayer has no outstanding tax debts or other Commonwealth liabilities to offset, the Commissioner will be required to refund a credit to the taxpayer. However in certain circumstances a taxpayer may wish to have their refundable amount offset against the tax debt of another taxpayer. The Commissioner is not obliged to act on the taxpayer's request and the paying of a refund directly to the taxpayer, for example, by paying the refund via electronic funds transfer directly into a bank account held by the taxpayer, will satisfy the legal obligation of the Commissioner under Division 3A of Part IIB to the TAA.

42. The Commissioner may, however, agree to such a request if:

- the taxpayer provides written consent to the Commissioner for this occur

- paying the refund in this manner is an efficient, effective and ethical use of the Commonwealth's resources for which the Commissioner is responsible (section 44 of the FMAA)
- offsetting the amount in this manner does not create an unreasonable risk to the revenue, and
- the offset satisfies the Commissioner's obligation to pay the refund the taxpayer is entitled to under Division 3A of Part IIB to the TAA.

43. If the Commissioner accepts a taxpayer's written request to offset their tax credit against the tax debt of another taxpayer, the refundable amount will only be offset to the extent of the tax liability of the intended recipient. Any remaining amount will be refunded to the taxpayer originally entitled to the refund.

Specific credits

44. Credits, other than payments, can arise on a taxpayer's account as a result of account adjustments, transfers, lodgment of an activity statement, or as a result of credit assessments. However, unlike payments, these credits are often subject to specific rules with regard to the manner in which they are offset. Some of these rules are discussed in the following paragraphs of this practice statement.

Pay as you go (PAYG) credits

45. Section 8AAZLD of the TAA provides priority for HEC assessment debts, compulsory repayment amounts arising under the HESA, and FS assessment debts with regard to the offset of the credit that arises under the PAYG system. That is, where an entitlement to a credit arises in relation to an income year for the PAYG instalments that were payable, or from amounts that were withheld from PAYG withholding payments, that credit will be applied initially to any HEC assessment debt, then the compulsory repayment amount and then the FS assessment debt, before being applied against income tax debts that are payable for that year.

Higher Education Support Act 2003 (HESA) payments

46. Where a taxpayer pays an amount to the Commonwealth under Division 151 of the HESA and the amount exceeds the total debts owed under Chapter 4 of the HESA, the excess may be applied against the taxpayer's primary tax debts prior to being refunded.

Fringe benefit tax (FBT) credits

47. An entitlement to a tax credit for FBT instalments payable, that arises upon the Commissioner making an assessment of the FBT, will be initially applied to the respective assessed tax for that FBT year.

Fuel tax credits (FTC)

Business taxpayers

48. Business taxpayers, that is, those registered for GST, are entitled to claim a fuel tax credit by lodging an activity statement.

49. Where a taxpayer lodges an activity statement, the sum of all fuel tax, fuel tax credits and fuel tax adjustments attributable to the same tax period must be set off against each other to produce a net fuel amount in accordance with section 60-5 of the *Fuel Tax Act 2006* (FT Act). If the net fuel amount is less than zero, the taxpayer will be entitled to a corresponding credit. This credit will initially be applied to any other liabilities notified in the same activity statement before being applied against other tax debts.

50. Certain business taxpayers (generally those taxpayers that previously claimed energy grants, or received fuel excise-free or at a concessional rate) are entitled to claim a fuel tax credit by lodging an early payment claim form. This arrangement pertains to fuel acquired, manufactured or imported between 1 July 2006 and 30 June 2008, inclusive.

Non-business taxpayers

51. Non-business taxpayers are entitled to claim fuel tax credits by lodging a fuel tax return. The sum of all fuel tax, fuel tax credits and fuel tax adjustments attributable to the same fuel tax return period must be set off against each other to produce a net fuel amount in accordance with section 60-5 of the FT Act. If the net fuel amount is less than zero, the taxpayer will be entitled to a corresponding credit. This credit will be applied against other outstanding tax debts.

Grants and benefits administered under the PGBAA

52. Grants and benefits that are administered under the PGBAA are not subject to the offsetting provisions contained within Division 3 of Part IIB of the TAA.

53. The Commissioner may offset a grant or benefit entitlement against a debt relating to an overpayment of a PGBAA entitlement (under section 24 of the PGBAA) or a penalty imposed (under Part 8 of the PGBAA). The Commissioner has a legal right under general law to offset PGBAA entitlements against other tax debts.

