PS LA 2011/4 - Recovering disputed debts

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This document has changed over time. This version was published on *14 April 2011*

Generated on: 27 November 2026, 02:40:40 AM

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2011/4

FOI status: may be released

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: **Recovering disputed debts**

PURPOSE: **To outline the circumstances and risk factors that will determine how and when action will be taken to recover disputed debts**

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BACKGROUND

1. The legislative framework which underpins the Commissioner's policy in the collection and recovery of disputed debt is designed to ensure that tax debtors do not improperly delay payment of tax by lodging objections, requests for tribunal reviews or appeals.

2. In that regard, the Commissioner can take legal action to recover outstanding tax irrespective of whether the tax is subject to an objection, review or appeal. (See *DFC of T v. Niblett* (1965) 8 FLR 134; *DFC of T v. Mackey* 82 ATC 4571.) Accordingly, the lodgment of an objection, while it remains unresolved, will not automatically relieve tax debtors of their obligation to make prompt payment, or serve to stay recovery action. (Refer to sections 14ZZM and 14ZZR of the *Taxation Administration Act 1953* (TAA).)

3. Similarly, the general interest charge (GIC) accrues on any disputed debt that remains unpaid after its due date.

TERMS USED

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

Administrative overpayment – has the same meaning as the definition in subsection 8AAZN(3) of the TAA.

Disputed debt – is a term used for the purposes of this practice statement to describe a tax-related liability, which is subject to an objection, a tribunal review or an appeal. In this context, 'disputed debt' also includes other related components that may arise from the making of the assessment increasing the liability of the taxpayer to tax. These related components include tax shortfall penalty and the GIC calculated from the date the correct amount of tax should have been paid and up until the date the assessment is made.

GIC – in this practice statement, refers to the general interest charge imposed for late payment.

MAP – is an abbreviation for the Mutual Agreement Procedure contained in Australia's double tax agreements which provide a process for resolving disputes pertaining to tax also assessed under other tax jurisdictions.

Principal tax debt – is a term used for the purposes of this practice statement to describe the primary tax at the centre of the dispute. It would include amounts like assessed income tax, assessed GST and assessed fringe benefits tax. It does not include the other debts that may arise from the making of these assessments, such as tax shortfall penalty or GIC.

Tax-related liability or liability – is a term used to define any pecuniary liability to the Commonwealth arising directly under a taxation law (including a liability the amount of which is not yet due and payable). It thus encompasses all types of taxes, penalties, additional charges for late payment, (including amounts previously defined under the *Income Tax Assessment Act 1936* (ITAA 1936) as 'tax' and under the *Superannuation Guarantee Administration Act 1992* as 'superannuation guarantee charge'). A table which lists the tax-related liabilities is found in section 250-10 of Schedule 1 to the TAA.

50/50 arrangement – is a term used to describe an agreement between the Commissioner and a tax debtor where upon payment of a minimum of 50% of the disputed debt, the Commissioner agrees not to recover the balance of the disputed debt and consents to a remission of 50% of the GIC (or 75% in certain cases – see paragraphs 22 and 23 of this practice statement) which would otherwise accrue in the event that the tax debtor's dispute is unsuccessful. This arrangement may be subject to certain conditions outlined in this practice statement.

STATEMENT

5. In dealing with objections and managing the risk to payment of disputed debt, the Commissioner is required to deal with varying classes of tax debtors in terms of their attitude, behaviour and compliance with the law. Thus, where an unresolved dispute is on foot, the risk of non-payment of any outstanding disputed debt is a serious concern which requires regular assessments of the risks associated with the case. In that regard, the risk factor will generally dictate the measure and level of sanction that the Commissioner will apply in managing the collection of disputed debts. (That is, the most severe sanction in the case where the highest level of risk is identified – see Law Administration Practice Statement PS LA 2011/6 Risk and risk management in the ATO.)

6. Tax officers must follow the principles and guidelines outlined in this practice statement. It is noted however that it is not possible to cover all the circumstances which may arise in dealing with disputed debt cases. Each case has to be considered on its merits and on the basis of all the relevant facts. Tax officers must not consider irrelevant factors and must exercise their own judgment in arriving at an appropriate decision based on the particular facts. The decision should be made in good faith and without bias.

7. The Commissioner's power to recover disputed debt is not an unfettered power. The courts have an inherent discretion to stay or intervene in the recovery process but will only do so in special circumstances. The onus lies on the tax debtor to justify any intervention by the court.

