PS LA 2011/5 - Recovery of administrative overpayments

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Practice Statement Law Administration

PS LA 2011/5

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This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs tax officers must follow their business line's escalation process.

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

SUBJECT: **Recovery of administrative overpayments**

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

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BACKGROUND

1. The taxation system operates primarily under a self-assessment regime, which relies on taxpayers to honestly self-assess their tax liabilities and entitlements to refunds of overpaid tax. Underpinning this regime are the Australian Taxation Office (ATO) risk engines and associated compliance activities, which aim to ensure that taxpayers do not understate their liabilities or overstate their entitlements to refunds.

2. The ATO computer system processes a voluminous number of transactions and system errors can result in money to which the recipient is not entitled being mistakenly refunded. Additionally, compliance activities will detect cases where money has been mistakenly paid as refunds to which the recipient is not entitled.

3. These mistakenly paid amounts are referred to in this practice statement as administrative overpayments.

TERMS USED

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

   Administrative overpayment – has the same meaning as in subsection 8AAZN(3) of the *Taxation Administration Act 1953* (TAA).

   Cause of action – means the legal elements necessary for the plaintiff to succeed in their action against the defendant.

   Declaratory order – means an order made by the court which declares what the rights are between the parties at the relevant date.

   Defendant – means the person against whom legal proceedings are brought. In this practice statement it refers to the recipient of the overpayment and in some instances, a third party who is holding or is in possession of the amount overpaid.

   Plaintiff – means the person who brings an action to court. In the case of an action under section 8AAZN of the TAA, it can be the Commissioner, the Commissioner's delegate or a Deputy Commissioner. In terms of a common law action, it is the Commonwealth.

   Recipient – means the person who has received the overpayment.

   RBA – means a running balance account as defined in section 8AAZA of the TAA.

   RBA deficit debt – means a balance on an RBA in favour of the Commissioner, where the total amount of due and payable primary tax debts allocated to the RBA are greater than the payments and credits allocated to that RBA.

   Traced – Tracing refers to a process that allows a person to track their assets that may have been taken by fraud, misappropriation, or mistake. For example, money can be followed at common law into and out of a bank account and also into the hands of a subsequent transferee, provided it does not cease to be identifiable by being mixed with other money in that account derived from some other source.

STATEMENT

5. Law Administration Practice Statement PS LA 2011/6 *Risk and risk management in the ATO* applies the principles outlined in Corporate Management Practice Statement PS CM 2003/02 *Risk and issues management* to the collection of unpaid liabilities, having regard to the compliance model.

6. The compliance model reflects the different taxpayer attitudes to compliance and the corresponding compliance strategy that best responds to each particular attitude.

7. Tax officers must follow the principles and guidelines outlined in this practice statement. Given the myriad of scenarios that can give rise to administrative overpayments, this practice statement mandates an assessment of the level of risk in each case to determine the requisite approach to be adopted in initiating collection activities. It is noted however, that it is not possible to set out all the circumstances that may give rise to an administrative overpayment and to assess the risks involved in advance. Each case has to be considered on its merits and on the basis of all the relevant facts. Tax officers must however, take care not to consider irrelevant factors and must exercise their own judgment in arriving at an appropriate decision based on the risks involved in each case. The decision should be made in good faith and without bias.

8. The decisions and actions taken by tax officers must be consistent with the commitments made by the ATO in the Taxpayers' Charter. Tax officers are also expected to follow Corporate Management Practice Statement PS CM 2007/01 *Respecting clients' rights of review*.

EXPLANATION

Statutory cause of action

9. Section 8AAZN was inserted in the TAA to enable the Commissioner to recover amounts paid to a person by mistake. The meaning of 'mistake' was considered in *David Securities Pty Ltd v. Commonwealth Bank of Australia* (1992) 175 CLR 353 and it was held to include both mistakes of fact and law. The mistakes contemplated by section 8AAZN include both the mistakes by the Commissioner, as well as those induced by the recipient of those overpayments.