54. The ATO will usually contact grant and benefit recipients to discuss offsetting these credits against their tax debts. If the recipient agrees to the offset, the credit will be applied against their tax debt. This agreement does not constitute a payment arrangement to pay the tax debt by instalments, it relates solely to an agreement to retain the credit.

55. Where the recipient enters into a suitable payment arrangement to pay off their outstanding tax debt, the Commissioner will seek to offset their entitlement to these credits as part of that arrangement, but understands that this may not always be practical. If a suitable payment arrangement cannot be reached because of prior arrangements that have been put in place in relation to the credits, for example, between the recipient of a grant and their supplier, the recipient may be given up to three months to make alternative arrangements so that a suitable payment arrangement can be reached which would include these credits.

56. If the recipient is not prepared to agree to an offset or a suitable payment arrangement, or has not lodged returns or met other tax obligations when required, the amount will be offset.

57. The entitlement to a fuel sales grant is limited to sales of fuel to end users occurring before 1 July 2006. Fuel sales grant claims under the PGBAA must be lodged with the Commissioner before 1 January 2007.

58. Benefits payable in relation to product stewardship (oil) continue to be administered under the PGBAA.

59. The entitlement to an energy grant for an on-road credit or an off-road credit for diesel applies only to diesel fuel purchased or imported before 1 July 2006. Energy grant claims for diesel under the PGBAA must have been lodged with the Commissioner before 1 July 2007. An alternative mechanism, under the *Fuel Tax Act 2006,* allows an entitlement for an on-road or an off-road credit for diesel fuel purchased or imported between 1 July 2003 and 30 June 2006 to be claimed as a decreasing fuel tax adjustment (only one claim can be made with respect to the fuel in relation to the 2 avenues available for claiming the grant). An entitlement for an on-road or off-road credit for diesel fuel claimed as a decreasing fuel tax adjustment may be automatically offset against any tax debt.

60. The entitlement to an energy grant under the PGBAA for an on-road credit or on-road alternative fuel use continues for alternative fuels acquired or imported before 1 July 2010.

Excise claims

61. Where a taxpayer is entitled to a credit or refund of an amount paid under the *Excise Act 1901,* as a result of a remission, drawback, refund or rebate under that Act, the Commissioner will generally seek to offset that amount if the taxpayer has an outstanding tax liability at the time this credit amount is determined.

62. The authority to offset these amounts exists because the Commissioner has general administration of the *Excise Act 1901* and any credits arising under that Act are treated in accordance with the Commissioner's general offsetting and refunding rules outlined in Part IIB of the TAA.

Tax offsets

63. Division 63 of the ITAA 1997 outlines the common rules for tax offsets. The table under subsection 63-10(1) of the ITAA 1997 provides the order in which tax offsets are to be applied to an income tax liability for the relevant year. To the extent that an amount of a tax offset remains, the table states what is to happen to it. Unless provided otherwise by the table, the excess tax offset cannot be refunded, transferred to another entity or carried forward.

Excess imputation credits

64. Certain taxpayers will be entitled to a refund of excess imputation credits in relation to dividends paid on or after 1 July 2000. The tax law allows for these credits to be offset against any tax debts owed.

65. The Commissioner has the authority not to offset in circumstances where the costs to do so would be prohibitive (sections 44 and 47 of the FMAA). The Commissioner recognises that it may be uneconomical to offset excess imputation credits against old small tax debts owed by taxpayers who have not been required to be in the taxation system for some time, for example, certain retirees.

66. Taxpayers who have had no obligation (other than the outstanding debt) to be in the taxation system for over two years, will not have these credits offset unless the amount of both the credit and the debt are substantial. If either the debt or the credit is not substantial, the Commissioner considers that it is uneconomical to pursue the debt.

67. If other taxpayers receiving these credits still continue to have obligations in the taxation system, any credits arising from the excess imputation will be offset against their tax debts.

68. Even in cases where the debt and credit are small, the Commissioner will offset an amount against any superannuation guarantee charge debts. Additionally, in cases where the Child Support Registrar under section 72 of the CS(R&C) Act requires the Commissioner to pay the credits to the Child Support Registrar, the Commissioner will offset the credits against any tax debts, regardless of whether the debt and credit are small, prior to paying any residual amount to the Child Support Registrar.