8. Some of the principles which the courts take into account in deciding whether to intervene may be relevant for the Commissioner in deciding whether to defer recovery action. These include:

   - The courts give 'great weight' to the policy priority given by the legislation to the recovery of revenue over the finalisation of objections and appeals.
   - The fact that the tax debtor has a dispute is a relevant factor to be taken into account but is not of itself sufficient to defer recovery action.
   - The merits of the tax debtor's dispute (for example, if the Commissioner is taking a position against the weight of precedent cases) may constitute a factor to be taken into account in deciding whether or not to grant a deferral of legal action.

- The courts give serious consideration to any adverse consequences to tax debtors that may flow from recovery action being instituted prior to the determination of objections. Accordingly, a stay may be granted in cases of extreme personal hardship to the tax debtor, however, the obligation to pay tax does not on its own constitute hardship. A stay may also be granted where the court considers it necessary to prevent an abuse of the court's process, for instance through vexatious or oppressive recovery proceedings.
- The courts will be reluctant to grant a stay where the tax debtor was party to artificial and contrived arrangements to avoid tax (*DFC of T v. Mackey* 82 ATC 4571).
- The courts will generally not exercise their discretion to set aside a statutory demand simply because the assessment on which it was based is the subject of a dispute under Part IVC of the TAA (*Hoare Bros Pty Ltd v. DFC of T* 96 ATC 4163). The High Court has re-affirmed this interpretation and determined that it applied equally to assessments of goods and services tax (GST) that are subject to dispute *(DCT v. Neutral Bay Pty Ltd; DCT v. MA Howard Racing Pty Ltd; DCT v. Broadbeach Properties Pty Ltd* ('Howard Group') [2008] HCA 41).

General principle

9. As a general principle, the Commissioner expects that all debts, including those subject to dispute, will be paid on time. Where tax is paid and the dispute is resolved in favour of the tax debtor (in whole or in part), the Commissioner will pay interest on overpayments under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*, in respect of certain types of tax which have been overpaid. (See Law Administration Practice Statement PS LA 2011/23 Credit Interest.)

General approach

10. The Commissioner may initiate recovery action for collection of unpaid disputed debts at any time, even before determining an objection, based on an analysis of the risk associated with the case. (See PS LA 2011/6.) This risk analysis continues during the various stages of the dispute resolution process while a debt remains unpaid.

11. In most cases where the Commissioner is satisfied that there is little or no risk, the tax debtor will be allowed to minimise exposure to the imposition of the GIC, where an objection, appeal or review has not been finalised, by entering into a 50/50 arrangement.

Inconsistencies in the interest on overpayment regime

12. The *Taxation (Interest on Overpayments and Early Payments) Act 1983* does not apply to the overpayment of all components of a disputed debt.

2001 income tax year & prior

13. In relation to assessments for years of income earlier than the 2000–01 income year, the Commissioner will pay interest following the determination of a dispute in the tax debtor's favour in respect to overpayments of the principal tax, tax shortfall penalties imposed under Part VII of the ITAA 1936 and the interest and GIC incurred under section 170AA of the ITAA 1936.

2004 year & prior

14. However, in relation to assessments for the 2000–01 to 2003–04 years of income, following a determination in the tax debtor's favour the Commissioner can only pay interest in respect to overpayments of the principal tax. That is, in these circumstances the Commissioner cannot pay interest in respect to any overpayment of tax shortfall penalties incurred under Division 284 of Schedule 1 to the TAA or GIC incurred under Division 5 of the *Income Tax Assessment Act 1997 (*ITAA 1997) (these penalties and charges essentially replaced the amounts formerly imposed under Part VII and section 170AA of the ITAA 1936).

2005 year & onwards

15. For years of income 2004–05 onwards, the Commissioner remains unable to pay interest in respect of any overpayment of tax shortfall penalties incurred under Division 284 of Schedule 1 to the TAA. However, for income tax cases, the Commissioner is able to pay interest on overpayment in respect to an overpayment of shortfall interest charge incurred under Division 280 of Schedule 1 to the TAA.

16. Similar considerations may apply to other tax types. For example overpayments of shortfall penalties and GIC relating to GST or a disputed liability properly characterised as an administrative overpayment do not attract interest under the Interest on Overpayment Regime.

17. In recognition of the irregular operation of the interest on overpayment regime, the framework for collection of disputed debt has been structured to ensure that those tax debtors who wish to pay a portion of their disputed debts are not unfairly disadvantaged.

Test Case Litigation Program

18. The Test Case Litigation Program (TCLP) is a public interest litigation program which provides financial assistance to selected taxpayers involved in litigation that will likely clarify the operation of the laws administered by the Commissioner.