10. Subsection 8AAZN(1) of the TAA treats certain overpayments by the Commissioner as a debt due to the Commonwealth 'by the person to whom the overpayment was made (the recipient)' and requires repayment to the Commissioner. The Commissioner has a statutory cause of action allowing him to sue and recover administrative overpayments as tax-related liabilities. That cause of action authorises recovery **only** from the person or persons to whom the Commissioner makes payment. For example, section 8AAZN of the TAA will not permit recovery of overpayments transferred to directors of a company where the company was the initial recipient of the overpayment.

11. Section 8AAZN of the TAA applies to administrative overpayments made on or after 1 July 1999.

12. An administrative overpayment is defined in subsection 8AAZN(3) of the TAA as:

    - an amount that the Commissioner has paid to a person
    - by mistake
    - being an amount to which the person is not entitled.

Common law causes of action

13. Prior to the enactment of section 8AAZN of the TAA, the Commissioner's ability to recover administrative overpayments was limited to common law causes of action such as:

    - an action for 'money paid from consolidated revenue without statutory authority' (See *Commonwealth v. Burn*s [1971] VR 825, applying *Auckland Harbour v. R* [1924] AC 318)
    - an action for money 'had and received'
    - an action for 'deceit'.

14. These causes of action remain valid and may continue to be used where section 8AAZN of the TAA has no application (for example, where it is desired to sue the person or persons to whom an amount of an overpayment has been transferred by the initial recipient of the overpayment or a subsequent transferee of the money). It should be noted that claims pursued under common law can only be made in the name of the Commonwealth, as plaintiff, and will not attract general interest charge (GIC).

15. Administrative overpayments can be categorised according to their cause into two broad groups:

    - mistakes by the Commissioner
    - mistakes by taxpayers and/or their representatives.

Mistakes by the Commissioner

16. Mistakes by the Commissioner are usually processing errors that produce an erroneous refund to a person. Although not exhaustive, they include the following:

    - incorrect keying or scanning of amounts
    - crediting of an electronic refund to an incorrect bank account
    - incorrect calculation and refund of interest entitlements
    - system and accounting errors.

Mistakes by taxpayers and/or their representatives

17. This category includes those cases where money has been refunded to a person as a result of inaccurate information being provided to the ATO either orally or in writing, which may be subsequently discovered as a result of voluntary disclosures, audits or compliance verifications.

18. Administrative overpayments can commonly occur as a result of false or misleading statements[1] or fraud. For instance, this could range from unintentionally understating activity statement liability amounts or overstating activity statement credits through false or misleading statements in an activity statement, to the more serious fraud, where an entity purports to conduct an enterprise for the sole purpose of obtaining substantial refunds.

[1] Making a false or misleading statement to the Commissioner may attract penalties under Part 4-25 of Schedule 1 to the TAA irrespective of whether or not there is a recoverable shortfall - see PS LA 2012/4 *Administration of penalties for making false or misleading statements that do not result in shortfall amounts* and PS LA 2012/5 *Administration of penalties for making false or misleading statements that result in shortfall amounts*.

19. A statement will be false or misleading where it is erroneous or incorrect; no element of deceitful or dishonest conduct on the part of the taxpayer or anyone else needs to be established. Fraud, on the other hand, can occur where a party intentionally induces a course of action by deceit or other dishonest conduct. This may involve acts or omissions or the making of false statements, orally or in writing, with the object of obtaining money or other benefit from, or of evading a liability to the Commonwealth.

20. Administrative overpayments commonly occur as a result of a mistake induced by the taxpayer and/or their tax agent, including in the following instances:

- over-claimed goods and services tax (GST) refunds
- overstated net fuel amount for fuel tax credits
- over-claimed refundable tax offsets[2]
- over-claimed pay as you go (PAYG) withholding credits
- identity theft or take-over, or
- tax agents' fraud.

