PS LA 2011/3 - Compromise of undisputed tax-related liabilities and other amounts payable to the Commissioner.

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Practice Statement Law Administration

PS LA 2011/3

This practice statement is issued under the authority of the Commissioner 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.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it

SUBJECT:	**Compromise of undisputed tax-related liabilities and other amounts payable to the Commissioner.**
PURPOSE:	**This practice statement sets out the factors to be considered and principles to be applied in reaching decisions on applications to compromise undisputed taxation debts.**

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BACKGROUND

1. Tax debtors have a responsibility to meet their payment obligations as and when they fall due for payment. Where a tax debtor does not pay by the due date, the Commissioner has a range of collection and recovery options (see Law Administration Practice Statement PS LA 2011/14 *General debt collection powers and principles*). These include, in appropriate cases, compromising the undisputed tax-related liabilities and other amounts payable to the Commissioner (undisputed taxation debts).

2. There is no express enactment under any of the taxation laws which empowers the Commissioner to compromise undisputed taxation debts. Section 8 of the *Income Tax Assessment Act 1936* (ITAA 1936) and equivalent provisions in other tax statutes confer upon the Commissioner responsibility for the general administration of the relevant legislation.

3. Section 15 of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) invests in the Commissioner a power to enter into an agreement that includes an undertaking not to pursue part of a taxation debt owing to the Commonwealth, as part of a financially prudent bargain.

4. Section 11 of the *Public Governance, Performance and Accountability Rule 2014* (PGPA Rule 2014) imposes on the Commissioner an obligation to pursue recovery of debts owing to the Commonwealth. This obligation is subject to some specified exceptions which in effect allow the Commissioner to decide not to pursue a debt in particular circumstances.

5. The powers of general administration, together with the powers in section 15 of the PGPA Act and section 11 of the PGPA Rule 2014 enable the Commissioner to compromise undisputed taxation debts (that is, agree to accept payment of less than the full amount owed in full and final settlement of the whole debt).

6. The power to compromise, however, is not an unfettered power that the Commissioner can exercise for any reason. It is a power which can only be properly exercised if it is exercised for a permissible purpose. In so far as the power of general administration is relevant to the compromise of taxation debts, the fundamental purpose of the power is to enable the efficient collection of taxation liabilities from those who are obliged to pay them.

TERMS USED

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

Compromise – in this context means to permanently agree not to pursue recovery of the balance of an undisputed taxation debt (effectively, to accept a sum less than the debt in full satisfaction of that debt – whether payable in one amount, either immediately or at a later date, or by instalments). It does not refer to agreements involving full payment, at a later date or by instalments, authorised by various taxation enactments which are discussed in detail in PS LA 2011/14.

Disgorged payments – refers to payments that the Commissioner is legally required to pay to a liquidator or trustee on the basis that such payment when originally received from the tax debtor was a voidable preference/transaction.

Reparation order – means an order made by a court following conviction of a person for an offence against a law of the Commonwealth (including breaches of the tax laws), which requires the person to make restitution to the Commonwealth 'by way of money, payment or otherwise' in respect of any loss suffered or expense incurred by the Commonwealth because of the offence.

Seizure of property in execution – refers to the legal process for seizing property belonging to a debtor and having it sold to meet the amount owed.

Unfair preference – refers to a transaction entered into between the company and its creditors which results in the creditor receiving, in respect of an unsecured debt, more than it would have received if the creditor were to prove for the debt in the winding up of the company.

Voidable preference – refers to payments made to a creditor by an insolvent debtor during a prescribed period prior to the debtor's bankruptcy which had the effect of putting that creditor into a preferential situation compared with other creditors.

Voidable transactions – refers to transactions in respect of which the Court may make an order under section 588FF of the *Corporations Act 2001.*

SCOPE

8. This practice statement details the factors and considerations that should be taken into account when deciding whether or not to accept an offer to compromise an undisputed taxation debt.

9. The guidelines for settlement of disputed taxation debts are contained within the ATO *Code of Settlement Practice* and those in relation to the settlement of debt recovery litigation are contained in Law Administration Practice Statement PS LA 2011/7 *Settlement of debt litigation proceedings.*

10. Securities obtained in relation to the *Excise Act 1901* cannot be compromised and are therefore excluded from the scope of this practice statement.

