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

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

This Law Administration Practice Statement provides guidance on the offsetting of refunds and credits, including the exercise of the discretion not to offset.

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 Practice 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 do not have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. What is this Practice Statement about?

This Practice Statement outlines:

- when credits and refunds will be offset against tax debts, and
- the Commissioner's discretion to refund instead of offset and what to consider in doing so.

2. Offsetting and the Commissioner's powers

Offsetting occurs when a taxpayer's credit or running balance account (RBA) surplus is applied to another liability of the taxpayer.[1]

For convenience, the word 'credit' in this Practice Statement refers to both a credit and an RBA surplus.

Commissioner is required to offset

We are required to offset credits, except in specific situations.[2]

Offsetting is generally automatic, based on accounting system rules. Attachment A to this Practice Statement details more specific rules related to particular types of credits.

Commissioner may refund credits in specific situations

You have the discretion to refund rather than offset credits only in particular situations.[3]

You must first consider whether the circumstances fall within the scope of these provisions (see section 3 of this Practice Statement). If they do, you need to then consider whether the facts warrant the refunding of the amount that has been, or could be, offset against another liability (see section 4 of this Practice Statement).

Refunding and ATO systems

Our accounting system rules will often automatically offset a payment or credit prior to consideration of the discretion to refund and not offset. Where an amount has been offset contrary to the principles outlined in this Practice Statement, and if the taxpayer requests us to do so, a refund will be provided to the taxpayer. This means that the discretion can be applied after an offset has occurred, provided the facts at the time of the offset would have warranted the exercise of the discretion.

3. When the Commissioner can refund rather than offset

You have the discretion not to offset a credit and instead refund the amount to a taxpayer.[4] This is limited to the following circumstances where:

- the amount owing is due but not yet payable
- the amount owing is under a payment arrangement and the taxpayer is complying with that arrangement
- we have agreed to defer recovery action, and/or
- the amount is to be offset against a director penalty debt.

These are the only circumstances where you are able to refund and not offset a credit.

[1] See Division 3 of Part IIB. Section 8AAZL of the *Taxation Administration Act 1953* (TAA).
[2] See section 8AAZL of the TAA.
[3] These situations are set out in subsections 8AAZL(3) and (4) of the TAA.
[4] Subsections 8AAZL(3) and (4) of the TAA.

4. Whether or not to exercise the discretion to not offset

Since the power to refund and not offset is discretionary, you must consider whether or not it is appropriate to exercise the power on a case-by-case basis.

If one of the discretions in section 3 of this Practice Statement applies, you should consider the following circumstances.

Where the amount owing is due but not yet payable

You may decide to refund and not offset a credit if that credit would be applied against a debt that is due but not yet payable.

As our systems will automatically offset credits against debts which have crystallised on the account that are due but not yet payable, this discretion will only be exercised where a taxpayer requests the credit be refunded.

You must consider individual circumstances of each case for any decision to refund the credit (as listed under the *General considerations* section of this Practice Statement). In addition to these, it may be appropriate to exercise the discretion to refund and not offset where the credit would be offset against a debt owed by the taxpayer in a different capacity.

For example, you may decide not to offset a credit from a taxpayer's own RBA against a debt owed on their GST joint venture RBA, where the retained credit is causing the taxpayer significant cash flow issues.

Payment arrangement

You have the discretion to refund a credit if it would be offset against a debt that is subject to a payment arrangement.

The discretion to refund should only be considered where the arrangement provides for the taxpayer to pay the debt by instalments and the taxpayer is meeting the terms of that arrangement.

However, most payment arrangements expressly allow for offsetting to occur. Therefore, you should generally offset credits against debts subject to a payment arrangement unless the general considerations warrant the exercise of the discretion to refund.

Note: If an offset during the course of a payment arrangement causes the taxpayer unexpected cash flow problems, they can apply for a temporary variation to that arrangement (see Law Administration Practice Statement PS LA 2011/20 *Payment and credit allocation*).

Where we have agreed to defer recovery proceedings

You should not offset credits against a tax debt that is subject to a formal deferral of recovery action. This may occur when the relevant debt is disputed.

