PS LA 2011/4 - Collection and recovery of disputed debts

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Practice Statement Law Administration

PS LA 2011/4

This law administration 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. 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.

Taxpayers can rely on this law administration 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 law administration 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: **Collection and recovery of disputed debts**

PURPOSE: **To provide guidelines for managing the collection and recovery of disputed debts**

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BACKGROUND

1. The legislative framework which underpins the Commissioner's policy on the collection and recovery of disputed debt is designed to ensure that objections, applications for review or appeals are not used to delay payment of tax.

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.[1] Accordingly, the lodgment of an objection, while it remains unresolved, will not automatically relieve taxpayers of their obligation to make prompt payment, or serve to stay recovery action.[2]

3. Similarly, the general interest charge (GIC) accrues at the statutory rate on any disputed debt that remains unpaid after its due date unless the taxpayer enters into a 50/50 arrangement to reduce their exposure to the GIC.

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 *Taxation Administration Act 1953* (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 – is the general interest charge imposed by Part IIA of the TAA for late payment.

[1] *DCT v. Neutral Bay Pty Ltd; DCT v. MA Howard Racing Pty Ltd; DCT v. Broadbeach Properties Pty Ltd* ('Howard Group') [2008] HCA 41.
[2] Refer to sections 14ZZM and 14ZZR of the TAA.

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 includes amounts such as assessed income tax, assessed net amount of goods and services tax (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, shortfall interest charge (SIC) or GIC.

SIC – is the shortfall interest charge that applies to shortfalls of income tax, minerals resource rent tax, petroleum resource rent tax, excess non-concessional contributions tax or Division 293 of the *Income Tax Assessment Act 1997* (ITAA 1997) tax. SIC is applied at a uniform rate that is lower than the GIC rate. Liability to SIC is covered in Division 280 of Schedule 1 to the TAA.

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 taxpayer whereby the taxpayer pays a minimum of 50% of the disputed principal tax debt and the Commissioner agrees to defer collection action for recovery of the balance of the disputed debt and other related components, and consents to a partial remission of the GIC which would otherwise accrue in the event that the taxpayer's dispute is unsuccessful. This arrangement is subject to certain conditions as outlined in this practice statement.

STATEMENT

5. In dealing with objections and managing the associated revenue risks, the Commissioner is required to deal with varying classes of taxpayers 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 may be a serious concern requiring 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.) [3]

6. ATO staff 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. ATO staff 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. The decisions and actions taken by ATO staff must be consistent with the commitments made by the ATO in the Taxpayers' Charter.

[3] See Law Administration Practice Statement PS LA 2011/6 *Risk management in the enforcement of lodgment obligations and debt collection activities*.

EXPLANATION

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 taxpayer to justify any intervention by the court.

8. Some of the principles which the courts take into account in deciding whether to intervene that may be relevant for the Commissioner in deciding whether to defer recovery action, 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 taxpayer 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 taxpayer'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 taxpayers 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 taxpayer, 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 taxpayer was party to artificial and contrived arrangements to avoid tax.[4]
   - 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.[5] The High Court has re-affirmed this interpretation and determined that it applied equally to assessments of GST that are subject to dispute.[6] The Full Federal Court has recently qualified *Broadbeach* to the extent that the merits of a pending Part IVC proceeding are a relevant consideration in the exercise of the discretion to grant a stay of execution of a summary judgment. However, the taxpayer will need to have more than a merely arguable case.[7]

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 taxpayer (in whole or in part), the Commissioner will pay interest on overpayments under the *Taxation (Interest on Overpayments and Early Payments) Act 1983* (T(IOEP)A), in respect of certain types of tax which have been overpaid.[8]

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[4] *DFC of T v. Mackey* 82 ATC 4571.
[5] *Hoare Bros Pty Ltd v. DFC of T* 96 ATC 4163.
[6] *DCT v. Neutral Bay Pty Ltd; DCT v. MA Howard Racing Pty Ltd; DCT v. Broadbeach Properties Pty Ltd* ('Howard Group') [2008] HCA 41.
[7] *Southgate Investment Funds Limited v. DCT* [2013] FCAFC 10.
[8] See Law Administration Practice Statement PS LA 2011/23 *Credit Interest.*

10. In line with the Taxpayers' Charter, the Commissioner is committed to the early resolution of disputes and will utilise an Alternative Dispute Resolution process wherever possible to achieve that end.[9]

General approach to the recovery of disputed debts

11. 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.[10] This risk analysis continues during the various stages of the dispute resolution process while a debt remains unpaid.