11. Employers' undisputed[1] debts and their associated general interest charge (GIC) which arose under the *Superannuation Guarantee (Administration) Act 1992* (exclusive of the administration components and Part 7 penalties), represent employees' entitlements which the Commissioner is required to pay to an eligible fund[2] on behalf of those employees. Accordingly, as a matter of public policy, it is considered appropriate to exclude such debts from the scope of this practice statement.

12. When assisting tax debtors in discharging their undisputed taxation debts, the Commissioner will, in the first instance, generally seek to exercise the Commissioner's express statutory powers with due regard to the relevant legislation, guidelines and policy in respect to those powers. The Commissioner's powers include, the power to:

    - remit penalties and other additional charges and interest including the GIC
    - enter into payment arrangements
    - defer time for payment
    - release from payment of certain liabilities.

13. Where the exercise of those statutory powers fails to bring about a satisfactory outcome for the revenue, the Commissioner may then consider whether it is appropriate to compromise the debt. (In some limited circumstances, the Finance Minister may approve a waiver of the debt.[3])

STATEMENT

14. The Commissioner's power to compromise must be exercised in accordance with the purpose of the taxation legislation, that is, to secure the highest net return taking into account considerations of good management and/or administrative common sense. In view of this, it would be unusual for the Commissioner to compromise a debt outside the statutory processes available under the bankruptcy and corporations laws unless it is satisfied that result would not be available without the compromise.

EXPLANATION

15. The benefits of entering into a compromise may include:

    - a saving in the costs of collection
    - collection at an earlier date than would otherwise be the case
    - collection of a greater sum than could be otherwise recovered, or
    - the abandonment by the tax debtor of some claim or right arising under a taxation law that has a monetary value (for example, the right to carry forward revenue and capital losses).

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[1] Where the employer's superannuation guarantee liability is disputed, special circumstances may warrant settlement of the dispute in accordance with the guidelines published in Superannuation practice note 2009/03 *Superannuation guarantee charge (SGC) – Settlement of disputed SGC liability*.
[2] Section 65 of the *Superannuation Guarantee (Administration) Act 1992* prescribes how the Commissioner is required to deal with employees' benefits.
[3] See Law Administration Practice Statement PS LA 2011/17 *Debt relief.*

16. Consideration will not be focused solely on the short term benefits and costs. Longer term considerations such as general compliance with taxation legislation are also relevant. Any immediate benefit of cost savings may, for example, be offset many times over if the tax debtor's compliance history is poor.

17. If considerations of good management or administrative commonsense lead the Commissioner to conclude that the most efficient way to collect the taxation liabilities correctly payable is to reach a compromise, then it is appropriate to compromise.

18. Likewise, if in a particular case, the Commissioner concludes that a greater amount can be recovered by entering into a compromise than by pursuing alternative remedies, such as agreeing to accept payment over an extended period of time or instituting legal proceedings leading to bankruptcy or liquidation, then it may decide that compromise is the most appropriate step to take.

19. On the other hand, considerations which are not directly related to the Commissioner's function of collecting taxes cannot support the use of the power to compromise. For example, it would not be permissible to accept a compromise to:

- assist those tax debtors who may have overcommitted themselves
- save a business from closure because a large number of people in a particular region depended on the business for employment
- avoid the failure of a business because the activities of the business might be seen to be serving a national interest (for example, a large exporter, a producer of a key raw material or product)
- alleviate what may be perceived to be a harsh or unfair operation of a tax law in particular circumstances
- avoid hardship (such as the need to sell a home or a business), or
- create for the Commissioner a benevolent public image or in the furtherance of some charitable objective.

20. Requests for compromise must be made to the Commissioner in writing. Application forms are available for individual and corporate tax debtors which seek the requisite information in a structured format.[4]

21. The onus is on the tax debtor to establish that the debt should be compromised. To this end, tax debtors should be made aware of the stringent requirements that must be satisfied in order to obtain a compromise agreement and of the actions the Commissioner may take if a compromise proposal is not accepted.