19. The purpose of the program is to develop legal precedent, that is, legal decisions which provide guiding principles on how laws administered by the Commissioner should be applied.

20. The criteria used for selecting cases for the program is set out in the TCLP booklet which can be downloaded from our website at www.ato.gov.au.

21. Details of the additional concessions offered to participants via the TCLP are outlined at paragraph 24 of this practice statement.

50/50 arrangements

22. A 50/50 arrangement is entered into by a tax debtor to minimise exposure to the GIC which would normally accrue at the statutory rate while an amount of disputed debt remains unpaid.

    This arrangement requires the tax debtor to agree to:

    - pay all undisputed debts and a minimum of 50% of the disputed debt (see calculation of amount payable below)

- co-operate fully in providing any requested information necessary for the early determination of the objection within 28 days of the request or within another agreed timeframe set by the case officer, and
- pay the whole of any subsequently arising tax liability which is not in dispute and for which no other deferral of legal action has been granted.

23. The Commissioner, in return, will agree not to recover the unpaid balance of the disputed debt until 14 days after (as appropriate):

    - the Commissioner determines the objection, or
    - the date the decision is handed down by the relevant appellate tribunal or court,

    and consent to a remission of 50% of the GIC which would otherwise accrue in the event that the tax debtor's dispute is unsuccessful. (See paragraphs 34 to 36 of this practice statement for full details of remission of GIC available in respect of the different years of income.)

24. Where a tax debtor, who has been selected as a test or lead case participant funded as part of the TCLP, enters into a 50/50 arrangement the Commissioner will increase the existing GIC remission concession from 50% to 75%.

Exclusion from 50/50 arrangements

25. Where the tax debtor's dispute relates to a debt which arose under the *Superannuation Guarantee (Administration) Act 1992,* a 50/50 arrangement will not be available to the tax debtor.

26. The rationale for this exclusion is that the GIC that would normally be remitted under a 50/50 arrangement represents a reduction in the employees' entitlement.

27. Accordingly, it is not considered appropriate for the Commissioner to enter into a 50/50 arrangement which may impact on the entitlement of employees.

Continuation of 50/50 arrangement at appeals and review stage

28. Where the Commissioner has entered into a 50/50 arrangement at the objection stage, and following the determination of the objection, the tax debtor promptly lodges an appeal or requests that the dispute be referred to the Administrative Appeals Tribunal (AAT), the Commissioner will (depending on an assessment of risk) generally extend the period of the 50/50 arrangement until 14 days after the date that the decision is handed down by the relevant appellate tribunal or court.

29. The level of risk associated with the case will dictate whether a 50/50 arrangement granted at objection stage should be rescinded or continued until finalisation of the appeal or review. Paragraphs 42 and 43 of this practice statement set out circumstances where a 50/50 arrangement will be rescinded.

30. In most cases, 50/50 arrangements should be rescinded where the subject matter of the objection at hand has been decided by a court or tribunal in favour of the Commissioner in a substantially similar case.

Description of disputed amounts payable under 50/50 arrangement

31. It should be noted, however, that the optional amounts if left outstanding, will attract GIC calculated at the full rate in the event that the dispute is resolved in favour of the Commissioner. Therefore the tax debtor may choose to pay 50% of the optional amounts and receive a remission of 50% of the GIC which would otherwise accrue in the event that the tax debtor's dispute is unsuccessful.

32. The following table indicates the mandatory and optional amounts payable under a 50/50 arrangement for income tax in the respective years of income:

Year of income	**Mandatory amounts payable**	**Optional amounts**
Prior to 2001	50% of entire disputed debt including the principal tax, tax shortfall penalties imposed under Part VII of the ITAA 1936 and the GIC incurred under section 170AA of the ITAA 1936.	Nil
2001 – 04 Inclusive	50% of the disputed principal tax.	Tax shortfall penalty imposed under Division 284 of Schedule 1 to the TAA and the GIC incurred Division 5 of the ITAA 1997.
2005 and subsequent years	50% of the disputed principal tax & 50% of the disputed shortfall interest charge imposed under Division 280 of Schedule 1 to the TAA.	Tax shortfall penalty imposed under Division 284 of Schedule 1 to the TAA and the GIC incurred under Division 5 of the ITAA 1997.

33. For other tax types those components of the disputed liability which attract overpayment interest will be considered mandatory amounts.