However, if there is new evidence since the deferral was granted that there is an unreasonable risk to revenue, the credit should be offset.

Where the offset is to a director penalty liability

There is a specific discretion for director penalty liabilities due to their parallel nature. Parallel liabilities include the company's underlying liability, as well as director penalties owed by any co-directors.

Payments or credits applied to one parallel liability will proportionately reduce the other liabilities.

You should consider whether any parallel liabilities are in dispute or being paid through an agreed payment arrangement.

If the company with the parallel liability has made arrangements or provided satisfactory security to pay the underlying liability, exercise of the discretion to refund and not to offset would generally be appropriate.

Otherwise, you should generally offset credits against director penalty liabilities unless the general considerations warrant the exercise of the discretion to refund.

General considerations

You must consider the individual circumstances of each case and whether refunding the amount would be fair and reasonable to other taxpayers who have paid all their debts on time. This requires you to balance the factors relevant to exercising the discretion.

Factors weighing against exercising the discretion to refund (instead of offset) a credit include:

- the taxpayer has a poor compliance history in meeting their tax obligations
- there is an unreasonable risk to revenue; for example, there is evidence that the taxpayer is dissipating assets
- the credit is being offset against a superannuation guarantee charge (SGC) or is to be paid to the Child Support Registrar, and
- the taxpayer is a promoter of schemes.

Factors that would support exercising the discretion to refund include where the taxpayer has shown that the offset will cause:

- serious financial hardship, and/or
- significant cash flow issues for their business.

An individual taxpayer is in serious financial hardship when they cannot meet the basic necessities of life.

The financial impact on a business can also be taken into account. There should be evidence that the business is engaging with the office to bring their liabilities up to date.

If you are unsure whether you should exercise the discretion to refund and not offset, you should contact Operational Policy, Assurance and Law (OPAL) for advice.

5. Where the taxpayer requests an offset of their credit against the taxation debt of another taxpayer

Sometimes, where they have no outstanding tax debts or other Commonwealth liabilities to offset, a taxpayer may wish to have their refund or credit offset against the tax debt of another taxpayer.

You are not required by law to do this and you should not agree to such a request as a matter of course. However, you may agree to their request if:

- there is little risk in doing so
- paying the refund in this manner is an efficient, effective, economical and ethical use of public resources for which the Commissioner is responsible[5], 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.

The request must:

- be made by the taxpayer or an authorised representative of the entitled taxpayer
- provide a statement by the taxpayer or an authorised representative of the entitled taxpayer that they understand the refundable amount will be offset against a different taxpayer's tax debt
- state how much of the refundable amount is to be offset against the other taxpayer's debt, and
- provide sufficient details to enable identification of the taxpayer and the debt against which the entitled taxpayer wants to have the refundable amount offset.

Any offset we agree to will only be to the extent of the tax liability of the other taxpayer. Any remaining amount must be refunded to the taxpayer entitled at law to the refund.

Example

ABC Pty Ltd is a wholly-owned subsidiary of XYZ Pty Ltd. The two companies are not grouped for any reporting purpose. ABC Pty Ltd lodges its quarter 3 business activity statement (BAS), which results in a $10,000 credit. ABC Pty Ltd also has an outstanding fringe benefits tax (FBT) debt of $1,500 that is due and payable. XYZ Pty Ltd has an outstanding income tax debt of $8,000.

Through a letter of informed consent, ABC Pty Ltd requests the Commissioner offset its refund against XYZ Pty Ltd's income tax debt. Provided that the letter of informed consent contains all relevant information, the Commissioner may exercise their discretion to offset ABC Pty Ltd's BAS credit against XYZ Pty Ltd's income tax debt.

The Commissioner must first offset $1,500 of the credit to ABC Pty Ltd's FBT debt, leaving a balance of $8,500. If the discretion to offset $8,000 to XYZ Pty Ltd's income tax debt is exercised, the remaining credit of $500 must be refunded to ABC Pty Ltd.

[5] Section 15 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Attachment A: Specific credits

The following credits have specific rules which apply to their allocation.