22. In lodging an application for a compromise, tax debtors should also be mindful that they are essentially admitting that:

(a) they are insolvent

(b) they may have been insolvent for some time, but now do not see this situation improving, and

(c) in some cases, they may have paid out other creditors to the detriment of the Commissioner (potentially, an act of bankruptcy under the *Bankruptcy Act 1966*).

[4] A link to the application forms is provided in the 'Other references' section at the end of this practice statement.

23. The Commissioner is entitled to use any available information when evaluating the risks inherent in particular debts and in considering which recovery action to take on those debts. Where such information discloses evidence of insolvency, this will usually imply a high level of risk. So where a compromise proposal is not accepted the Commissioner may take the appropriate action to mitigate such risks.

Limitations on the Commissioner's ability to compromise

24. In a private agreement between a creditor and a debtor which involves acceptance of a lesser sum in full satisfaction of a debt, the creditor, in consideration for payment of the lesser sum, would usually grant a legal discharge of the balance of the debt such that, in law, it no longer existed.

25. The Commissioner, however, does not have the same power. For taxation debts, it is the Commonwealth (not the Commissioner) who is the creditor. The Commissioner is simply the agent through which the Commonwealth acts to collect.

26. Any purported grant of a discharge would be ineffective and would not prevent subsequent recovery of the debt. Consequently, the Commissioner's inability to give a valid discharge may be unacceptable to a tax debtor.

27. Many of the remedies available to the Commissioner to secure payment are discretionary rather than mandatory. Accordingly, the Commissioner may use his judgment on how best to collect any taxation debt. The Commissioner may decide not to exercise any or all of these discretionary remedies (that is, effectively compromise the debt) provided, in so doing, the Commissioner is acting for reasons of good management or administrative commonsense so far as collecting the revenue is concerned.

28. The most appropriate mechanism for giving effect to a compromise is for the Commissioner to enter into a deed which would include a covenant that the Commissioner will not exercise any discretionary remedy to enforce payment. A covenant in these terms would be enforceable at law against the Commissioner.

29. There are limitations on the Commissioner's ability to compromise. The Commissioner cannot enter into an agreement to do something contrary to that prescribed by legislation. Any agreement attempting this would be ineffective at law.

30. The limitations on the Commissioner's ability to compromise include:

    (a) a covenant by the Commissioner not to exercise or pursue discretionary remedies will not prevent the Commonwealth itself, or other agencies of the Commonwealth, such as the Commonwealth Director of Public Prosecutions, from exercising such powers or remedies as are separately available to it or them. Such remedies include recovery of unpaid amounts (or equivalent amounts) by way of reparation orders made under the *Crimes Act 1914* or penalties under provisions such as section 12 of the *Crimes (Taxation Offences) Act 1980* or section 8W of the *Taxation Administration Act 1953 (*TAA), and

    (b) the power of compromise is not available in the cases of higher education loan programme (HELP) debts or student financial supplement (FS) assessment or accumulated debts. The Commissioner does not have the general administration of either the *Higher Education Support Act 2003* (HESA) or the *Student Assistance Act 1973* (SAA), even though he is charged with responsibility for collection of liabilities arising under those Acts through the income tax

system. Nevertheless, the provisions of sections 154-45 and 154-50 of the HESA and 12ZP of the SAA provide authority for the Commissioner to deal with any foreseeable circumstances by way of deferring or amending such assessments.

31. The only options available to a tax debtor who is not prepared to accept the limitations to the Commissioner's ability to compromise as detailed in the preceding paragraph of this practice statement, are either to apply to the Commissioner for release or apply to the Finance Minister for a waiver of the balance of the debt. A tax debtor could also obtain a discharge of the debt (apart from HELP debt) by becoming subject to the insolvency processes available under the bankruptcy or corporations laws.

Matters that should be considered

32. Generally, the avenues available to both creditors and debtors for dealing with debts under various statutes operate to effectively protect all parties and provide alternatives to bankruptcy or liquidation for debtors. Specific provisions of the bankruptcy and corporation laws act to protect the interests of all creditors, who each have the opportunity of voting on compromise proposals in cases where debtors offer payment of less than the full debt.