General Interest Charge imposed or remitted under 50/50 arrangements

34. Where the Commissioner has entered into a 50/50 arrangement with a taxpayer upon receiving payment of only 50% of the mandatory portion of the disputed debt, the tax debtor will still receive a deferral of legal action in respect to the entire unpaid balance of the disputed debt as outlined above. However, in this circumstance the tax debtor will be liable for GIC as follows:

- on any debts not in dispute, GIC will accrue at the full rate from the due dates until the date of payment
- on the full amount of the disputed principal tax debt, GIC will accrue at the full rate from the due date for payment until, but not including, the date the tax debtor pays a minimum of 50% of the disputed principal tax debt
- on the remaining balance of the disputed principal tax debt that is being deferred under the arrangement, the tax debtor will be liable for 50% of the GIC calculated for the period commencing from the date of payment of a minimum of 50% of the disputed principal tax debt until 14 days after the date (as appropriate):
  - the Commissioner determines the objection, or

- the decision is handed down by the relevant appellate tribunal or court

(that is, the Commissioner will remit 50% of the GIC accrued during this period)

- on the remaining balance of the optional components of the disputed debt that are being deferred under the arrangement (for example, the unpaid disputed tax shortfall penalty imposed under Division 284 of Schedule 1 to the TAA and the GIC incurred under Division 5 of the ITAA 1997 for the period commencing from the date the correct amount of principal tax should have been paid and up until the date the assessment is made), GIC will accrue at the full rate from the due dates until the date of payment (see paragraph 31 of this practice statement, a tax debtor may reduce their exposure by paying 50% of all these other related components or 50% of one of these other related components as part of the arrangement), and
- 14 days after the date that (as appropriate):
  - the Commissioner determines the objection, or
  - the decision is handed down by the relevant appellate tribunal or court,

  the remaining balance of the disputed principal tax debt that was previously deferred under the arrangement will be subject to GIC at the statutory rate until the balance is paid in full.

35. As mentioned above, in addition to paying a minimum of 50% of the mandatory portion of the disputed debt, a tax debtor may choose to voluntarily pay as part of the arrangement:
    - 50% of all of the optional components of the disputed debt (for example, any tax shortfall penalty and certain amounts of GIC), or
    - 50% of any one of these other components.
36. Where a tax debtor, for example, has chosen to voluntarily pay 50% of the entire disputed debt as part of the 50/50 arrangement, the tax debtor will further minimise their exposure to GIC. In this case, in addition to the GIC concession outlined in paragraph 34 of this practice statement, the tax debtor will also receive in relation to the remaining balance of the optional components of the disputed debt, a 50% remission of the GIC calculated for the period commencing from the date of payment of 50% of the optional components of the disputed debt until 14 days after the date that (as appropriate):
    - the Commissioner determines the objection, or
    - the decision is handed down by the relevant appellate tribunal or court.

Where the tax debtor does not accept a 50/50 arrangement

37. Should the tax debtor choose not to enter into a 50/50 arrangement, collection action is unlikely to be commenced prior to the determination of the objection unless the circumstances of the case indicate an unacceptable level of risk.
38. Similarly, at review or appeals stage, collection action is unlikely to be commenced prior to the decision of the AAT or court, unless the circumstances of the case indicate an unacceptable level of risk.

39. It should be noted, however, that the fact that the Commissioner has not, for whatever reason, instigated collection action while an objection, tribunal review or appeal remains unresolved does not in itself amount to a decision by the Commissioner to defer recovery of the disputed debt.

40. Where a 50/50 arrangement has not been accepted, GIC will accrue at the statutory rate on any of the disputed debt that remains unpaid after its due date.

Deferral of recovery action

41. The Commissioner will only agree to a deferral of recovery action where:

- the tax debtor has entered into a 50/50 arrangement
- the Commissioner considers that a genuine dispute exists in regard to the assessability of an amount, or
- the Commissioner is pursuing arguments which are inconsistent with a previously published ATO view or go against the weight of precedent cases (that is, the Commissioner is challenging the previously accepted position).

Such an agreement will usually be expressed in writing.

High risk cases

42. A 50/50 arrangement will be refused or rescinded and recovery action may be instigated even before an objection, review or appeal is finalised where there are reasonable grounds for the Commissioner to believe that the associated risk requires such action. (See PS LA 2011/6.)