69. Where a refund of excess imputation credit is offset contrary to this practice statement, the Commissioner will refund the amount immediately upon the taxpayer's request.

Excess baby bonus

70. A taxpayer will be eligible to claim the baby bonus if they had a baby or gained legal responsibility for a child aged 5 years old and under (for example, through adoption), on or after 1 July 2001 and before 1 July 2004. A claim for the baby bonus must be lodged for the income year that the entitlement pertains before 1 July 2014. The law allows for the credit attributable to the baby bonus to be offset against any tax debt.

71. As with the treatment of excess imputation credits, the Commissioner recognises that it may be uneconomical to offset credits in relation to the baby bonus against old small tax debts owed by these taxpayers who have not been required to be in the taxation system for some time.

72. Eligible taxpayers for the baby bonus who have had no obligation (other than the outstanding debt) to be in the taxation system for over 2 years, will not have these credits offset unless the amount of both the credit and the tax debt are substantial. If either the credit or the tax debt is small, the Commissioner would consider that it is uneconomical to pursue the tax debt.

73. If taxpayers receiving these credits still continue to have other obligations in the taxation system, any credits arising from the excess baby bonus will be offset against those other tax debts.

74. Even in cases where the credit and tax debt are small, the Commissioner will offset an amount against any superannuation guarantee charge debts. Additionally, in cases where the Child Support Registrar under section 72 of the CS(R&C) Act requires the Commissioner to pay the credits to the Child Support Registrar, the Commissioner will offset the credits against any tax debts, regardless of whether the debt and credit are small, prior to paying any residual amount to the Child Support Registrar.

75. Where a refund of excess baby bonus is offset contrary to this practice statement, the Commissioner will refund the amount immediately upon the taxpayer's request.

Other refundable tax offsets

76. Where a taxpayer is entitled to a 'refundable tax offset' in a particular income year, the Commissioner will generally refund any excess amount after the refundable tax offset is applied to a taxpayer's income tax liability for that year.

77. However, if the taxpayer has other tax liabilities at the time this excess amount is determined the Commissioner will offset such amounts against these liabilities.

78. In addition to the refundable tax offsets mentioned at paragraphs 64 to 75 of this practice statement, another refundable tax offset is the 'no-TFN contribution income' tax offset.

79. From 1 July 2007, where income based superannuation contribution is earned and the receiving superannuation fund member has not quoted their tax file number (TFN) to their superannuation fund or retirement savings account provider, the provider will be taxed at 46.5% (instead of 15%) in respect of that income.

80. If that superannuation fund member supplies their TFN to their fund within 4 years, for the relevant income year, the fund may be entitled to a tax offset equal to the amount of income tax payable on the 'no-TFN' contribution income. This tax offset will be applied against the income tax payable by the superannuation fund for the income year in which the offset is subsequently claimed.

81. If after applying this offset to the income tax payable for the relevant income year there is an excess, this excess will be refunded, provided the superannuation fund does not have any other tax liabilities at the time the excess is determined.

Transferable tax offsets

82. The table under subsection 63-10(1) of the ITAA 1997 informs that some excess tax offsets are allowed to be transferred by the taxpayer originally entitled to that tax offset to another taxpayer.

83. For example, a taxpayer who is entitled to the senior Australian tax offset (SATO) can transfer any excess to their spouse in the income year in which the offset is claimed and it will be used to help reduce the spouse's income tax liability for that year (this can be done through the lodgment of a taxpayer's income tax return).

84. Similarly, a taxpayer entitled to the child care tax offset can have any excess transferred to their spouse for the income year in which they are entitled to that offset.

Carry forward tax offsets

85. The table in subsection 63-10(1) of the ITAA 1997 also informs that some excess tax offsets may be carried forward to future income years.

86. For example, a taxpayer entitled to a tax offset arising from their franking deficit tax liability can carry forward any excess amount of this offset in the income year claimed, to the following income year.

Family tax benefit

87. Provided there are no other tax debts to apply a credit against, section 87 of *A New Tax System (Family Assistance)(Administration) Act 1999* allows the Commissioner to apply an income tax refund (or part thereof) to the Family Assistance Office (FAO) debts, including family tax benefit (FTB) debts, from any year and child care benefit debt determined on or after 1 July 2006 (this does not apply to a debt owed by an approved child care service). This is performed on the request of the Secretary of the Department of Families, Community Services and Indigenous Affairs. Where section 72 of the CS(R&C) Act requires the Commissioner to pay residual refunds to the Child Support Registrar, any remaining credit, after tax and FAO debts have been offset, will then be applied to any child support debts.