33. In this regard, it should be recognised that a favourable compromise arrangement with the Commissioner would serve little purpose if the tax debtor's financial position indicates that there is a risk that other unsatisfied creditors are likely to instigate bankruptcy proceedings to enforce payment of their debts. In the event of such action, any payment received by the Commissioner may need to be repaid as a voidable preference.

34. There is a similar risk for corporate tax debtors. Payments made under compromise agreements have been found to be voidable transactions (in that they were unfair preferences under section 588FA of the Corporations Act and insolvent transactions under section 588FC of the Corporations Act where the agreement may result in all creditors not being paid in a timely fashion by an insolvent company (*Smith v. DFC of T* 97 ATC 4471; (1997) 36 ATR 142)).

35. It is not possible to set out all of the circumstances which might arise in a particular case and which might justify entering into a compromise. Nevertheless, there are some matters that need to be considered before deciding whether or not to compromise a taxation debt. These include:

- determining the potential return to the Commonwealth if there were no compromise
- what allowance should be made, if any, for tax losses that may be available, and
- determining the return to the Commonwealth if the compromise was accepted.

Determining the position without compromise

36. In making an assessment of what the position will be without a compromise, it is not only necessary to look at the value of the tax debtor's present property but also to examine the tax debtor's future prospects, past transactions and the position of any related entities. There is no time limit within which the Commissioner must recover taxation debts. Consequently, the Commissioner can have access to income derived and assets acquired for an unlimited period in order to obtain payment.

37. This assessment should proceed on the basis that the tax debtor will voluntarily pay over net current assets. In relation to individual tax debtors, there is an expectation that they will also agree to pay any surplus from their current and future income which is not needed for meeting their future taxation debts or their necessary living expenses during the currency of the compromise deed, together with other assets acquired up to three years after the date of the compromise agreement. This creates some alignment with the Bankruptcy Act. (For example, Division 4B of Part VI of the Bankruptcy Act provides guidance with regard to the contribution the debtor could make). In other words, the assessment process should disregard the potential enforcement costs or the time it would take for a liquidator or trustee to ultimately realise assets to satisfy the taxation debts.

38. In considering the question of a tax debtor's future prospects, regard should be had to any arrangements which have been implemented or are proposed which might have the effect of diverting income or property that might otherwise accrue to the tax debtor or to other entities. Unless there are compelling reasons for the implementation of the particular arrangements and the diversion of income or property is unavoidable, compromise will not be accepted on the basis of the reduced income or property likely to be available. In these cases, the arrangements should be ignored for the purpose of calculating the value of the tax debtor's future income or property. This stand should be maintained even though, in the final analysis, the Commissioner might not, through bankruptcy or other legal remedies, be able to avoid the arrangements.

39. The overriding consideration is that the Commissioner should not be seen to condone arrangements which are detrimental to the revenue. To do so may encourage proliferation of such arrangements to the even greater detriment of the revenue.

40. A full assessment of the position as it would be without a compromise also involves a consideration of the application of bankruptcy and/or corporation law to the facts of the case. There are four broad areas in which bankruptcy law remedies can make available to creditors funds over and above the value of a debtor's present property. They are:

    (i) the 'clawback' of money or assets previously disposed of by way of preferences in favour of other creditors, voluntary settlement (that is, transfers of property for nil or inadequate consideration) and fraudulent disposition (that is, property disposed of with intent to defeat or delay creditors)

    (ii) the recovery of money or assets held by entities controlled by the debtor (see Division 4A of Part VI of the Bankruptcy Act)

    (iii) the requirement that the bankrupt contribute to their estates from future earnings (see Division 4B of Part VI of the Bankruptcy Act), and

    (iv) the vesting of all divisible property, acquired by a bankrupt prior to discharge, in the trustee for the benefit of creditors.

41. The Corporations Act contains provisions which roughly parallel the 'clawback' provisions of the Bankruptcy Act and there are also provisions which allow for recovery of money from company officers in a range of circumstances. A prerequisite to the employment of these provisions is the liquidation of the company.