43. In all cases action may be taken to recover disputed amounts where:

- the tax debtor's total liability includes an amount which is not subject to a dispute
- there are reasonable grounds to believe the revenue is at risk (for example, funds or assets are being dissipated)
- the tax debtor declines to supply additional facts or other material, within 28 days of the request, necessary for the determination of the objection. This timeframe may be varied, where appropriate, by negotiation between the case officer and the tax debtor, or
- the objection is considered to be frivolous or without merit by virtue of the fact that the law in relation to the matter in dispute is well-settled and the tax debtor is going against the weight of precedent cases[1]. In such cases, it is unlikely that the Commissioner will consider acceptance of a 50/50 arrangement or security as an alternative to legal action for recovery of the whole debt.

[1] for example, where the tax debtor's grounds of objection have been previously considered and rejected by an appellate tribunal in another similar case and leave to appeal to a superior court has been refused to that tax debtor.

Legal action in high risk cases

44. Where the level of risk requires the Commissioner to instigate legal recovery action for collection of a disputed debt, such action will be taken by the most appropriate means depending upon the circumstances of the case, whether by issuing a summons or writ or the use of a statutory demand pursuant to section 459E of the *Corporations Act 2001*.

45. Where the Commissioner has obtained an unfettered judgment as a result of civil proceedings, execution of such judgment may be sought in appropriate cases.

    However, if the facts of the case necessitate recovery action to proceed to bankruptcy or liquidation (for example, where delaying such action would jeopardise a trustee or liquidator's ability to claw back assets within a statutory timeframe), the seriousness of such action will require approval to proceed from the responsible Director in the Debt Business Line.

46. Where a tax debtor seeks to delay the recovery action by applying for a stay of recovery or of execution, GIC will continue to accrue at the statutory rate irrespective of the outcome of the application. At that point in time, it will be imperative to reassess the risk associated with the case. The court may be advised in certain low risk cases[2] that the Commissioner will agree to recovery action being deferred, only in respect of any disputed debt, if:

    - the tax debtor meets the Commissioner's requirements for a deferment of legal action set out above, or
    - the tax debtor or another party provides an acceptable undertaking to the court that in the event of a decision favourable to the Commissioner, the disputed debt will be paid in full within 14 days of the decision of the AAT or court. Such deferment will be subject to the imposition of GIC at the statutory rate.

47. If the tax debtor declines to accept these terms, the recovery action should proceed. In rare cases, the tax debtor may be able to demonstrate they do not have sufficient assets to support an acceptable undertaking to the court that the debt will be paid in full if the AAT or court fully or partially disallows the appeal (that is, the tax debtor can demonstrate to the court that they would be insolvent if the tax debts were held to be payable). In those circumstances, subject to the level of risk, provided that the tax debtor consents to the Commissioner having leave to enter judgment, the Commissioner would in turn consent to a stay of entry of judgment until 14 days after the decision of the AAT or court.

48. It should be noted that the onus remains with a tax debtor to produce documentary evidence in support of their financial position. A mere allegation that the tax debtor is facing insolvency does not in itself mean that the Commissioner should await the outcome of protracted litigation before obtaining an appropriate share in the bankrupt's estate. (See *DCT (Vic) v. Ewen* 84 ATC 4550.)

49. Wherever possible, suitable consent orders should be settled to reflect the exact terms of an agreement and to eliminate the possibility of further dispute in the event that a favourable decision necessitates the entry of judgment by the Commissioner.

[2] for example, where the taxpayer has a genuine dispute that is not the subject of a previous judicial pronouncement.

Alternatives to legal action in high risk cases

50. Where the Commissioner determines that the level of risk necessitates action to secure payment of the disputed debt before resolution of a dispute, the following options will be considered as alternatives to the instigation of legal action for recovery of the debt or possible submissions from the tax debtor to mitigate the perceived risk:

- Payment of the whole debt within 14 days of a demand being issued to the tax debtor.
- Payment of the whole debt by instalments.
- Payment of 50% of the disputed debt in a lump sum with the balance being paid by instalments.
- Payment of 50% of the disputed debt together with the provision of acceptable security for the remaining balance.
- Provision of acceptable security for the whole debt.
- Provision of financial documents to substantiate that payment of the disputed debt would cause serious financial hardship (*DC of T v. Gergis* 91 ATC 4510; *DC of T v. La Rosa* (1997) 37 ATR 84).

51. Acceptance of any of the above options will be subject to imposition of the GIC at the statutory rate on any amounts ultimately held to be payable. However, consideration may be given to remission of part of the amount imposed upon receipt of an application for remission from the tax debtor.

52. Where a tax debtor is unable to comply with the Commissioner's demand for payment within 14 days and wishes to advance submissions to mitigate the perceived risks, the Commissioner will require a full and true disclosure of the financial position of the tax debtor and all associated entities upon which the tax debtor can reasonably be expected to rely for financial assistance. In addition to the pre-requisite financial statements which would normally be required by the Commissioner, the tax debtor may also be required to disclose information such as the name of the owners of properties where the tax debtor resides or conducts their business and where third parties are reported to be the owners of such properties.