12. At objection stage, the Commissioner expects taxpayers who are pursuing a bona fide objection to cooperate with the ATO in providing the necessary information for an early resolution of their objections. If the Commissioner offers a 50/50 arrangement, this arrangement will minimise the taxpayer's exposure to the GIC and permit the deferral of recovery action for the balance of the disputed debt and other related components.

13. On the other hand, the lodgment of frivolous objections or deliberate delays in providing the required information for a swift resolution of objections is likely to result in the disallowance of the objection and commencement of legal action for recovery of the disputed debt.

14. Similarly, any actions by taxpayers which constitute a risk to the revenue (see paragraphs 44 and 45 of this practice statement) will lead to the commencement of legal action for recovery of the disputed debt.

15. At review or appeal stage, the Commissioner will seek to enforce collection of any unpaid disputed debt unless a formal deferral of recovery action has been granted to the taxpayer. (See paragraph 43 of this practice statement).

Interest on overpayment regime

16. The T(IOEP)A does not apply to the overpayment of all components of a disputed debt. To be subject to interest on overpayment, the component of a disputed debt must fall within the meaning of 'relevant tax' as defined in subsection 3C(1) of the T(IOEP)A.

17. The application of the interest on overpayment regime varies depending on the year of income, as outlined below.

2000 income tax year and prior

18. 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 taxpayer'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 former section 170AA of the ITAA 1936.

[9] Law Administration Practice Statement PS LA 2013/3 *Alternative dispute resolution* (*ADR) in ATO disputes* sets out the policies and guidelines all staff must follow when attempting to resolve disputes by means of ADR.
[10] See PS LA 2011/6.

2001 to 2004 income tax years inclusive

19. However, in relation to assessments for the 2000–01 to 2003–04 years of income, following a determination in the taxpayer'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 ITAA 1997 (these penalties and charges essentially replaced the amounts formerly imposed under Part VII and section 170AA of the ITAA 1936).

2005 income tax year and onwards

20. 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.

21. 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.

Test Case Litigation Program

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

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

24. 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.

25. Details of the additional concessions offered to participants via the TCLP are outlined at paragraph 29 of this practice statement.

50/50 arrangements

26. Subject to a risk assessment, the Commissioner may offer a taxpayer a 50/50 arrangement which minimises their exposure to the GIC which would normally accrue at the statutory rate while an amount of disputed debt remains unpaid.

27. The 50/50 arrangement requires the taxpayer to agree to:

- pay all undisputed debts and a minimum of 50% of the disputed principle tax debt
- 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.

28. The Commissioner, in return, will agree to:

- defer the recovery of the unpaid balance of the disputed debt and the unpaid balance of the related components (that is, any tax shortfall penalty, GIC and SIC) 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
- remit 50% of the GIC which would otherwise accrue in the event that the taxpayer's dispute is unsuccessful. (See paragraph 36 of this practice statement for further detail of the GIC concessions that are available).

29. Where a taxpayer, who has been selected as a test or lead case participant funded under 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

30. Where the taxpayer'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 taxpayer.

31. 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.

32. 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

33. Where the Commissioner has granted a 50/50 arrangement at the objection stage, and following the determination of the objection, the taxpayer lodges an appeal or applies to the Administrative Appeals Tribunal (AAT) for a review of the decision, 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.

34. 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 44 and 45 of this practice statement set out circumstances where a 50/50 arrangement will be rescinded.

35. 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.

