PS LA 2011/22 - Refunds of running balance account surpluses and credits - Commissioner's discretion to retain amounts

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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:	**Refunds of running balance account surpluses and credits – Commissioner's discretion to retain amounts**
PURPOSE:	**To provide guidance to staff on the circumstances in which the Commissioner will exercise discretionary power to retain running balance account (RBA) surpluses and credits under Division 3A of Part IIB of the *Taxation Administration Act 1953*.**

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BACKGROUND

1. In this practice statement, all legislative references are to the *Taxation Administration Act 1953* (TAA) unless otherwise indicated.

2. Generally, an entity is required to notify its obligations arising under the business activity statement (BAS) provisions[1] (as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997*) in the 'approved form'. The business activity statement and the instalment activity statement are the approved forms that an entity is required to use in order to notify these obligations.

3. Division 3A of Part IIB provides rules about the refunding of running balance account (RBA) surpluses or credits (including an excess non-RBA credit).[2] Generally, the Commissioner is required to refund an RBA surplus or credit of an entity that has not been allocated or applied against a tax debt under Division 3 of Part IIB.

4. This practice statement explains the rules relating to two separate discretions that enable the Commissioner to retain an RBA surplus or credit that has not been allocated or applied under Division 3 of Part IIB.

5. The first discretion arises under section 8AAZLG. This provision states that where:

   - an entity has an RBA surplus or a credit that the Commissioner would be required to refund,[3]
   - the entity has not given the Commissioner a notification that they are required to give under the BAS provisions, and
   - that notification affects or may affect the amount of the refund,

   the Commissioner may retain the amount of the refund until the entity has given the notification or the Commissioner makes an assessment of the amount, whichever happens first.

6. The second discretion arises under section 8AAZLH. This provision states that where:

   - an entity has an RBA surplus or credit, arising in relation to the BAS provisions, that the Commissioner would be required to refund,[4] and
   - the entity entitled to the refund has **not** nominated an account for the refunds to be paid into, or the account nominated does **not** meet the following conditions:
     - it is maintained at a branch or office of a financial institution in Australia, and
     - it is held by:
       (i) the entity alone or together with another entity
       (ii) the entity's registered tax agent or BAS agent, or

[1] BAS provisions cover the goods and services tax law, wine tax law, luxury car tax law, fuel tax law, the PAYG withholding provisions in the TAA, the PAYG instalment provisions in the TAA, and the provisions in the *Fringe Benefits Tax Assessment Act 1986* dealing with FBT instalments.
[2] RBA surpluses are balances in favour of an entity in an entity's running balance account; a credit is generally an amount that the Commissioner must pay to an entity under a taxation law (however described); and an excess non-RBA credit is a specific type of credit arising under Division 3 to the extent that payments, credits or RBA surpluses are not allocated or applied under an RBA or applied against a non-RBA tax debt
[3] Section 8AAZLF sets out when the Commissioner is required to refund these amounts.
[4] See paragraph 3 of this practice statement

(iii) a legal practitioner as trustee or executor for the entity estate

the Commissioner may retain the refund until the entity nominates an account that meets the conditions set out above. However, subsection 8AAZLH(3) provides the Commissioner with a further discretion to nevertheless direct that the refund be paid to the entity 'in a different way'.

STATEMENT

7. Tax officers must follow the principles and guidelines outlined in this Practice Statement when exercising the Commissioner's discretions under sections 8AAZLG and 8AAZLH to retain refunds, pay refunds where he has a discretion to retain them and pay refunds in a different way.

8. It is noted however that it is not possible to set out all the circumstances in which the discretions may or may not be exercised. Each case has to be considered on its merits and on the basis of all the relevant facts. Tax officers must however ensure that the pre-conditions prescribed for the exercise of the discretions are met and must take care not to consider irrelevant factors and must exercise their own judgment in arriving at an appropriate decision. The decision should be made in good faith and without bias.

