PS LA 2011/22 - Refunds of running balance account surpluses and credits - Commissioner's discretion to retain refunds and the discretion to pay refunds in a different way

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Practice Statement Law Administration

PS LA 2011/22

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. ATO personnel, including non-ongoing staff and relevant contractors must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

SUBJECT: **Refunds of running balance account surpluses and credits – Commissioner's discretion to retain refunds and the discretion to pay refunds in a different way**

PURPOSE: **To provide guidance to tax officers on the circumstances in which the Commissioner will exercise the discretion to retain running balance account surpluses and credits under Division 3A of Part IIB of the *Taxation Administration Act 1953* and the discretion to pay refunds in a different way.**

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BACKGROUND

1. Generally, an entity is required to notify its obligations arising under the business activity statement (BAS) provisions in the 'approved form'. The BAS and the instalment activity statement are the approved forms that an entity is required to use in order to notify these obligations.

2. Division 3A of Part IIB of the *Taxation Administration Act 1953* (TAA) provides rules about the refunding of running balance account (RBA) surpluses or credits (including an excess non-RBA credit). 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 of the TAA.[1]

3. The Commissioner is not required to refund an RBA surplus or excess non-RBA credit that arises because a payment is made in respect of an anticipated tax debt of the entity, unless the entity requests in the approved manner that the Commissioner do so. 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 of the TAA and the discretion to pay refunds in a different way.

4. Tax officers must follow the principles and guidelines outlined in this practice statement when exercising the Commissioner's discretions under sections 8AAZLG and 8AAZLH of the TAA to retain refunds and to pay refunds in a different way. Each case has to be considered on its merits and on the basis of all legislative requirements and the relevant facts.

5. The decisions and actions taken by tax officers must be consistent with the commitments made by the ATO in the Taxpayers' Charter. Tax officers are also expected to follow the directions of the Chief Executive Instruction CEI 2014/06/04 *Respecting client's rights of review* and advise entities of the relevant avenues for review.

TERMS USED

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

   BAS provisions – are defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) and cover the goods and services tax law, wine tax law, luxury car tax law, fuel tax law, the pay as you go (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 fringe benefits tax instalments.

   Credit – is generally an amount that the Commissioner must pay to an entity under a taxation law, however described (see section 8AAZA of the TAA).

   Entity – includes an individual, partnership, company, person in the capacity as a trustee of a trust, a government agency, a corporation sole or any other person (see section 8AAZA of the TAA).

   Excess non-RBA credit – a specific type of credit arising under Division 3 of Part IIB of the TAA 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.

   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

[1] Note that subsection 8AAZLF(2) of the TAA provides that the Commissioner is only required to refund a voluntary payment that has not been allocated or applied if the entity requests a refund in the approved manner (via telephone, in writing or through the Tax Agent Portal). A voluntary payment occurs when an entity pays money to the ATO that is not due and payable.

degree in law but does not hold a current practising certificate. Under subsection 8AAZLH(2A) of the TAA, the legal practitioner must be acting as a trustee or executor for the entity. The subsection does not extend to general representation.

RBA surplus – are balances in favour of an entity in an entity's running balance account.

STATEMENT

Basic concepts

7. The first discretion the Commissioner has to retain an RBA surplus or credit arises under section 8AAZLG of the TAA. This provision states that where:

   - an entity has an RBA surplus or a credit that the Commissioner would be required to refund,[2] and
   - 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.

8. The second discretion arises under section 8AAZLH of the TAA. This provision states that where:

   - an entity has an entitlement to a refund of an RBA surplus or excess non-RBA credit, arising in relation to the operation of the BAS provisions, or the resource rent tax provisions,[3] 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
       (iii) a legal practitioner as trustee or executor for the entity estate,

   the Commissioner is not obliged to refund any amount until the entity nominates an account that meets the conditions set out above. However, subsection 8AAZLH(3) of the TAA provides the Commissioner with a further discretion to nevertheless direct that the refund be paid to the entity 'in a different way'.

9. It is important to note that amounts retained under sections 8AAZLG and 8AAZLH of the TAA are not subject to the notification requirements detailed in section 8AAZLGA. Tax office staff who need to consider the notification requirements that apply in relation to section 8AAZLGA should refer to Law Administration Practice Statement PS LA 2012/6 *Exercise of the Commissioner's discretion under section 8AAZLGA of the Taxation*

[2] Section 8AAZLF sets out when the Commissioner is required to refund these amounts.
[3] As defined in subsection 995-1(1) of the ITAA 1997.

Administration Act 1953 to retain an amount that would otherwise have to be refunded.

EXPLANATION

Discretion to retain refunds until information or notification is given – section 8AAZLG of the TAA

10. Section 8AAZLG of the TAA 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.

11. The Commissioner's policy in relation to retaining refunds where there is an outstanding notification is separated into two broad categories which are discussed in the following paragraphs.