Serious financial hardship

53. A submission based on serious financial hardship would require the support of financial documents, which show that the tax debtor's inability to pay the disputed debt is not merely due to short-term liquidity problems. Conversely, a disclosure which amounts to a declaration of insolvency as defined in the *Bankruptcy Act 1966* would not be considered just cause for deferring legal recovery action.

54. Serious financial hardship in the context of a personal taxation debt of an individual tax debtor, such as income tax, is likely to ensue where payment of the disputed debt would place a tax debtor in a situation where there are insufficient assets, which could be reasonably realised to cover the gap between personal income and the expenses associated with the basic necessities of everyday life.

55. In the context of an individual or corporate tax debtor who is engaged in business, a presumption of serious financial hardship would be sustained where the tax debtor can demonstrate that the business would suffer prejudice of an extraordinary type such that survival of the business would be endangered if forced to make payment of 50% of the disputed debt.

56. Misfortune beyond a tax debtor's control such as sickness, accident, flood, fire, drought, can obviously have significant impact on a tax debtor's capacity to pay, to such an extent that immediate payment of any part of a disputed debt may be regarded on compassionate grounds as an imposition of undue hardship on the tax debtor.

57. A finding of serious financial hardship is unlikely where the tax debtor or entities associated with the tax debtor hold assets such as term deposits, shares, investment properties, boats, or where there appears to be considerable scope for economising on items such as accommodation, clothes, education or general living or business expenses. Similarly, the mere anticipation of inconvenience or disruption to the tax debtor's business or personal lifestyle which could result from the reorganisation of the tax debtor's financial affairs to pay 50% of the disputed debt would not amount to hardship.

Securities

58. It should be noted that unlike a financial institution whose primary function is to derive interest income on loans to its clients, the Commissioner's primary duty to Government is to optimise collection of taxation debts. From that perspective, it is not normally in the revenue's best interest for the Commissioner to accept security in lieu of payment of disputed debts. Accordingly, the Commissioner will only accept security in very limited circumstances[3]. (For a definition of 'acceptable security', see Law Administration Practice Statement PS LA 2011/14 General debt collection powers and principles.)

Objections after the commencement of recovery action

59. In any case, where the due date for payment of tax has passed and an objection has not been lodged, the ATO may commence debt collection action in accordance with the principles and practices set out in this policy document. Such action will usually be preceded by an advice of the ATO's intention to do so unless the level of risk requires the Commissioner to seek immediate injunctive relief from the court to secure assets that are in the process of being dissipated.

60. In some instances, an objection may be lodged after the ATO has commenced action to recover the debt. The notice of objection will frequently be accompanied by a request to defer or stay recovery action until the objection is determined. Alternatively, the tax debtor may defend the recovery proceedings or apply to the court to set aside a statutory demand.

61. Such requests require careful consideration to establish whether there are substantive reasons why the objection was not lodged promptly or whether the late lodgment of the tax debtor's objection was merely intended to frustrate the recovery proceedings.

[3] such as where a tax debtor has an unencumbered asset in the form of real property but has been unable to obtain a loan from financial institutions because of an inability to service repayment of such loan in the absence of sufficient income.

62. An assessment of the risks associated with the case will generally assist in determining whether the proceedings should be discontinued. To this end, the Commissioner may be prepared to discontinue proceedings on the basis that the tax debtor bears the costs of the proceedings where it can be established that:

- there is little or no risk associated with the case (see PS LA 2011/6)
- the objection has merit
- there are substantive reasons why the objection was not lodged promptly, and
- recovery proceedings would not have been instigated, had the objection been lodged promptly.

63. Where the converse applies, recovery action may proceed prior to the entering of a judgment and its execution by any means other than bankruptcy or liquidation while the objection is being processed as a matter of priority.

64. Where bankruptcy or liquidation is the only means of execution available to the Commissioner and the objection cannot be determined promptly then provided:

- the tax debtor continues to cooperate in the fast resolution of the objection
- there is little or no risk to the revenue, and
- all tax not in dispute has been paid,

the Commissioner may agree to defer bankruptcy or liquidation until the objection has been determined.

65. If the facts of the case require recovery action to proceed to bankruptcy or liquidation, approval to proceed with such action should be sought from the responsible[4] Director in the Debt Business Line.