Retaining refunds until information or notification is given – section 8AAZLG

9. The Commissioner will generally retain an entity's refund, including income tax refunds, if the entity has outstanding activity statements.

10. It is recognised however, that there may be circumstances which warrant the payment of a refund, even if an activity statement is outstanding or has not been processed by the Australian Taxation Office (ATO).

11. The Commissioner's policy in relation to retaining refunds where there is an outstanding activity statement is separated into two broad categories. The first category relates to the circumstances where the outstanding activity statement is due to be given *before* the entitlement to the refund arises ('prior activity statements'). An example is where an entity is claiming a GST refund by providing its BAS for the month of March and at that time the entity has an outstanding BAS for the previous month of February. The second category relates to circumstances where an activity statement is due to be given *after* the refund entitlement arises but the activity statement notification becomes outstanding before the refund is paid to the entity ('subsequent activity statements'). An example is where an entity is claiming a GST refund by providing its BAS for the month of March, however, before the ATO has processed the refund the entity's BAS for the month of April becomes outstanding.

Payment of refund where prior activity statements are not given

12. The Commissioner may not retain a refund, irrespective of whether a prior activity statement notification is outstanding, or has not been processed, if the entity can demonstrate, or information held in the ATO confirms the following:

for an individual

- that the retaining of the refund will cause serious financial hardship – that is, the individual will not be able to afford the basic necessities of life

for a business

- the viability of the business will be compromised if the refund is retained,

AND

for all entities:

- the inability to give the outstanding activity statement by the original due date is directly caused by circumstances beyond the entity's control, or
- the entity is not contributing to the delay in processing of the activity statement through failing to provide required additional information, and
- the entity has a good compliance history – for example, no debts or other outstanding tax obligations.

13. In this context, an entity will not have contributed to the delay in processing the activity statement if circumstances outside their control have caused the delay in providing the required additional information.

14. Where the delay in giving an activity statement is due to circumstances outside the entity's control, consideration may be given to deferring the due date for giving the activity statement.[5]

Payment of refund where subsequent activity statements are not given

15. On request from an entity, the Commissioner may not retain a refund where the only outstanding activity statement notification relates to a period that fell due subsequent to the date that the entitlement to the refund arose and there is no known tax debt owing by the entity or other adverse circumstances giving reason to retain the refund.

16. In addition, where a tax debt is owed by an entity in these circumstances, the Commissioner may also not retain a refund, provided the Commissioner has legal authority to exercise a discretion not to offset the refund (see in particular subsection 8AAZL(3)) and the following conditions are met:

for an individual

- in the case of an individual, the retention of the refund will cause serious financial hardship, meaning they will not be able to afford the basic necessities of life,

for a business

- in the case of a business, the viability of the business will be compromised if the refund is retained.

[5] Law Administrative Practice Statement PS LA 2011/15 Lodgment obligations, due dates and deferrals.

Paying a refund that directly arises under the BAS provisions to an entity 'in a different way' – section 8AAZLH

17. Under section 8AAZLH, there are certain circumstances where the Commissioner may retain refunds payable in relation to RBA surpluses (or excess non-RBA credits that relate to an RBA) if tax debts arising under the BAS provisions have been allocated to that RBA. Those circumstances will arise where an entity has not nominated a financial institution account meeting the conditions in subsection 8AAZLH(2A)[6] to receive such a refund. In these circumstances, the Commissioner will usually retain the refund until such an account is nominated. However, subsection 8AAZLH(3) provides the Commissioner with discretion to pay such a refund to the entity in a different way.

Payment by cheque

18. Generally, the Commissioner will only pay a refund to an entity by cheque under subsection 8AAZLH(3) in exceptional circumstances. Without limiting the exceptional circumstances that may arise, this will include cases where:

- the person holds religious beliefs that preclude the operation of a bank account,
- the entity is the Public Trustee of a State, or
- the entity is not a resident of Australia and doesn't have a place of business or residence in Australia, and:
  - it is a department, agency or wholly owned entity of a foreign government, or
  - the entity is a person with diplomatic status.