Pay as you go credits

Where an entitlement to a credit arises in relation to pay as you go (PAYG) instalments or PAYG withheld, that credit will be applied initially to:

- compulsory repayment amounts arising under the *Higher Education Support Act 2003* (HESA), and
- student financial supplement assessment debts.

Note: Prior to 3 June 2010, priority was also given to higher education contribution assessment debts.

Higher Education Support Act 2003 payments

Where a taxpayer pays an amount to the Commonwealth under Division151 of the HESA and the amount exceeds the total debts owed, the excess may be applied against the taxpayer's primary tax debts prior to being refunded.

Fringe benefits tax credits

An entitlement to a tax credit for FBT instalments payable, that arises when an assessment of the FBT is made, will be initially applied to the assessed tax for that FBT year.

Fuel tax credits

Business taxpayers

If an entitlement to a credit arises on an activity statement lodged by a business taxpayer (that is, the assessed net fuel amount is less than zero), this credit will initially be applied to any other liabilities notified in the same activity statement before being applied against other tax debts.

Non-business taxpayers

If an entitlement to a credit arises on a fuel tax return lodged by a non-business taxpayer on a fuel tax return (that is, the assessed net fuel amount is less than zero), this credit will be applied against other outstanding tax debts.

Grants and benefits administered under the *Product Grants and Benefits Administration Act 2000*

Entitlements to product grants and benefits are not subject to the offsetting provisions contained within Division 3 of Part IIB of the TAA.

A product grant or benefit entitlement can be offset against a debt relating to an overpayment of a *Product Grants and Benefits Administration Act 2000* (PGBAA) entitlement[6] or a penalty imposed.[7]

We generally cannot offset PGBAA entitlements against other tax debts without the recipient's consent.

However, you may 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.

Where the recipient enters into a suitable payment arrangement to pay off their outstanding tax debt, you should seek to include the entitlement offset as part of that arrangement, unless it is not practical to do so.

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.

Excise claims

Where a taxpayer is entitled to a credit or refund of an amount paid under the *Excise Act 1901,* that amount can be offset if the taxpayer has an outstanding tax liability at the time the credit amount is determined.[8]

Tax offsets

The table under subsection 63-10(1) of the *Income Tax Assessment Act 1997* (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 also states what is to happen to it.

Unless specifically provided for in the table, the excess tax offset cannot be refunded, transferred to another entity or carried forward.

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[6] Section 24 of the PGBAA.
[7] Part 8 of the PGBAA.
[8] 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.

Excess franking credits

Certain taxpayers will be entitled to a refund of excess franking credits in relation to dividends paid on or after 1 July 2000. These credits can be offset against any tax debts owed.

However, we have the authority not to offset if the cost to do so would be prohibitive.[9] Sometimes it will be uneconomical to offset the credits against old tax debts owed by taxpayers who have not been required to be in the taxation system for some time; for example, certain retirees.

Therefore, 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.

This exception does not apply to SGC debts or child support debts. In the case of child support debts, the credit will be offset against any tax debt, regardless of size, before it is paid to the Child Support Registrar.

Where a refund of excess franking credit is offset contrary to this Practice Statement, we will refund the amount upon receipt of a request to do so from the taxpayer.

Baby bonus credits

Any credit attributable to the baby bonus can be offset against any tax debts owed.

However, sometimes it will be uneconomical to offset the credits against old tax debts owed by claimants who have not been required to be in the taxation system for some time.

Therefore, eligible claimants for the baby bonus who have had no obligation (other than the outstanding debt) to be in the taxation system for over two years will not have the baby bonus credits offset unless the amount of both the baby bonus credit and the tax debt are substantial.

This exception does not apply to SGC debts or child support debts. In the case of child support debts, the credit will be offset against any tax debt, regardless of size, before it is paid to the Child Support Registrar.

Where a baby bonus credit is offset contrary to this Practice Statement, we will refund the amount upon receipt of a request from the taxpayer to do so.

Credits in relation to refunds of excess concessional superannuation contributions

For the 2011–12 and 2012–13 income years only, taxpayers whose superannuation contributions exceed their concessional cap by $10,000 or less are able to make a once-only request to have the excess concessional (before tax) contributions refunded and assessed at their marginal tax rate, rather than pay excess contributions tax.