88. Conversely, the Commissioner may apply the whole or part of an FTB credit (other than child care benefits) to any primary tax debts (Section 226 of the *A New Tax System (Family Assistance) (Administration) Act 1999).* These credits can arise where a taxpayer claims their FTB entitlements through the Family Assistance Office (via Centrelink) and subsequently lodges the relevant year income tax return where, upon assessment, it is established that they had over-estimated their income for the purposes of claiming FTB.

89. Section 93 of *A New Tax System (Family Assistance)(Administration) Act 1999* allows a person, other than a person that owes a tax debt, who is entitled to an income tax refund, to give consent to the Commissioner to apply their refund (or part thereof) to reduce another person's Family Assistance Office debt including family tax benefit debts from any year, and Child Care Benefit debt determined on or after 1 July 2006.

Input tax credits

90. The sum of all GST and input tax credits (including appropriate adjustments) attributable to the same tax period must be set off against each other to produce a net amount in accordance with sections 7-5, 17-5 and 126-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).

91. Where the net amount of GST notified in an activity statement is less than zero, the taxpayer will be entitled to a corresponding credit. This credit will initially be applied to any other liabilities notified in the same activity statement before being applied against other tax debts.

GST groups

92. Under Division 48 of the GST Act taxpayers may elect to group, that is one taxpayer within the group (the representative member) deals with all the GST and fuel tax debts of the group. The representative member is liable for all the GST and fuel tax debts of the group and is entitled to all the input tax credits and fuel tax credits of the members of the group. However, all members of the group are jointly and severally liable to pay the group's GST and fuel tax debts.

93. Section 8AAZA of the TAA defines RBA group to mean a GST group and subsections 8AAZLA(1) and 8AAZLB(1) of the TAA require the Commissioner to offset any RBA group member's credit entitlements against another member's tax liabilities. The Commissioner will, as a general rule, apply such credit amounts of a member initially against any of their own tax liabilities.

94. If that member has no tax liabilities, the amount would then be allocated across the group commencing with the member that has the oldest period tax debt for each tax type (for further details refer to PS LA 2011/20).

95. The joint and several liability provision does not apply to a member of a GST group if an Australian law has the effect of prohibiting that member from entering into any arrangement under which they become liable for another entity's debts, for example, some financial institutions. However, that member will remain liable for any amount payable under an indirect tax law (including a GST or fuel tax debt) by the representative member of the group, to the extent that the liability arises from its own acts or omission.

GST joint ventures

96. Under Division 51 of the GST Act taxpayers may elect to enter into a GST joint venture and nominate one taxpayer to be responsible for the GST reporting and payment obligations that relate to that joint venture operation.

97. The joint venture operator is liable for all GST and fuel tax debts and is entitled to all input tax and fuel tax credits of the joint venture participants as they relate to that joint venture. Additionally, each GST joint venture participant is jointly and severally liable for the GST liabilities and fuel tax debts incurred by the joint venture. The Commissioner may offset a participant's tax credit entitlements against any GST or fuel tax related debt incurred by the GST joint venture.

GST and PAYG withholding branches

98. Under Division 54 of the GST Act and Subdivision 16-BA of the TAA, certain taxpayers may elect to branch their business operations provided each branch has an independent accounting system and the branch can be identified by reference to its activities or location. If the Commissioner registers a GST or PAYG withholding branch, each branch will lodge their own BAS separately and make corresponding payments of BAS liabilities or receive BAS refunds.

99. Although GST and PAYG withholding branches operate as distinct entities, the parent entity still bears the ultimate legal responsibility for lodging the branches' activity statements and making corresponding payments. The parent entity is also required to lodge a separate activity statement for activities not included in the activity statement of its GST and PAYG withholding branches.

100. The Commissioner will not usually offset an available credit entitlement between branches and the parent entity. However, there is the option to do so if there are certain tax debts due (even where they are not yet payable) by any of the branches or the parent entity. The Commissioner will, as a general rule, apply credit entitlements of a branch initially against their own tax liabilities.