Payment to a third party bank account

19. The Commissioner may also consider paying a refund to which section 8AAZLH applies electronically to a nominated third party account (that is, other than one meeting the conditions under subsection 8AAZLH(2A)) where the account is held by:

- a parent entity or nominated member entity for a related group of entities including special purpose entities,
- a manager, custodian, administrator or agent charged with the responsibility of managing some financial aspects of a large number of separate entities such as, strata titles, property trusts, managed investment funds or superannuation funds,
- a trustee for a number of trusts, or
- a representative of an incapacitated entity, for example, a liquidator or receiver.

[6] As set out in paragraph 6 of this practice statement.

20. The Commissioner may exercise the discretion to pay such a refund to a third party account where the following criteria are satisfied:

- the overall policy intent of section 8AAZLH is maintained (see paragraph 32 of this practice statement),
- there is a significant legal relationship between the entity entitled to the refund and the third party into whose financial institution account it will be paid,
- the nominated account is maintained at an office or branch of a financial institution in Australia,
- the entity entitled to the refund gives the Commissioner a clear authority to pay the refund to the nominated financial institution account, and
- there is a legislative requirement, a standard industry or commercial practice, or a legal reason for the refund to be paid to that third party.

EXPLANATION

Retaining refunds until information or notification is given

21. Generally, Division 3 of Part IIB requires the Commissioner to offset any payment, credit or RBA surplus to either an RBA or a non-RBA tax debt. This offset process is mandatory, except in the circumstances outlined in subsection 8AAZL(3), where the Commissioner has a discretion to not offset and may instead refund the amount.[7]

22. Section 8AAZLG provides that the Commissioner may retain a refund of an RBA surplus or credit where an entity has not given a notification that it is required to give under the BAS provisions, and that affects or may affect the amount that the Commissioner refunds. This recognises that, while offsetting a refund against a debt that is either due or payable within a short period of time is necessary for reducing an entity's cost of compliance and for the efficient collection of the revenue, retaining a refund may in certain circumstances cause unnecessary hardship for an individual or unnecessary cash flow problems for a business.

23. Generally, the Commissioner will retain an entity's refund entitlement if they have an outstanding activity statement. The Commissioner, however, may refund an RBA surplus or credit in this circumstance where:

- the Commissioner is required to or has the authority to refund the amount under section 8AAZLF (including where the discretion under subsection 8AAZL(3) has been exercised),
- the entity has a good compliance history – for example, no debts or other outstanding tax obligations, and
- where retaining the refund would cause an individual to suffer serious financial hardship, or would effect the viability of a business.

[7] Law Administration Practice Statement PS LA 2011/21 Offsetting of refunds and credits against taxation and other debts, provides guidance on when the Commissioner may exercise the discretion under subsection 8AAZL(3).

24. Where the outstanding activity statement relates to a period that was required to be notified before the entitlement to the refund arises, the entity will generally also need to demonstrate that the delay in providing the activity statement was outside of their control or that they did not contribute to the delay in providing the additional information required to process the activity statement.

Paying a refund that directly arises under the BAS provisions to an entity 'in a different way'

25. Where tax debts which have arisen directly under the BAS provisions are allocated to a particular RBA, section 8AAZLH generally provides for the mandatory electronic payment of refunds of RBA surpluses or credits that relate to an RBA into an entity's nominated financial institution account.

26. To reduce the risk of fraudulent claims, subsection 8AAZLH(2) restricts the nominated account to one that is held at a branch or office of a financial institution in Australia. Subsection 8AAZLH(2A) further restricts the accounts into which refunds can be paid, as set out in paragraphs 27 to 30 of this practice statement.

27. To comply with subsection 8AAZLH(2A), the entity can only nominate an account:

- held by the entity entitled to the refund, or
- jointly held by that entity with other entities, or
- held by the registered tax agent or BAS agent of the entity, or
- held by a legal practitioner acting as a trustee or executor for the entity.