In this circumstance, the taxpayer must authorise a voluntary release authority to enable their superannuation fund to remove the funds from their superannuation account and pay to the Commissioner the requested amount (which can be up to 85% of the excess amount originally contributed). This amount is then included by the Commissioner in the taxpayer's assessable income (usually by way of an amended assessment for the relevant year) and taxed at the taxpayer's relevant marginal tax rate.

When assessed on the returned amount, the taxpayer is entitled to credits as follows:

- a credit for the contributions returned by the superannuation fund, and
- a tax offset credit equivalent to the contributions tax paid (usually 15%) by the superannuation fund on the returned contribution.

These credits will first be applied to the assessed income tax (for the assessment that includes the relevant returned amount as income) and then, to the extent that the credits exceed the income tax and other amounts payable in that assessment, may be offset to other tax debts, then to other Commonwealth debts. The balance may then be refunded.

Other refundable tax offsets

Where a taxpayer is entitled to another type of 'refundable tax offset'[10] in a particular income year, any excess amount after the refundable tax offset will be applied to a taxpayer's income tax liability for that year and any other tax liabilities outstanding at that time.

Transferable tax offsets

The excess of some tax offsets (for example, the senior Australian tax offset and the child care tax offset) can be transferred by the taxpayer entitled to them to another taxpayer.[11]

[9] Section 15 of the PGPA Act and section 11 of the *Public Governance, Performance and Accountability Rule 2014*.

[10] For example, the 'no-TFN contribution income' tax offset, which applies when a superannuation fund member is taxed at 46.5% rather than 15% because they have not quoted their tax file number but subsequently do so within four years.

[11] Subsection 63-10(1) of the ITAA 1997.

Carry forward tax offsets

The excess of some tax offsets (for example, a tax offset arising from a franking deficit tax liability) may also be carried forward to future income years.[12]

Family tax benefit

Provided there are no other tax debts to apply a credit against, an income tax refund can be applied, if the Secretary of Services Australia requests, to any Centrelink debts.[13] A taxpayer can also give consent to apply their refund to reduce another person's (for example, their spouse's) Centrelink debt.[14] Application to these debts will take priority over application to child support debts.

Equally, we may apply a family tax benefit credit (other than childcare benefits) to any primary tax debts.[15]

Input tax credits

Input tax credits are set off against goods and services tax (GST) attributable to the same period. Where there is an excess (that is, the assessed net amount on the activity statement is less than zero), the credit will be applied to any other liabilities notified in the same activity statement before being applied against other tax debts.

GST groups

These indirect tax laws include the GST law, wine tax law, luxury car tax law and fuel tax law.

Where there is a GST group [16], although the representative member is liable for all GST and fuel tax debts, all members of the group are jointly and severally liable to pay the group's GST and fuel tax debts. A GST group is included in the definition of an RBA group and thus any credit amounts of a member will initially be applied against their own tax liabilities.[17] Any excess would then be allocated across the group, commencing with the member that has the oldest period tax debt for each tax type.

Joint and several liability 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 does 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

Where taxpayers have entered into a GST joint venture[18], the joint venture operator is liable for all tax debts payable by the GST joint venture under an indirect tax law, and each GST joint venture participant is also jointly and severally liable for those tax debts (unless there is a valid indirect tax sharing agreement (ITXSA), limiting the participant's liability).[19]

Where a valid ITXSA exists [20],the participant's joint and several liability may be limited by the ITXSA. Due to this, any credits owing to a participant (who is not the operator) will not be automatically offset against tax debts payable under an indirect tax law by the GST joint venture. Offsetting may still occur to an entity's own integrated client account, FBT and income tax accounts. We may request a copy of the ITXSA to determine the extent to which each participant is liable and may offset across the GST joint venture if appropriate under the agreement.[21]

Cross-entity offsetting may also occur in limited circumstances where no ITXSA has been obtained (for example, where we have decided to take debt collection action against all participants or any participant of a GST joint venture), based on the most expedient means of recovery.