GIC imposed or remitted under 50/50 arrangements

36. Where the Commissioner has entered into a 50/50 arrangement with a taxpayer, upon receiving payment of the mandatory 50% portion of the disputed debt, the taxpayer will receive a deferral of legal action in respect to the entire unpaid balance of the disputed debt as outlined in paragraphs 27 and 28 of this practice statement. The taxpayer will be liable for the GIC as follows:

- On any debts not in dispute, the 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 taxpayer pays a minimum of 50% of the disputed principal tax debt.
- On the remaining balance of the disputed principal tax debt and on the balance of the related components of the disputed debt that are being deferred under the arrangement , the taxpayer 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 the period.)
- 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 and the balance of the related components of the disputed debt that was previously deferred under the arrangement, will be subject to GIC at the statutory rate until the balance is paid in full.

Quantum of the GIC deductible under a 50/50 arrangement

37. Section 25-5 of the ITAA 1997 provides for deductibility of the GIC. A tax deduction for the GIC incurred can be claimed in income tax returns for the years ended 30 June 2000 onwards. Conversely section 20-25(2A) of the ITAA 1997 requires the taxpayer to return any amount of GIC remitted as recouped income. Similarly, under section 20-25 of the ITAA 1997 a credit adjustment to GIC is treated as recouped income.[11]

38. Accordingly, taxpayers whose disputed debt is the subject of a 50/50 arrangement will effectively be entitled to claim a deduction for 50% of the total amount of the GIC incurred during any financial year while the 50/50 arrangement remains in force. In practice, when completing their income tax return, taxpayers who wish to claim their entitlement to the GIC deduction:
    - will need to include the full amount of the GIC accrued during the particular financial year as a deduction, and
    - must return the amount remitted (or credit adjusted) under the 50/50 arrangement as recouped income in the financial year when the dispute is settled.

[11] For further discussions on the deductibility and assessability of GIC see Law Administration Practice Statement PS LA 2011/12 *Administration of general interest charge (GIC) imposed for late payment or under estimation of liability.*

Where the taxpayer does not enter into a 50/50 arrangement

39. Where the taxpayer has chosen not to enter into a 50/50 arrangement, the risk associated with the case will be assessed on the basis of such factors as the taxpayer's level of indebtedness to the ATO, their capacity to pay their debt in full in the event of an unsuccessful objection, whether an independent internal review[12] has already been carried out by the ATO (and if so, the outcome of that review), coupled with their level of cooperation with the ATO in resolving their dispute. Collection action will be commenced prior to the determination of the objection whenever the circumstances of the case indicate an unacceptable level of risk.

40. At review or appeal stage, the Commissioner will seek to enforce collection of any unpaid disputed debt where a formal deferral of recovery action has not been granted to the taxpayer. (See paragraph 43 of this practice statement).

41. It should be noted however, that the fact that the Commissioner has not, for whatever reason, initiated 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.

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

Deferral of recovery action

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

- the taxpayer has entered into a 50/50 arrangement and there is no evidence to suggest that payment of the amount deferred is at risk
- 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

44. A 50/50 arrangement will be refused or rescinded and recovery action may be initiated even before a dispute is finalised where there are reasonable grounds for the Commissioner to believe that the associated risk requires such action.[13]

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

- the Commissioner has not agreed to a formal deferral of recovery action
- the taxpayer's total liability includes an amount which is not subject to a dispute

[12] For further information on the ATO independent internal review process refer to the ATO external website. For example, see *Correct a mistake or dispute a decision: Independent internal review* and *Independent review of Large Business and International Statement of Audit position*. (Links to these documents are provided in the 'Other references' section at the end of this practice statement.)
[13] See PS LA 2011/6.

- there are reasonable grounds to believe the revenue is at risk (for example, funds or assets are being dissipated)
- the taxpayer declines to supply additional facts or other material necessary for the determination of the objection, within 28 days of the request. This timeframe may be varied, where appropriate, by negotiation between the case officer and the taxpayer, or
- the objection is considered to be frivolous or without merit[14] - in such cases, it is unlikely that the Commissioner will offer a 50/50 arrangement or accept security as an alternative to legal action for recovery of the whole debt.

Legal action in high risk cases

46. Where the level of risk requires the Commissioner to initiate 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*.

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

48. 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 Service Delivery (Debt).

49. Where a taxpayer seeks to delay the recovery action by applying for a stay of proceedings or of execution, the 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[15] that the Commissioner will agree to recovery action being deferred, only in respect of any disputed debt, if:

    - the taxpayer meets the Commissioner's requirements for a deferral of legal action set out above, or
    - the taxpayer 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 deferral will be subject to the imposition of the GIC at the statutory rate.