42. Accordingly, an assessment of a compromise application should proceed on a projection of the likely return to the revenue after the Commissioner has exhausted all rights under the provisions discussed in the previous two paragraphs of this practice statement. Whilst it is preferable for the projected amount arrived at in the determination of the position without compromise to be settled between the tax debtor and the Commissioner, it is recognised that this may not always be possible given that the parties may have different views as to the Commissioner's prospect of success in any potential litigation. Notwithstanding this, no allowance should be made for the costs or delay involved in enforcing those remedies.

43. A compromise will generally deliver better results to the revenue than would be obtained by any available recovery processes and for this reason many, perhaps most, tax debtors may be unwilling to reach a compromise. As a consequence, the amounts ultimately recovered in some cases adopting other recovery approaches may be significantly less than the amounts calculated under this approach. These losses, however, are seen to be simply a cost associated with achievement of the broader objective of voluntary compliance by the taxpaying community at large. From the Commissioner's perspective, exercising good management and administrative commonsense in the general administration of the tax law entails giving precedence to this objective over the recovery of some additional funds in individual cases.

44. In evaluating the dollar value of debts that may be recoverable by a trustee or liquidator on behalf of the tax debtor from their debtors, there may be certain circumstances in which it would be acceptable to discount the face value of rights relating to past transactions or anticipated future interests. Such cases would include those involving costs of litigation in proceedings by the tax debtor which are unrelated to any action by the Commissioner on behalf of the Commonwealth (for example, costs associated with an action for damages for personal injury or breach of contract by an arms-length party).

45. It would also be permissible to discount the value of a debt payable to the tax debtor in the future provided that the circumstances concerning its creation and terms of repayment do not involve uncommercial elements. An interest-free loan to a party associated with the tax debtor, for example, could be considered to be uncommercial in this sense.

46. It is important to ensure that non-compliant behaviour in the form of reckless or careless failure to make provision to pay an expected taxation debt, even by instalments over time, is not rewarded or condoned. Again, the broader objective of achieving voluntary compliance is more important than the amount recovered in any individual case.

Losses that may be available for tax purposes

47. It will not be unusual that a tax debtor who makes a compromise proposal has incurred substantial losses of either revenue or capital nature, or both. It would be quite unacceptable that a tax debtor be allowed the benefit of a compromise, whether in respect of an income tax debt or some other taxation debt, but at the same time retain the right to offset losses against future income or capital gains.

48. Consequently, the deed evidencing the compromise should contain provisions that bind the tax debtor to not claim losses against income of future years and to exclude capital losses from the calculation of future net capital gains or losses. The provisions would need to clearly identify the specific losses (revenue, capital or both) to be foregone by reference to a date, usually the end of the income year either preceding or succeeding the date of the deed. Agreements of this kind, which effectively amount to abandonment of the tax debtor's statutory rights, can be validly entered into by tax debtors and would be enforceable by the Commissioner.

Determining position with compromise

49. Having ascertained what the potential position would be without a compromise, it is then necessary to assess what benefit will flow to the Commonwealth from acceptance of the compromise offer. Unless benefits of substance can be clearly demonstrated, then the compromise offer should be rejected.

50. It is not sufficient that the compromise offer is equal to the Commissioner's assessment of what the position would be without the compromise. There must be a positive advantage of substance to the revenue in accepting the compromise. If for no other reason, this stance is justified by the fact that a compromise will involve loss of access to any future windfall gains by the tax debtor which, of course, will not have been taken into account in the evaluation process described previously.

Guiding principles in considering compromise applications

A. The Commissioner will not accept compromise proposals that offer less than the tax debtor's total net assets in full satisfaction of the taxation debt.

51. Bankruptcy law and the law relating to seizure of property in execution exempt from this obligation certain basic necessities like clothing, furniture, tools of trade and the like. Subject to these exemptions, any compromise offer will be expected to consist of no less than the full value of the whole of the tax debtor's present property.

52. The same guiding principle applies to corporate tax debtors. Because of this, it is unlikely that many corporate tax debtors will seek to compromise their debts. They will probably seek an arrangement with creditors under Part 5.3A of the Corporations Act or go into liquidation. Both of these options are discussed in Law Administration Practice Statement PS LA 2011/16 *Insolvency – collection, recovery and enforcement issues for entities under external administration*. Where a corporate tax debtor is contemplating a compromise, enquiries should be made to ascertain whether the tax debtor or its principals have engaged in conduct that satisfies guiding principle (E) (that is, the Commissioner will not consider requests for compromise where this may directly or indirectly impact on other actions involving the tax debtor or other parties).