First category - payment of a refund where prior notification is not given

12. This category relates to the circumstances where the notification is due to be given *before* the entitlement to the refund arises ('prior notification'). 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

13. The Commissioner may not retain a refund, irrespective of whether a prior 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[4] – 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 notification 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 notification through failing to provide required additional information, and
- the entity has a good compliance history – for example, no debts or other outstanding tax obligations.

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

[4] 'Serious hardship' is not a defined term and must be given its ordinary meaning. Law Administration Practice Statement PS LA 2011/17 *Debt Relief* provides useful discussion regarding factors the Commissioner considers relevant for determining hardship.

15. Where the delay in giving a notification is due to circumstances outside the entity's control, consideration may be given to deferring the due date for giving the notification.[5]

Second category - payment of a refund where subsequent notification is not given

16. This category relates to circumstances where a notification is due to be given *after* the refund entitlement arises but that notification becomes outstanding before the refund is paid to the entity ('subsequent notification'). 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 completed processing the refund the entity's BAS for the month of April becomes outstanding

17. On request from an entity, the Commissioner may decide not to retain a refund where the only outstanding 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.

18. In addition, where a tax debt is owed by an entity in these circumstances and the Commissioner decides not to offset[6] an RBA surplus or a credit (for example, in accordance with subsection 8AAZL(3) of the TAA), the Commissioner may also decide not to retain a refund if the following conditions are met:

    for 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

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

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

19. The overall policy intent of the legislation is that an RBA surplus or a credit should be refunded in such a way as to reduce administration and compliance costs without increasing opportunities for fraud.

20. Where tax debts which have arisen directly under the BAS provisions are allocated to a particular RBA, section 8AAZLH of the TAA 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.

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

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

[6] Entities that have an existing payment arrangement should refer to Law Administration Practice Statement PS LA 2011/21 *Offsetting of refunds and credits against taxation and other debts*. That practice statement explains the circumstances where the Commissioner will refund an amount rather than apply it to another tax debt.

22. On request, in cases where the Commissioner is satisfied that there is a low risk of fraud the Commissioner may, under subsection 8AAZLH(3) of the TAA refund an RBA surplus or credit by cheque or to the account of a properly authorised nominee.

Payment by cheque

23. Generally, the Commissioner will only pay a refund to an entity by cheque under subsection 8AAZLH(3) of the TAA 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

24. The Commissioner may also consider paying a refund under subsection 8AAZLH(3) of the TAA electronically to a nominated third party account (that is, other than one meeting the conditions under subsection 8AAZLH(2A) of the TAA) 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.

25. The Commissioner may exercise the discretion to pay such a refund to an entity under subsection 8AAZLH(3) of the TAA to a third party account where the following criteria are satisfied:

- the overall policy intent of section 8AAZLH is maintained (see paragraph 19 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.

Examples of the discretion under subsection 8AAZLH(3) of the TAA

Group accounts

26. Where the requirements set out in paragraph 19 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

27. Where the requirements set out in paragraph 19 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.

28. 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 (being, for example, the underlying investment, fund deposit or savings account).

Representatives of incapacitated entity accounts

29. Where the requirements in paragraph 19 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.[7]

[7] For the purposes of this practice statement the terms 'representative' and 'incapacitated entity' take the same meaning as provided in section 195-1 of *A New Tax System (Goods and Services Tax) Act 1999*.

Amendment history

Date of amendment	Part	Comment
4 November 2014	various	Updated to meet ATO Style guide requirements; revised headings and placement of text; additional information added to clarify topic discussion.
	Footnote 1	New information on Commissioner's treatment of voluntary payments.

Subject references	Refunds Commissioner's discretion
ATOLaw topic	Goods and services tax~~Taxation Administration Act 1953~~retention of refunds
Legislative references	TAA Pt IIB Div 3 TAA Pt IIB Div 3A TAA 8AAZA TAA 8AAZL(3) TAA 8AAZLF TAA 8AAZLF(2) TAA 8AAZLG TAA 8AAZLH TAA 8AAZLH(2) TAA 8AAZLH(2A) TAA 8AAZLH(3) ITAA 1997 995-1(1) A New Tax System (Goods and Services Tax) Act 1999 195-1 Fringe Benefits Tax Assessment Act 1986
Related practice statements	PS LA 2011/15 Lodgment obligations, due dates and deferrals PS LA 2011/17 Debt Relief PS LA 2011/21 Offsetting of refunds and credits against taxation and other debts PS LA 2012/6 Exercise of the Commissioner's discretion under section 8AAZLGA of the Taxation Administration Act 1953 to retain an amount that would otherwise have to be refunded.
Case references	1-59PLLGA
Other references	CEI 2014/06/04 Respecting client's rights of review
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