50. If the taxpayer declines to accept these terms, the recovery action should proceed. In rare cases, the taxpayer 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 taxpayer 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 taxpayer consents to the Commissioner having leave to enter judgment, the Commissioner would in

[14] For example, where the taxpayer'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 taxpayer.

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

turn consent to a stay of entry of judgment until 14 days after the decision of the AAT or court.

51. It should be noted that the onus remains with a taxpayer to produce documentary evidence in support of their financial position. A mere allegation that the taxpayer 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.[16] 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.

Alternatives to legal action

52. 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 initiation of legal action for recovery of the debt or possible submissions from the taxpayer to mitigate the perceived risk:

- Payment of the whole debt within 14 days of a demand being issued to the taxpayer.
- 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.[17]

53. 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 taxpayer.

54. Where a taxpayer 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 taxpayer and all associated entities upon which the taxpayer 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 taxpayer may also be required to disclose information such as the name of the owners of properties where the taxpayer resides or conducts their business and where third parties are reported to be the owners of such properties.

Serious financial hardship

55. A submission based on serious financial hardship would require the support of financial documents, which show that the taxpayer's inability to pay the disputed debt is not merely due to short-term liquidity problems. Conversely, a

[16] See *DCT (Vic) v. Ewen* 84 ATC 4550.
[17] *DC of T v. Gergis* 91 ATC 4510; *DC of T v. La Rosa* (1997) 37 ATR 84.

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.

56. Serious financial hardship in the context of a personal taxation debt of an individual taxpayer, such as income tax, is likely to ensue where payment of the disputed debt would place a taxpayer 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.

57. In the context of an individual or corporate taxpayer who is engaged in business, a presumption of serious financial hardship would be sustained where the taxpayer 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.

58. Misfortune beyond a taxpayer's control such as sickness, accident, flood, fire, drought, can obviously have significant impact on a taxpayer'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 taxpayer.

59. A finding of serious financial hardship is unlikely where the taxpayer or entities associated with the taxpayer 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 taxpayer's business or personal lifestyle which could result from the reorganisation of the taxpayer's financial affairs to pay 50% of the disputed debt would not amount to hardship.

Securities

60. 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.[18] (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

61. 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 practice statement. 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.

62. 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

[18]Such as where a taxpayer 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.

accompanied by a request to defer or stay recovery action until the objection is determined. Alternatively, the taxpayer may defend the recovery proceedings or apply to the court to set aside a statutory demand.

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

64. 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 taxpayer bears the costs of the proceedings where it can be established that:

- there is little or no risk associated with the case[19]
- the objection has merit
- there are substantive reasons why the objection was not lodged promptly, and
- recovery proceedings would not have been initiated, had the objection been lodged promptly.

65. Where the converse applies, recovery action may proceed to the entry 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.

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

- the taxpayer 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.

67. 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 Director in Service Delivery (Debt).[20]

Bankrupt's standing to pursue objection

68. Where the taxpayer'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 taxpayer. [21] However, a bankrupt taxpayer may have standing to pursue an objection where the objection decision would have consequences in terms of tax payable in future years after the taxpayer's discharge.[22]

[19] See PS LA 2011/6.
[20] For example, where delaying such action would jeopardise a trustee or liquidator's ability to claw back assets within a statutory timeframe.
[21] See *McCallum v. FC of T* 97 ATC 4509.
[22] 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

69. 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.

70. 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 taxpayer's ability to pay the debt since the date the tax became due and payable
- any circumstances that have affected the taxpayer'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.

71. Any delay in determining the objections would carry negligible weight in any consideration of special circumstances[23] 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 taxpayer'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 taxpayers to defer the time for payment of a liability (for example, under section 255-10 of Schedule 1 to the TAA).[24]

(iv) Taxpayers have options to compel the Commissioner to determine an objection (see section 14ZYA of the TAA).

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

72. The prospect of remission of the 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

73. 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.

74. 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.

75. 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.

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[23] See paragraph 8AAG(5)(a) of the TAA and PS LA 2011/12.
[24] See PS LA 2011/14.