B. The Commissioner will not accept compromise proposals unless there is a benefit in doing so over and above that which would flow from taking actions under either the Bankruptcy Act or the Corporations Act.

53. If in a particular case, the Commissioner concludes that a greater amount can be recovered by entering into a compromise than by pursuing alternative remedies, such as agreeing to accept payment over an extended period of time or instituting legal proceedings leading to bankruptcy or liquidation, then it may decide that compromise is the most appropriate outcome for the revenue.

54. It is often argued that the Commissioner should accept a lesser amount than what is recoverable in a bankruptcy or liquidation, because if he does not, he will suffer the expense and delay of legal proceedings necessary to forcibly realise property. This argument is not accepted because to do so would be to reward behaviour which amounts to non-compliance with the tax debtor's obligations. This would be wholly inconsistent with the objective of achieving a high level of voluntary compliance by the community generally. However, due allowance can be made for the legitimate costs associated with the realisation of an asset which are not attributable to any active obstruction (or inaction) on the part of the tax debtor.

55. Another aspect is what cost savings to the Commissioner are relevant in calculating any benefit. Only future cost savings are relevant. Tax debtors who defer discussing their affairs with the Commissioner until they are at the door of the Court will have little chance of their proposals being accepted as the Commissioner would have already incurred costs in commencing the legal proceedings.

C. The Commissioner must be able to quantify the tax debtor's total taxation debt.

56. The tax debtor's lodgment obligations must be up to date and there must be certainty as to the amount that is the subject of the compromise application.

57. The Commissioner will not consider requests for compromise where:

- the taxation debts are subject to dispute
- an application to waive the debt has not been finalised, or
- an application for release from payment of an income tax or fringe benefits tax debt has not been finalised.

58. In terms of disputed debts, the *Code of Settlement Practice* sets out the relevant considerations for reaching an out-of-court settlement concerning the amount which a tax debtor is or will be liable to pay in a case where there is a genuine dispute about the actual amount of a liability.

59. In most cases where disputed debts are settled, the terms of settlement are given effect by the issue of assessments or amended assessments on an agreed basis and those assessments thereafter determine for all purposes the amount of a tax debtor's liability.

D. The Commissioner will neither prejudice other creditors' entitlements nor accept that other creditors can prejudice the Commissioner's entitlements.

60. In considering whether or not to enter into a compromise, it is necessary to ensure that the proposed compromise does not disadvantage any other creditors. Such a proposal should be refused unless it can be shown that all affected creditors consent to the arrangement. On the other hand, a proposal involving payment to the Commissioner of funds provided by a third party, for example, a relative, would not disadvantage any other creditor.

61. It would also be prudent to gain an appreciation of the other creditors' intentions in relation to the payment of their debts. Firstly, the Commissioner will not consider a proposal if another creditor intends to take, or has initiated, formal recovery proceedings. Secondly, it is necessary to ensure that whatever arrangements have been, or are proposed to be, made in relation to some or all other creditors do not place them in a position of advantage relative to the Commonwealth. Proposals where the Commissioner is the only creditor should receive very close scrutiny as it is likely that other creditors' debts may have been fully satisfied in preference to the taxation debts.

62. There would, of course, be no objection to creditors, such as former employees with claims for wages, who would enjoy priority in a formal administration under insolvency law, being given an equally preferred status under the proposed compromise terms.

E. The Commissioner will not consider requests for compromise where this may directly or indirectly impact on other actions involving the tax debtor or other parties.

63. In respect of the recovery of penalties for directors of non-complying companies under Division 269 of Schedule 1 to the TAA (and Division 9 of Part VI of the ITAA 1936 for penalties due prior to 1 July 2010), compromise is unavailable in situations where a director penalty liability exists for more than one director. Compromise can only be considered where options against the company are exhausted and there are no director penalty liabilities outstanding for the same debt against other directors. Therefore, compromise may be an option:

- for a single director of a company - where all viable recovery avenues against the company have been exhausted, or
- where one or more directors are exposed to a parallel liability - where all viable recovery avenues against the company and the other directors have been exhausted.