Bankrupt's standing to pursue objection

66. Where the tax debtor's estate becomes the subject of another form of insolvency administration before the objection is determined, then the right to pursue that objection, as a general rule, would vest in the insolvency practitioner who is appointed as trustee, liquidator or administrator of the tax debtor. (See *McCallum v. FC of T* 97 ATC 4509.) However, a bankrupt tax debtor may have standing to pursue an objection where the objection decision would have consequences in terms of tax payable in future years after the tax debtor's discharge (per Lehane J at 97 ATC pp 4522-4523; *Robertson Jnr v. DFC of T* 2004 ATC 4209, per curiam, at pp 4212-4213).

Remission requests based on delay

67. Occasionally some objections take longer to determine, and requests may be received for a remission of additional charges for late payment or GIC for the duration of that delay. Such a request may be made independently of any 50/50 arrangement.

[4] (for example, where delaying such action would jeopardise a trustee or liquidator's ability to claw back assets within a statutory timeframe.)

68. A full or partial remission may be granted in individual cases depending on the facts of those individual cases. In considering whether to grant any remission, it would be expected that consideration would be given to the following:

- the tax debtor's ability to pay the debt since the date the tax became due and payable
- any circumstances that have affected the tax debtor's ability to pay the debt since the date the tax became due and payable, including steps taken to mitigate, or mitigate the effects of, the circumstances that contributed to the delay in payment, and
- any special circumstances.

69. The delay in determining the objections would carry negligible weight in any consideration of special circumstances because:

(i) The fact the assessment is subject to an objection does not alter the fact the tax raised in the assessment remains due and payable.

(ii) Subject to the facts of individual cases, any delay in determining an objection should not impact on a tax debtor's ability to pay their tax. Assuming some initial financial inability to pay in full, a delay ought to enhance their ability to pay their tax debt off by instalments over time.

(iii) It may be open for some tax debtors to defer the time for payment of a liability (for example, under section 255-10 of Schedule 1 to the TAA) – see PS LA 2011/14.

(iv) Tax debtors have options to compel the Commissioner to determine an objection (see sections 14ZY and 14ZYA of the TAA).

(v) Tax debtors are entitled to interest on overpayments on any tax `ultimately found to be overpaid should the objection be allowed in full or in part.

70. The prospect of remission of GIC is not to be used as an inducement to achieve finalisation of a dispute although, depending on the circumstances, remission may form a component of a settlement.

Alternative assessments

71. Law Administration Practice Statement PS LA 2006/7 Alternative assessments outlines the approach of the ATO when alternative assessments are made in respect of the same income, benefit or transaction for one or more taxpayers.

72. Essentially, in a particular income year, the Commissioner may validly issue two or more assessments relating to the same transaction against different taxpayers, or against the same taxpayer under different taxing provisions.

73. In those cases, the payment by one of these entities of 50% of its disputed liability relating to that transaction, may provide benefits to all entities which have been assessed in relation to that transaction.

74. The benefits available to the other entities would be the remission of the GIC imposed on its disputed debt relating to that transaction. The amount of the benefit would be limited to a maximum of:

- the amount of GIC that would be remitted as a result of the payment if the payment had been made by the entity itself and not the paying entity, plus
- an amount equal to the GIC remitted on the paying entity's debt as a result of its 50/50 or similar arrangement.

75. The income of a discretionary trust or similar entity could be adjusted as one of the adjustments or assessments resulting from the transaction. The benefits outlined immediately above are only available to the other entities assessed (excluding the other beneficiaries) if all of the beneficiaries of the trust pay 50% of the disputed debt relating to the transaction. Despite any non-payment by other beneficiaries, any beneficiary that pays 50% of its disputed debt will be entitled to the benefits normally available other than those outlined in paragraphs 74 and 75 of this practice statement.

76. In relation to these 'multiple' assessments, no inference should be drawn by the relevant entities from the actions of the ATO as to the merits or validity of any of the assessments raised.

77. In the event that the appellate tribunal ultimately decides the substantive issue against the Commissioner, the full amount paid will be refunded together with interest on overpayment.

Application of payments and offsetting of credits

78. Section 8AAZL of the TAA sets out how the Commissioner must treat payments received in respect of taxation debts as well as credit entitlements arising under a taxation law.

79. Where the payment due under a 50/50 arrangement has been accepted by instalments, such payments made will be applied to reduce each component of the disputed debt to 50%, or in a manner consistent with the terms of the arrangement entered.

80. In relation to credits such as those emanating from subsequent income tax assessments or activity statements the Commissioner will generally offset such credits to any unpaid disputed debt unless the tax debtor has entered into a 50/50 arrangement.