Consolidated income tax groups

101. Under Division 703 of the ITAA 1997, wholly owned-groups of entities can elect to consolidate and thereafter be treated as a single entity for income tax purposes. Broadly, this means that the subsidiary entities lose their individual income tax identities and are treated as parts of the head company (HC) of the consolidated group for the purposes of determining income tax liability during the period in which they are members of the group.

102. Liability to pay the income tax attributable to group activities rests with the HC. If the HC does not pay a liability by the due date, all entities that were members of the group for a part of the liability period (the contributing members) become jointly and severally liable for that group liability. However, joint and several liability may be avoided by the contributing members if, just before the due date the particular group liability was covered by a valid tax sharing agreement (TSA).

103. A member's joint and several liability or liability equal to the contribution amount under a TSA does not become due and payable until 14 days after the Commissioner gives the entity written notice.

104. The Consolidated Group regime does not enable the offsetting of one entity's credits against the debts of another entity except where both entities are members of a GST group for the purposes of Division 48 of the GST Act. The law in relation to offsetting should be distinguished from the legislation that makes entities jointly and severally liable for a liability.

105. It is conceivable that the HC and/or one or more subsidiaries of a consolidated group could also be members of a GST group and may therefore be subject to the RBA group offsetting provisions (see paragraphs 92 to 95 of this practice

statement on GST groups). In discussing offsetting in this scenario, the legislative intent behind the introduction of the TSA regime is to be respected.

Accordingly:

- if the HC is a member of a GST group, any refund or credit belonging to any other member of the GST group (who is not a subsidiary member of the consolidated group) may be offset against any of the HC's debts
- if the HC is a member of a GST group, any refund or credit belonging to any other member of the consolidated group that is not a member of the GST group will not be offset against any of the HC's debts
- if the HC is not a member of the GST group, offsetting other GST group members' refunds or credits against any of the HC's debts cannot occur
- if the HC is a member of a GST group, its refunds or credits may be offset against any liability of the other members of the GST group even if those companies are not members of the consolidated group, or
- if the HC and one or more subsidiary members of a consolidated group are also members of a GST group, a refund or credit of a subsidiary member will not be applied to any HC group liability or another subsidiary's joint and several consolidated group liability or TSA component amount where that liability is covered by an existing TSA that includes the subsidiary member.

106. Where a HC's or subsidiary member's refund or credit amounts can be offset against another member's liability, the Commissioner will, as a general rule, apply these amounts initially against their own tax liabilities. If that member has no tax liabilities, the amount would then be allocated across the group commencing with the HC or subsidiary member that has the debts with the earliest due date for each tax type (refer to PS LA 2011/20).

Bankruptcy

107. When debtors are discharged from bankruptcy, they are released from the debts that were provable in the bankruptcy. This has an important effect on the application of credits arising from assessments relating to income years after the date of the sequestration order. Until a bankrupt is discharged, any excess credits, such as credits for amounts withheld under the PAYG system, can be applied in reduction of any liability (both pre and post-sequestration) before any remaining balance is refunded to the debtor (*Taylor v. DFC of T* 87 ATC 4441). However, once a bankrupt has been discharged, the pre-sequestration debt is considered to be irrecoverable at law and is written off. Any excess credits arising after the bankrupt's discharge will be refunded, assuming there are no other debts.

108. The only exception to this is when an assessment relating to a pre-sequestration year results in a credit. This would be offset against the bankrupt's debt regardless of whether or not the bankrupt has been discharged because section 86 of the Bankruptcy Act requires the Commissioner to set off the provable debt with any credit entitlements pertaining to the pre-sequestration period.

109. If a taxpayer is an undischarged bankrupt, the Commissioner will firstly allocate or apply any entitlement to a tax credit relating to the post-sequestration income period to any post-sequestration tax debt (including additional charges for late payment). This credit would then be allocated to any tax due in respect to the pre-sequestration income period.

Part X Bankruptcy Act – Agreements with creditors without sequestration

110. Prior to the enactment of the Bankruptcy Act in June 2004, there were three different forms that an agreement under Part X of the Bankruptcy Act could take:

- a deed of assignment
- a deed of arrangement, or
- a composition.

111. When all dividends to which creditors are entitled have been distributed, any remaining balances owing up to the date of execution of the deed, or acceptance of the composition, may be written off as irrecoverable at law. This has an important effect on the application of any excess credits, such as credits for amounts withheld under the pay as you go system.