Where no valid ITXSA exists [22], any credit entitlements of the joint venture operator may be offset against any tax debts payable by the GST joint venture under an indirect tax law. Any remaining credit entitlements of a GST joint venture on the operator's RBA will be allocated to any other liability of the operator, as listed in Attachment B to PS LA 2011/20. If the entity is the operator of multiple joint ventures, we will use the credits on one joint venture account to offset against tax debts on another joint venture account. Credits owing to one GST joint venture participant (who is not the operator) will not be offset against the tax debt of another GST joint venture participant.

GST and PAYG withholding branches

Where taxpayers have elected to branch their business operations, each branch has its own BAS for the

[12] Subsection 63-10 of the ITAA 1997.
[13] Section 87 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (ANTS(FA)A).
[14] Section 93 of the ANTS(FA)A.
[15] Section 226 of the ANTS(FA)A.
[16] Under Division 48 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).
[17] Subsections 8AAZLA(1) and 8AAZLB(1) of the TAA.
[18] Division 51 of the GST Act.
[19] Section 110-60 of the GST Act.
[20] Section 110-60 of the GST Act.
[21] Section 444-80 of Schedule 1 to the TAA.
[22] Section 110-60 of the GST Act.

relevant period and a related RBA. Each RBA of the branches is considered an RBA of the parent entity.

A credit arising on the RBA of a branch will first be applied against any tax liability on that RBA. Credits will then be used to automatically offset against the tax debts on the parent entity's RBA. Any excess credit will then be applied against the tax liabilities on the RBA of other branches of the parent entity. If there is excess credit after this allocation the excess will be applied to other accounts, such as FBT and income tax accounts.[23]

Consolidated income tax groups

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.

However, the law in relation to offsetting should be distinguished from the legislation that makes entities jointly and severally liable for a liability.

Liability to pay the income tax attributable to the activities of a consolidated group activities rests with the head company. If not paid 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). 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.

Where members of a consolidated group are also members of a GST group and may therefore be subject to the RBA group offsetting provisions (see the previous discussion in this Practice Statement on GST groups). However, the legislative intent behind the introduction of the TSA regime is to be respected.

Therefore:

- If the head company 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 head company's debts.
- If the head company 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 head company's debts.
- If the head company is not a member of the GST group, offsetting other GST group members' refunds or credits against any of the head company's debts cannot occur.
- If the head company 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.
- If the head company 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 head company 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.

Where a head company's or subsidiary member's refund or credit amounts can be offset against another member's liability, generally these amounts will be applied 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 head company or subsidiary member that has the debts with the earliest due date for each tax type.

Bankruptcy

When debtors are discharged from bankruptcy, they are released from the debts that were provable in the bankruptcy. Therefore:

- until a bankrupt is discharged, any excess credits can be applied to reduce any liability (both pre-and-post-sequestration or bankruptcy);[24] the credit should firstly be applied to any post-sequestration debt, then to pre-sequestration debts, and
- 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.

The only exception to this is where the credit arises from an assessment for a pre-sequestration period (for example, an income year or tax period). This credit would be offset against the bankrupt's debt regardless of whether or not the bankrupt has been discharged.[25]

[23] Sections 8AAZLA and 8AAZLB of the TAA.
[24] *Taylor, J. v Commissioner of Taxation* [1987] FCA 232.
[25] Section 86 of the *Bankruptcy Act 1966* (Bankruptcy Act).

Personal insolvency agreements (Part X of the *Bankruptcy Act 1966*)

The execution of a personal insolvency agreement (PIA) may provide for the taxpayer to be released from certain debts[26], but release will only occur when the terms of the PIA have been complied with. Therefore:

- If tax debts have been released by the PIA, 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 PIA, and which has not been released, credits arising may be applied in reduction of the debt. Credits arising from a post-PIA period will be applied firstly to any post-PIA liabilities, then to pre-PIA debts (assuming that the PIA has not already operated to release the taxpayer from those debts).
- Credits in relation to periods prior to the agreement will be offset even if the relevant assessment is made after the agreement.