Accrual of GIC

21. As mentioned in paragraph 13 of this practice statement, administrative overpayments which do not fall within the ambit of section 8AAZN of the TAA and can only be recovered under a common law remedy, will not attract GIC.

22. GIC will, however, accrue on any administrative overpayments arising under section 8AAZN of the TAA:

- from the specified due date, being at least 30 days after a notice is given,[3] to the recipient under subsection 8AAZN(2) of the TAA, or
- from the date of the overpayment, upon allocation of the administrative overpayment debt to an RBA, under subsection 8AAZF(1) of the TAA.

23. Subsections 8AAZN(1) and (2) of the TAA are severable to the extent that the giving of notice under subsection 8AAZN(2) is **not** a mandatory prerequisite to the cause of action under subsection 8AAZN(1). Therefore, the Commissioner is able to commence proceedings for recovery of administrative overpayments as soon as the mistake is detected, without giving a notice under subsection 8AAZN(2) of the TAA.

24. The giving of a notice under subsection 8AAZN(2) of the TAA, which essentially establishes a due date for payment being at least thirty days after the notice is given, is only required where the Commissioner, in his discretion, wishes to impose GIC. It is also open to the Commissioner to impose GIC in such cases where he allocates the administrative overpayment debt to an RBA.

25. In essence, the provisions allow the Commissioner a choice as to how he will recover an administrative overpayment. For example, he can allocate an administrative overpayment to an RBA as a primary tax debt. In such a case the Commissioner's claim is no longer for an administrative overpayment under subsection 8AAZN(1). Instead GIC becomes payable under section 8AAZF and forms part of the RBA deficit debt due and payable under section 8AAZH, and is enforced as such.

[2] Refundable tax offsets - means those tax offsets listed at section 67-23 of the *Income Tax Assessment Act 1997*.
[3] In terms of section 28A of the *Acts Interpretations Act 1901*, 'give' has the same meaning as 'serve'.

Administrative overpayments not allocated to an RBA

26. Despite the Commissioner having a choice to allocate an administrative overpayment to an RBA as a means of imposing GIC from the date the overpayment occurred, due to certain system constraints, the Commissioner does not account for income tax liabilities on an RBA basis. As a consequence, overpayments resulting from the processing of income tax returns are not allocated to an RBA.

27. The overpayments that are likely to result from the processing of income tax returns include those where the over-claimed credit or tax-offset that has been refunded to the taxpayer does not form part of the assessment and therefore cannot be corrected by an amended assessment.[4] Examples of such administrative overpayments are set out below:

- over-claimed PAYG withholding credits refunded to the taxpayer
- over-claimed refundable tax offsets[5] where all or part of the refundable tax offset is refunded to the taxpayer.

28. Other overpayments such as over-paid entitlements to interest under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*, made in relation to income tax, that have been inadvertently refunded to the taxpayer are also not allocated to an RBA.

29. When recovering overpayments not allocated to an RBA, a notice under subsection 8AAZN(2) of the TAA will need to be served on the recipient of the overpayment so that GIC may accrue from the due date specified in the notice.

Legislative amendments

30. Previously, where amounts refunded under:

- the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)
- the *A New Tax System (Luxury Car Tax) Act 1999* (LCT Act), and
- the *Fuel Tax Act 2006*,

were overpaid, such amounts were treated as administrative overpayments under section 8AAZN of the TAA, with GIC calculated on the resultant RBA deficit debt when the administrative overpayment was allocated to the RBA.

31. *Tax Laws Amendment (2009 GST Administration Measures) Act 2010* amended:

- section 35-5 of the GST Act
- section 17-5 of the LCT Act, and
- section 61-5 of the Fuel Tax Act.

32. In terms of these amendments, which took effect in relation to tax periods commencing, or claims made, on or after 24 March 2010, the overpaid amounts are now treated as amounts of tax (rather than administrative overpayments) that became payable, and due for payment, at the time when the overpaid amount was paid or applied.