112. Under a deed of assignment the taxpayer is released from their provable debts when the deed has been duly executed by both the taxpayer and the trustee (section 230 of the Bankruptcy Act). Therefore, any excess credits arising after the execution of the deed will be refunded.

113. The execution of a deed of arrangement may provide for the taxpayer to be released from certain debts (section 234 of the Bankruptcy Act). If tax debts have been released by the deed, any excess credits arising after that time will be refunded. If there is any tax debt which was due and payable at the date of execution of the deed and which has not been released, credits arising may be applied in reduction of the debt.

114. A composition operates to release the taxpayer from all debts which would have been provable had a bankruptcy occurred (section 240 of the Bankruptcy Act). Any excess credits arising after the date of acceptance of the composition will be refunded.

115. Credits in relation to periods of income prior to the execution of a deed or acceptance of a composition will be offset even if the relevant assessment is made after these events because section 86 of the Bankruptcy Act requires the Commissioner to set off the provable debt with these credit entitlements.

Part X Bankruptcy Act – Personal insolvency agreements (PIA)

116. From June 2004, the previous three different forms of agreements under Part X of the Bankruptcy Act have been replaced by a hybrid agreement (incorporating elements from each of these agreements) known as a personal insolvency agreement.

117. The execution of a PIA may provide for the taxpayer to be released from certain debts (section 230 of the Bankruptcy Act).

118. If tax debts have been released by the PIA, any excess credits arising after that time will be refunded.

119. If there is any tax debt which was due and payable at the date of execution of the PIA, and which has not been released, credits arising may be applied in reduction of the debt.

120. The Commissioner will first seek to apply credits arising from a post-PIA period to any post-PIA liabilities.

121. If there are no known post-PIA liabilities, the Commissioner will apply such credits to the pre-PIA debts. This is assuming that the PIA has not already operated to release the taxpayer from those debts.

122. Refunds in relation to periods of income prior to the agreement will be offset even if the relevant assessment is made after these events because section 86 of the Bankruptcy Act requires the Commissioner to set off the provable debt with these credit entitlements.

Part IX Bankruptcy Act – Debt agreements

123. Tax debts subject to a debt agreement will, until the terms of an agreement have been completed, have any credits applied in reduction of them. However, once a debtor has fulfilled the terms of the agreement, they will be released from their pre-arrangement provable tax debts, and credits can no longer be offset against them .

124. Refunds and credits in relation to periods or years of income prior to the agreement can be offset even if the credit arises after the debtor has been released from them. This is because section 86 of the Bankruptcy Act requires the Commissioner to set off the provable debt with these credit entitlements.

Division 6 of Part IV Bankruptcy Act – Composition or arrangement with creditors

125. The law operates in a similar fashion to Part X of the Bankruptcy Act (see paragraphs 110 to 122 of this practice statement), however in this instance the taxpayer would be released from provable debts and their bankruptcy annulled upon the passing of the special resolution to accept the taxpayer's proposal. Accordingly, refunds of tax cannot be offset against a tax debt subject to the composition or arrangement unless the composition or arrangement is annulled.

Part 5.3A Corporations Act 2001 – Deed of company arrangement

126. Generally, liabilities that arise before the beginning of an administration are provable under a deed of company arrangement (DOCA).

127. Until released from its provable debts, credits due to a company should be applied in reduction of any liability (both pre and post-administration) before any balance is refunded. Once a company is released from its debts, however, any credit entitlements arising after that time will be refunded to it, assuming there are no post-administration debts to which the amounts can be applied. The only exception to this rule is that credits relating to pre-administration periods will be applied against pre-administration debts regardless of whether or not a company has been released from those debts.

128. The Commissioner will apply any credit relating to a post-administration period first to any post-administration liabilities. If there are no known post-administration liabilities, a post-administration credit will be applied against pre-administration debts where those debts have not been released by operation of the DOCA. Pre-administration credits will first be applied against pre-administration debts, then against any post-administration debts before any balance is refunded.

Corporate insolvencies

129. Credits due to a company in liquidation must first be applied against any debts of the company before a refund can be made.

130. Credits in respect of post-liquidation periods should first be applied against post-liquidation debts and then any other debts of the company.

Representatives of incapacitated entities

131. A GST or fuel tax credit due to a person in their capacity as a representative of an incapacitated entity cannot be offset against liabilities of the incapacitated entity. This is because, for GST and fuel tax purposes, the representative and the incapacitated entity are different entities.