81. Once a decision has been made to retain a credit and it has been applied to a disputed debt, the Commissioner will not reapply such credit to any subsequent tax liability of the tax debtor. For details of the Commissioner's policy relating to the treatment of credits arising for a tax debtor while a disputed debt remains outstanding, see Law Administration Practice Statement PS LA 2011/21 Offsetting of refunds and credits against taxation and other debts.

COMPETENT AUTHORITY ISSUES – MUTUAL AGREEMENT PROCEDURES

82. In cases where the Commissioner makes a transfer pricing or profit re-allocation adjustment, the debtor may seek Competent Authority assistance under the Mutual Agreement Procedure (MAP) article contained in Australia's double tax agreements, to attempt to have the matter resolved with the other tax jurisdiction involved.

83. Where a MAP has been initiated by the debtor, irrespective of whether objection or appeal rights are being pursued concurrently by the debtor, the liability assessed will be treated as a disputed debt for collection purposes. To this end, it is recognised that the collection of tax during MAP cases will in some instances impose temporary double taxation on the taxpayer whilst the MAP is in progress because the same profits have been subject to tax in both jurisdictions. Where the possibility of such double taxation arises the Commissioner will agree to defer recovery action, including the recovery of any GIC until an agreed future date, which will usually be the date that the MAP process is concluded unless:

- there is a risk to the revenue
- the taxpayer has other liabilities unpaid after the due date, or
- the taxpayer has failed to meet other tax obligations when required.

84. Decisions in respect of individual adjustments and in respect of individual years are separate decisions.

85. Taxpayers should refer to Taxation Ruling TR 2000/16 for the remission policy in respect of the GIC which has accrued during the MAP.

86. A taxpayer may also be entitled to a limited remission of GIC incurred both prior to the MAP and up to 14 days after the MAP has been concluded. (For further details refer to Law Administration Practice Statement PS LA 2011/12 Administration of general interest charge (GIC) imposed for late payment or under estimation of liability.)

ATOLaw topic	Income Tax~~Administration~~debt recovery and insolvency
Legislative references	ITAA 1936 170AA ITAA 1936 Pt VII ITAA 1997 Div 5 TAA 1953 8AAZL TAA 1953 14ZY TAA 1953 14ZYA TAA 1953 14ZZM TAA 1953 14ZZR TAA 1953 Pt IVC TAA 1953 Sch1 Div 280 TAA 1953 Sch1 Div 284 TAA 1953 Sch1 255-10 Bankruptcy Act 1966 Corporations Act 2001 459E Proceeds Of Crime Act 2002 SGAA 1992 Taxation (Interest on Overpayments and Early Payments) Act 1983
Related public rulings	TR 2000/16
Related practice statements	PS CM 2003/02 Risk and issues management (internal link only) PS CM 2007/02 Fraud control and the prosecution process (internal link only) PS LA 2006/7 Alternative assessments PS LA 2011/6 Risk and risk management in the ATO PS LA 2011/12 Administration of general interest charge (GIC) imposed for late payment or under estimation of liability PS LA 2011/14 General debt collection powers and principles PS LA 2011/21 Offsetting of refunds and credits against taxation and other debts
Case references	DCT (Vic) v. Ewen 84 ATC 4550; (1984) 15 ATR 818 DC of T v. Gergis 91 ATC 4510; (1991) 22 ATR 1 DC of T v. La Rosa (1997) 37 ATR 84 McCallum v. FC of T 97 ATC 4509; (1997) 36 ATR 256 DCT v. Neutral Bay Pty Ltd; DCT v. MA Howard Racing Pty Ltd; DCT v. Broadbeach Properties Pty Ltd ('Howard Group') [2008] HCA 41; (2008) 237 CLR 473; 2008 ATC 20-045; (2008) 69 ATR 357 DFC of T v. Niblett (1965) 8 FLR 134; [1965] NSWR 1552 DFC of T v. Mackey (1982) 64 FLR 432; 82 ATC 4571; (1982) 13 ATR 547 Hoare Bros Pty Ltd v. DFC of T (1996) 62 FCR 302; 96 ATC 4163; (1996) 32 ATR 148 Robertson Jnr v. DFC of T [2004] FCAFC 46; 2004 ATC 4209; (2004) 55 ATR 106
Date issued	14 April 2011
Date of effect	14 April 2011
Contact email	OperationalPolicyAssuranceandLawWorkManagement@ato.gov.au
Section	Operational Policy, Assurance and Law