Debt agreements (Part IX of the *Bankruptcy Act 1966*)

Where a debt agreement exists:

- Until the terms of an agreement have been completed, credits will be applied in reduction of the debts subject to that agreement.
- Once the terms of the agreement have been fulfilled, credits can no longer be offset against the debts subject to that agreement.
- 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 the debts.

Composition or arrangement with creditors (Division 6 of Part IV of the *Bankruptcy Act 1966*)

A composition or arrangement with creditors is similar to a PIA, except that the taxpayer is released from their provable debts and the bankruptcy annulled when a special resolution accepting the taxpayer's proposal is passed. Therefore, refunds cannot be offset against a tax debt subject to the composition or arrangement, unless the composition or arrangement itself is annulled.

Deed of company arrangement (Part 5.3A of the *Corporations Act 2001*)

The following applies when a deed of company arrangement is in place.

- Until the company is released from its provable debts, any excess credits can be applied to reduce any liability (both pre-and-post-administration). The credit should firstly be applied to any post-administration debt, then to pre-administration debts.
- Once the company is released from its debts, any excess credits arising after the effectuation of the deed of company arrangement will be refunded, assuming there are no other post-administration debts.

The only exception to this is where the credit relates to a pre-administration period. This credit would be offset against pre-administration debts regardless of whether or not the company has been released from those debts.

Companies in liquidation

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

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

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,[27] nor (if there is more than one representative acting in different capacities) can the credits of one be offset against the debts of another.

Where the GST or fuel tax credit due to an incapacitated entity arises:

- After the appointment of a representative – it 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).
- Before the appointment of a representative – it 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.

[26] Section 230 of the Bankruptcy Act.

[27] For the purposes of Division 58 of the GST Act, they are different entities.

Product grants and benefits and arrangements under the *Bankruptcy Act 1966* and the *Corporations Act 2001*

Grants and benefits payable under the PGBAA for post-insolvency periods cannot be applied against pre-insolvency debts.[28]

Grants and benefits payable under the PGBAA for pre-insolvency periods will be applied against pre-insolvency debts.[29]

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

Interest payable, arising under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*, will be initially allocated to the account to which it pertains and then to any other tax debt.

Credits arising from account adjustments

Where a credit arises from an account adjustment, it is to be applied against the account posting to which it pertains and then to reduce any amounts due and payable on the account to which it is posted.

Remainder credits

Where any credit remains after the initial offset of the specific credits outlined above, it 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.

Superannuation credits

SGC credits

Where SGC credits arise, they should be offset against any other liabilities of the employer to the Commonwealth before being refunded.

Because there is no specific provision allowing excess SGC credits to be refunded, they will be refunded in accordance with section 77 of the PGPA Act.

Superannuation contributions surcharge (SCS) credits

SCS credits may be offset against other surcharge liabilities of the provider or member before being refunded. Because there is no specific provision allowing excess SCS credits to be refunded, they will be refunded in accordance with section 77 of the PGPA Act.

As a matter of policy, SCS credits may be offset against other surcharge liabilities of the provider or member before refunding any balance as required.

Superannuation holding accounts special account, government co-contributions and unclaimed money credits

A credit relating to superannuation holding accounts special account (SHASA), government co-contribution or unclaimed money cannot be offset against the person's tax debts.[30] Further, as these amounts are not subject to the offsetting provisions contained in the TAA, these amounts cannot be paid to the Child Support Registrar.

However, you may contact the relevant person and ask if the credit may be offset against the person's tax debts. This option may be provided for the convenience of the person entitled and would be solely at their discretion. If they agree, the credits can then be offset against the person's tax debts.

Where a superannuation provider has made a payment in accordance with the *Superannuation (Unclaimed Money and Lost Members) Act 1999* and the amount exceeded the amount payable, the excess may be refunded to the superannuation provider for the fund or to another fund that provides rights relating to the person equivalent to those provided by the fund who made the original payment where that fund no longer exists. These amounts cannot be offset against the superannuation provider's or person's tax debts.[31]

Offsetting future or later superannuation credits against existing superannuation debts

A person may have an existing superannuation debt and may be entitled to a later credit for the same superannuation product. For example, an employee may have an existing SGC debt due to a prior overpayment. Their employer then makes a later payment of SGC in relation to this employee. This later payment would then be available to allocate to the employee's superannuation fund or as a direct payment (as appropriate).