132. A GST or fuel tax credit due to an incapacitated entity that arises after the appointment of a representative will initially be offset against any post-appointment tax debts of the entity. Any remaining credit will then be offset against any pre-appointment tax debts provided the entity has not been released from those debts. Conversely, a GST or fuel tax credit that arises before the appointment of a representative will initially be offset against any pre-appointment tax debts of the entity. Any remaining credit will then be offset against any post-appointment tax debts.

Grants and benefits administered under the PGBAA and arrangements under the Bankruptcy and Corporations Acts

133. Grants and benefits payable after 1 July 2003 under the PGBAA are excluded from the operation of the statutory offset provisions in Division 3 of Part IIB to the TAA. This occurs because the definition of credit under section 8AAZA of the TAA does not include credits arising after 1 July 2003 under the PGBAA. This affects the common law insolvency administration offset rules such that grants and benefits payable under the PGBAA for post-insolvency periods cannot be applied against pre-insolvency debts.

134. Grants and benefits payable under the PGBAA for pre-insolvency periods will be applied against pre-insolvency debts using the set-off provisions in section 86 of the Bankruptcy Act or section 553C of the Corporations Act..

135. In receiverships, however, grants and benefits payable under the PGBAA should be applied against any liabilities the entity has regardless of which period the grant or benefit and the liabilities relate. This is because the appointment of a receiver would not normally impact on the rights of unsecured creditors of the company, including a right of legal offset.

Credits from delayed refund interest, interest on overpayments and early payments

136. Division 3 of Part IIB of the TAA requires interest payable, arising under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*, to be offset against any tax debt owed to the Commissioner. The interest will be initially allocated to the account to which it pertains.

Credits arising from account adjustments

137. Credit arising from an account adjustment is to be applied against the account posting to which it pertains and then in reduction of any amounts due and payable on the account to which it is posted.

Remainder credits

138. Any remaining credit from the initial offset of the specific credits outlined above is to be allocated to any other liability the taxpayer has to the Commonwealth that arises under an Act of which the Commissioner has the general administration.

Amendment history

Date of amendment	Part	Comment
15 August 2011	Paragraph 15	Adjusted to reflect law change to s8AAZL of the TAA eff 1 July 2011
	Paragraph 17	Adjusted to reflect law change to s8AAZL of the TAA eff 1 July 2011
	Paragraph 18	Adjusted to reflect Commissioner's administration of law change to s8AAZL of the TAA eff 1 July 2011
	Paragraph 20	Changed to reflect the position that an offset that has already occurred will only be overturned where it is incorrect.
	Paragraph 39	Adjusted to reflect law change to s8AAZL of the TAA eff 1 July 2011

Legislative references	A New Tax System (Family Assistance) (Administration) Act 1999 87 A New Tax System (Family Assistance) (Administration) Act 1999 93 A New Tax System (Family Assistance) (Administration) Act 1999 226 ITAA 1997 Div 63 ITAA 1997 Div 703 TAA Pt IIA Div 1 TAA Pt IIB Div 3 TAA Pt IIB Div 3A TAA 8AAZA TAA 8AAZL TAA 8AAZLA TAA 8AAZLB TAA 8AAZLD TAA 8AAZN Bankruptcy Act 1966 86 Bankruptcy Act 1966 230 Bankruptcy Act 1966 234 Bankruptcy Act 1966 240 Bankruptcy Act 1966 Pt IV Bankruptcy Act 1966 Pt IX Bankruptcy Act 1966 Pt X Bankruptcy Legislation Amendment Act 2004 Corporations Act 2001 Pt 5.3A Corporations Act 2001 553C Excise Act 1901 FMAA 44 FMAA 47 FTA 60-5 HESA Div 151 CS(R&C)A 1988 72 GST Act 7-5 GST Act 17-5 GST Act 126-5 GST Act Div 48 GST Act Div 51 GST Act Div 54 PGBAA 24 PGBAA Pt 8 Taxation (Interest on Overpayments and Early Payments) Act 1983
Related practice statements	PS LA 2011/14 General debt collection powers and principles PS LA 2011/15 Lodgment obligations, due dates and deferrals PS LA 2011/20 Payment and credit allocation
Case references	Taylor v. DFC of T (1987) 16 FCR 212; 87 ATC 4441; (1987) 18 ATR 715
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