64. Under section 588FGA of the Corporations Act the Commissioner is entitled to seek an indemnity against a director of a company in respect of any loss or damage resulting from an order obtained by a liquidator against the Commissioner in respect of an unfair preference or other voidable transaction relating to a pay as you go withholding payment. Where directors have a liability under section 588FGA, they may seek to compromise that debt. It should be borne in mind that the effect of section 588FGA is to return the Commissioner to a similar legal position that the Commissioner would have been in had the disgorged payments not been made and the Commissioner had invoked the director penalty recourse set out under Division 269 of Schedule 1 to the TAA (and in Division 9 of Part VI of the ITAA 1936 for penalties due prior to 1 July 2010). Although liabilities of directors arising under section 588FGA are not taxation debts as such, the Commissioner will adopt a similar approach to the compromising of such debts as he would with a director penalty liability (see paragraph 63 of this practice statement).

65. Compromise is rarely available in situations where more than one member of a consolidated group under Division 721 of the *Income Tax Assessment Act 1997* (ITAA 1997) is jointly and severally liable for the same debt because the Commissioner may recover from other members of the consolidated group. Where a contributing member is liable for an amount under a tax sharing agreement, compromise will not be considered until all options against the head company have been exhausted. An offer of compromise made by either the head company or a contributing member may be considered once all options against each jointly and severally liable party have been exhausted.

66. It is open to the tax debtor to seek to compromise their debts once all options against each jointly liable party have been exhausted. In rare cases where a dispute exists between the parties who are jointly and severally liable for the tax debt, their rights could also be compromised where there is a demonstrable benefit to the revenue. In that event, the compromise of these other actions could include terms to encompass all debts owed by the tax debtor and other parties. For example, a director against whom action is being taken to recover a director's penalty may also have an income tax debt. In appropriate cases, the Commissioner may compromise both debts. Where this occurs, the tax debtor and the other parties would normally be made parties to the compromise arrangement by way of deed.

F. The Commissioner cannot accept compromise proposals where the only reason to support the proposal is the tax debtor's claim of hardship in paying their taxation debts.

67. Considerations of hardship alone cannot justify the exercise of the power to compromise. Parliament has laid down a specific procedure for dealing with serious hardship cases. This procedure has displaced any implied authority the Commissioner may have had to deal with hardship cases under his powers of general administration. For the same reason, serious hardship considerations cannot justify the exercise of the power to compromise in the case of those liabilities for which there is no provision for release on grounds of serious hardship.

68. A typical example is where the total of the tax debtor's resources is equal to the taxation debt. The fact the tax debtor must dispose of a home and a source of income (be it a business or investments) and all other assets and property in order to pay will not justify accepting less than the full amount as full payment of the debt. Tax debtors have a responsibility to manage their affairs to ensure funds are available to meet taxation debts. The fact they may have used funds to acquire assets instead of setting those funds aside to meet their taxation debts is no reason for the Commissioner to accept anything less than the full amount.

G. The Commissioner will take into account the tax debtor's compliance history.

69. An agreement to compromise a debt is essentially based on trust. The Commissioner will not enter into a compromise agreement where a tax debtor has demonstrated a lack of candour, provided misleading or incomplete information, declined to provide any information, or failed to enter into or honour reasonable agreements to pay their debts without reasonable cause.

70. In deciding how to administer the taxation laws, the Commissioner manages risks. High risk taxpayers include those who continually participate in aggressive tax planning arrangements, regularly lodge their taxation returns late and/or pay their taxation debts late or not at all. The conduct of high risk tax debtors excludes them from compromise agreements. For these reasons, debts in the form of reparation orders and other similar orders made by the Courts as a result of a conviction will not be compromised.

H. The Commissioner will not accept a compromise proposal where the tax debtor could lodge a debt agreement under Part IX of the Bankruptcy Act.

71. As debt agreements offer the same benefits to tax debtors as compromise agreements, but at less cost to the Commissioner, the Commissioner will not consider compromise proposals where the tax debtor meets the requirements of, and can lodge, a debt agreement proposal with the Australian Financial Security Authority.