[28] Because these grants and benefits do not fall within the definition of credit in section 8AAZA of the TAA.
[29] Using the set-off provisions in section 86 of the Bankruptcy Act or section 553C of the *Corporations Act 2001*.
[30] Because they do not fall within the definition of 'credit' as defined in section 8AAZA of the TAA.
[31] Sections 18A, 20K and 24J of the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.

Where a later SGC, SHASA or unclaimed money credit becomes available, this cannot be offset against any existing debt that relates to that credit.

The only circumstance where the Commissioner may offset future entitlements against existing debts is in relation to the superannuation co-contribution.[32]

Date issued	14 April 2011
Date of effect	14 April 2011

[32] Section 24 of the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003*.

Amendment history

Date of amendment	Part	Comment
20 January 2022	Attachment A	Updated Attachment A under headings 'GST joint ventures' and 'PAYG Withholding branches' to outline the Commissioner's position regarding offsetting between these entities.
	Various	Multiple changes made throughout to align with ATO style guide and standards for citations and references.
25 September 2019	Page 8	Updated 2nd dot point under Deed of company arrangement (Part 5.3A of the *Corporations Act 2001*)
1 February 2018	Various	Updated the body of the LAPS to clarify the interaction between offsetting and the ATO systems, the instances when offsetting is available and included the discretion for director penalty liabilities.
	Page 4	Clarified the treatment of dividends received from an insolvency administration.
	Paragraph 3 and Attachment A	Removed references to small amounts as an exception to the general principle.
3 July 2014	Paragraphs 13, 40, 61, 139 & 141; legislative reference section	Updated references to the *Financial Management and Accountability Act 1997* with relevant provisions in the *Public Governance, Performance and Accountability Act 2013* and the *Public Governance, Performance and Accountability Rule 2014.*
	Paragraphs 41 to 45	Updated content to include material from internal document (Operations Practice Note 2004/32).
	Paragraphs 72 to 74	New material around excess contributions tax credits.
	Paragraphs 138 to 147	New material to outline policy around offsetting of various superannuation credits.
15 August 2011	Paragraphs 15, 17 and 18	Adjusted to reflect law change to section 8AAZL of the TAA effective 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 section 8AAZL of the TAA effective 1 July 2011.

References

Legislative references	ITAA 1997 63-10 ITAA 1997 63-10(1) TAA 1953 Pt IIB Div 3 TAA 1953 Pt IIB Div 3A TAA 1953 8AAZA TAA 1953 8AAZL TAA 1953 8AAZL(3) TAA 1953 8AAZL(4) TAA 1953 8AAZLA(1) TAA 1953 8AAZLB(1) ANTS(GST)A 1999 Div 48 ANTS(GST)A 1999 Div 51 ANTS(GST)A 1999 Div 54 ANTS(GST)A 1999 Div 58 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 Bankruptcy Act 1966 Pt IV Div 6 Bankruptcy Act 1966 86 Bankruptcy Act 1966 Pt IX Bankruptcy Act 1966 Pt X Bankruptcy Act 1966 230 Corporations Act 2001 Pt 5.3A Corporations Act 2001 553C Excise Act 1901 Higher Education Support Act 2003 Div 151 Product Grants and Benefits Administration Act 2000 24 Product Grants and Benefits Administration Act 2000 Pt 8 Public Governance, Performance and Accountability Act 2013 15 Public Governance, Performance and Accountability Act 2013 77 Public Governance, Performance and Accountability Rule 2014 11 Superannuation (Unclaimed Money and Lost Members) Act 1999 18A Superannuation (Unclaimed Money and Lost Members) Act 1999 20K Superannuation (Unclaimed Money and Lost Members) Act 1999 24J Taxation (Interest on Overpayments and Early Payments) Act 1983
Case reference	Taylor, J. v Commissioner of Taxation (1987) FCR 212; 87 ATC 4441; (1987) 18 ATR 715; (1987) 73 ALR 219
File reference	1-59J405A
Related Practice Statement	PS LA 2011/20