28. 'Held by the entity' means that the entity:

- is the legal owner of the account,
- has satisfied the financial institution's 'proof of identity' requirements with regard to opening the account, and
- is identified in the records associated with the account as having a legal entitlement or control over any monies held in the account.

29. The term entity includes an individual, partnership, company, entity in the capacity as a trustee of a trust, a government agency or a corporation sole[8].

30. The term 'legal practitioner' means a barrister or solicitor admitted to practice under relevant State or Territory law. It does not extend to a person who has a degree in law but is not qualified to practice. Under subsection 8AAZLH(2A), the legal practitioner must be acting as a trustee or executor for the entity. The subsection does not extend to general representation.

31. Subsection 8AAZLH(3) provides the Commissioner with a discretion to pay the refunds in a different way.

32. The overall policy intent of the legislation is that an RBA surplus or credit should be refunded in such a way as to reduce administration and compliance costs without increasing opportunities for fraud. In order to achieve this, the Commissioner will generally refund monies into the accounts outlined under subsection 8AAZLH(2A). However, in cases where the Commissioner is satisfied that there is a low risk of fraud the Commissioner may, under subsection 8AAZLH(3) and as set out in paragraphs 17 to 20 of this practice statement, refund an RBA surplus or credit by cheque or to the account of a properly authorised nominee.

[8] See section 8AAZA.

33. Subsection 8AAZLH(5) states that the Commissioner will satisfy his obligation to pay the refund when he pays the moneys to the credit of an account nominated by the entity. If the entity wishes to revoke their authority for the Commissioner to pay to a third party account, they must advise the Commissioner.

Examples

Group Accounts

34. Where the requirements set out in paragraph 20 of this practice statement are satisfied, a refund payable to a member of a group of entities will be paid into a financial institution account held in the name of another member of that group. The other member (third party) may be a parent, subsidiary or other related entity. In these cases it is common commercial practice for a parent entity or a nominated member entity to hold one account which is used by all of the group members.

Managed funds accounts

35. Where the requirements set out in paragraph 20 of this practice statement are satisfied, a refund payable to a strata title company, or the trustee of a property trust, investment fund or superannuation fund will be paid into a third party account. The third party account would be one held in the name of the manager, custodian, administrator or agent charged with the responsibility of managing the financial affairs of that strata title company, property trust, investment fund or superannuation fund.

36. In the financial, property, investment and superannuation funds management industries, it is standard industry practice to appoint a manager who is required to hold a single account in respect of all of the funds which they manage. Under corporations and managed investments legislation there may also be a legal requirement to appoint a custodian to the property.

Trustee's accounts

37. Where the requirements in paragraph 20 of this practice statement are satisfied, a refund payable to a trustee, who is the trustee of two or more different trusts, will be paid to an account in the trustee's name (as distinct from an account in the name of the trustee as trustee for a particular trust).

38. Legally only the trustee can open an account. There is no requirement in trust law that the trust relationship be identified or disclosed when the trustee deals with trust property.

Representatives of incapacitated entity accounts

39. Where the requirements in paragraph 20 of this practice statement are satisfied, a refund payable to a representative of an incapacitated entity such as a liquidator or receiver will be paid to an account in the representative's name and capacity. For the purposes of this practice statement 'representatives of incapacitated entities' takes the same meaning as in section 195-1 of *A New Tax System (Goods and Services Tax) Act 1999*.

Subject references	Refunds Commissioner's discretion
Legislative references	TAA Pt IIB Div 3 TAA 8AAZA TAA 8AAZL(3) TAA 8AAZLF TAA 8AAZLG TAA 8AAZLH TAA 8AAZLH(2) TAA 8AAZLH(2A) TAA 8AAZLH(3) TAA 8AAZLH(5) ITAA 1997 995-1(1) A New Tax System (Goods and Services Tax) Act 1999 195-1
Related practice statements	PS LA 2011/15 Lodgment obligations, due dates and deferrals PS LA 2011/21 Offsetting of refunds and credits against taxation and other debts
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