I. The Commissioner will not accept a compromise proposal where, within 5 years immediately before the proposal, the tax debtor has been a:

- ***party to an earlier compromise agreement with the Commissioner***
- ***bankrupt, or***
- ***party to an arrangement under Part IX or Part X of the Bankruptcy Act or Part 5.3A of the Corporations Act.***

72. The above arrangements within taxation, bankruptcy and corporations legislation provide for different forms of insolvency administration for tax debtors that relieve the tax debtor from the burden of their debts so that they can start afresh. In deciding how to collect taxation debts, the Commissioner manages risks. Tax debtors that seek to be relieved of their debts within this time period are too high a risk for compromise agreements.

Application of refunds and credits

73. Section 8AAZL of the TAA sets out how the Commissioner must treat payments, credits and running balance account (RBA) surpluses. The Commissioner may allocate a payment or credit first to an RBA (Method 1) or apply these amounts first against a non-RBA tax debt (Method 2).

74. Generally, 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 entity (subsection 8AAZL(3) of the TAA). These circumstances include where:

- the debt is due but not yet payable
- the taxpayer is complying with an arrangement to pay the debt by instalments, or
- the Commissioner has agreed to defer recovery of the debt.

75. Notwithstanding that the acceptance of a compromise by the Commissioner constitutes a permanent deferment of recovery of the debt, as a general principle, the Commissioner will offset any credits that may arise against the amount of the tax debt until such time as all the terms of a deed have been fully satisfied.

76. When the tax debt payable under a deed of compromise has been extinguished, any credits that may subsequently arise cannot be applied against the amount of debt that the Commissioner has agreed to compromise.

Deed to evidence compromise agreement

77. In all cases of compromise, a deed drafted by ATO Review and Dispute Resolution, must be signed by all relevant parties to evidence what has been agreed between the parties.

Amendment history

Date of amendment	Part	Comment
4 December 2013	General	Updated to meet ATO style guide requirements and to improve readability.
	Scope – new paragraph 11	To exclude superannuation guarantee debts from the scope of the practice statement
30 June 2014	Paragraphs 3, 4 and 5; Legislative references	Updated references to *Financial Management and Accountability Act 1997* with relevant provisions in *Public Governance, Performance and Accountability Act 2013* and *Public Governance, Performance and Accountability Rule 2014;* updated contact details.
4 December 2014	Paragraph 74	Corrected to reflect the legislative change introduced in 2011 and to clarify the circumstances when the Commissioner may refund an amount.

ATOLaw topic	Income Tax ~~ Administration ~~debt recovery and insolvency
Legislative references	ITAA 1936 8 ITAA 1936 Pt VI Div 9 ITAA 1997 Div 721 TAA 1953 8W TAA 1953 8AAZL TAA 1953 8AAZL(3) TAA 1953 Sch1 Div 269 Bankruptcy Act 1966 Pt VI Div 4A Bankruptcy Act 1966 Pt VI Div 4B Bankruptcy Act 1966 Pt IX Bankruptcy Act 1966 Pt X Corporations Act 2001 Pt 5.3A Corporations Act 2001 588FA Corporations Act 2001 588FC Corporations Act 2001 588FF Corporations Act 2001 588FGA Crimes Act 1914 Crimes (Taxation Offences) Act 1980 12 PGPA Act 2013 15 PGPA Rule 2014 11 Excise Act 1901 HESA 2003 154-45 HESA 2003 154-50 SAA 1973 12ZP Superannuation Guarantee (Administration) Act 1992 65
Related practice statements	PS LA 2011/7 Settlement of debt recovery litigation proceedings PS LA 2011/14 General debt collection powers and principles PS LA 2011/16 Insolvency – collection, recovery and enforcement issues for entities under external administration PS LA 2011/17 Debt relief
Case references	Smith v. DFC of T 97 ATC 4471; (1997) 36 ATR 142
Other references	Code of settlement Australian Financial Security Authority
File references	1-4EEQXYH
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Contact email	OperationalPolicyAssuranceandLawWorkManagement@ato.gov.au
Section	Operational Policy, Assurance and Law