76. 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.

77. 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 76 and 77 of this practice statement.

78. 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.

79. 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

80. 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.

81. 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 primary tax debt to 50% or in a manner consistent with the terms of the arrangement entered.

82. 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 primary tax debt unless the taxpayer has entered into a 50/50 arrangement.

83. Once a decision has been made to retain a credit and it has been applied to a disputed debt, the Commissioner will generally not reapply such credit to any subsequent tax liability of the taxpayer. For details of the Commissioner's policy relating to the treatment of credits arising for a taxpayer 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

84. 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.

85. 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 a MAP 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 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.

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

87. Taxpayers should refer to Taxation Ruling TR 2000/16 *Income tax: international transfer pricing transfer pricing and profit reallocation adjustments, relief from double taxation and the Mutual Agreement Procedure* for the remission policy in respect of the GIC which has accrued during the MAP.

88. A taxpayer may also be entitled to a limited remission of the GIC imposed both prior to the MAP and up to 14 days after the MAP has been concluded. (For further details refer to PS LA 2011/12).

Amendment history

Date of amendment	Part	Comment
26 February 2015	Paragraph 15	Corrected reference to paragraph 43.
	Paragraph 39	Updated for clarification.
	Paragraph 40	Corrected reference to paragraph 43.
23 December 2014	General	Updated to meet ATO Style guide requirements; added in footnote references; repositioned paragraphs dealing with interest on overpayment regime.
	Various	Revised policy position – where a 50/50 arrangement is acceptable, the taxpayer will only be required to pay 50% of the principal tax component of the disputed debt to receive a deferral of legal action and a partial remission of GIC imposed, on remaining balance of disputed debt (which includes associated shortfall penalties, SIC and GIC).
	Terms used	Included definition for shortfall interest charge.
	New paragraph 15 & paragraph 40 (previously 38)	Revised policy position - At review or appeal stage, the Commissioner will seek to enforce collection of any unpaid disputed debt unless a formal deferral of recovery action has been agreed to with the taxpayer, subject to a risk assessment.
	New paragraphs 37 to 38	Explain the tax treatment of the GIC incurred and remitted under a 50/50 arrangement.
	Paragraph 39 (previously 37)	Included a footnote to reference the ATO external website and documents on the independent internal review process.
	Paragraph 43 & 45 (previously 41 & 43)	Explanation of conditions for deferral of recovery action.

ATOLaw topic	Administration ~~Debt recovery and insolvency
Legislative references	ITAA 1936 ITAA 1936 170AA ITAA 1936 Pt VII ITAA 1997 Div 5 ITAA 1997 25-5 ITAA 1997 25-25(2)(a) ITAA 1997 Div 293 TAA 1953 Pt IIA TAA 1953 8AAG(5)(a) TAA 1953 8AAZL TAA 1953 8AAZN(3) TAA 1953 14ZYA TAA 1953 14ZZM TAA 1953 14ZZR TAA 1953 Sch 1 250-10 TAA 1953 Sch 1 255-10 TAA 1953 Sch 1 Div 280 TAA 1953 Sch 1 Div 284 Bankruptcy Act 1966 Corporations Act 2001 459E SGAA 1992 Taxation (Interest on Overpayments and Early Payments) Act 1983 Taxation (Interest on Overpayments and Early Payments) Act 1983 3C(1)
Related public rulings	TR 2000/16
Related practice statements	PS LA 2006/7 Alternative assessments PS LA 2011/6 Risk management in the enforcement of lodgment obligations and debt collection activities 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 PS LA 2011/23 Credit interest PS LA 2013/3 Alternative dispute resolution (ADR) in ATO disputes
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 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. 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 McCallum v. FC of T 97 ATC 4509; (1997) 36 ATR 256 Robertson Jnr v. DFC of T [2004] FCAFC 46; 2004 ATC 4209; (2004) 55 ATR 106 Southgate Investment Funds Limited v. DCT [2013] FCAFC 10
Other references	Taxpayers' charter Correct a mistake or dispute a decision: Independent internal

	review Independent review of Large Business and International Statement of Audit Position
File references	1-4BTR97K
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