[4] Adjustment of such claims by the Commissioner may not give rise to objection rights under Part IVC of the TAA.

[5] Note: Certain refundable tax offsets such as education tax offset are claimable whether or not a tax return is lodged.

33. GIC will statutorily accrue on those amounts from their respective due dates which is the date the overpayment was paid or applied.

34. Overpayments in relation to tax periods commencing, or claims made under the GST, LCT and Fuel Tax Acts, before 24 March 2010 will continue to be treated as administrative overpayments to which section 8AAZN applies and therefore be subject to the policy prescribed at paragraphs 35 to 45 of this practice statement.

Risk-based approach

35. The Commissioner is duty-bound by law[6] to ensure that money mistakenly paid out of consolidated revenue, without authority, is recovered in the most effective and timely manner. In doing so, the Commissioner will use the appropriate option for recovery.

36. In dealing with the recovery of an administrative overpayment, the treatment, timing and mode of recovery to be adopted in each case will depend on the amount involved and the circumstances or degree of mischief which gave rise to the overpayment.

37. As stated in paragraph 6 of this practice statement, the compliance model[7] prescribes that the measure and sanction that the Commissioner must implement on a case-by-case basis will be commensurate with the level of risk to the revenue associated with the particular case and the capacity and willingness of the overpayment recipient to repay the amount. As each case will turn on its own facts, the Commissioner will apply the level of sanction that the circumstances dictate (that is, the most severe sanction in the case where the highest level of risk is identified).

38. The level of risk associated with each case will determine:

- whether the Commissioner should rely on section 8AAZN of the TAA or one or more of the common law causes of action for recovery of the debt, and
- if section 8AAZN is to be invoked, whether a notice under subsection 8AAZN(2) should be given.

39. As a general principle, the Commissioner would regard administrative overpayments induced by taxpayers or their representatives as falling within a higher risk category than those which occurred as a result of a mistake by the Commissioner.

40. Accordingly, where the administrative overpayment is attributable to the recipient's (or their agent's) action or statement, the effect of giving a notice under subsection 8AAZN(2) of the TAA would be to forego part of the GIC accruing during the period in which the entity had the benefit of the administrative overpayment funds. In particular, GIC would not be recoverable during the period between the date the administrative overpayment was made until 30 days after service of the notice, which would usually occur well after the Commissioner finally determined that the recipient was not entitled to the payment.

[6] Section 11 of the *Public Governance, Performance and Accountability Rule 2014*..
[7] See PS LA 2011/6.

41. It is not considered an equitable outcome that a person, who was responsible for the overpayment, should have the benefit of GIC-free funds during this period. For this reason, a notice under subsection 8AAZN(2) of the TAA should not be issued in these circumstances and the administrative overpayment will be taken to have been allocated to an RBA on the issue date of the overpayment/refund. Accordingly, GIC will accrue on the overpayment/refund from its issue date. The exception to this rule is where system constraints preclude the overpayment from being allocated to an RBA (see paragraphs 26 to 29 of this practice statement).

42. Conversely, where an overpayment is solely the result of the Commissioner's mistake, for example, a keying error, a notice under subsection 8AAZN(2) of the TAA should be given to the recipient of the administrative overpayment. In such circumstances, GIC will not accrue until at least 30 days after the notice has been given to the taxpayer. This approach is in line with the Commissioner's policy to treat taxpayers fairly where the overpayment arises from circumstances beyond their control. The exception to this rule will be where the administrative overpayment falls within a high risk category because of one or more of the following factors:

- the amount refunded is in excess of $50,000
- the recipient has a poor compliance record
- evidence held (for example, where the recipient is a non-resident) suggests that there is a risk that the administrative overpayment may not be repaid.

43. Section 8AAZN of the TAA should not be used to recover amounts of indirect taxes which would otherwise not be payable as the result of the operation of the 4 years time limit prescribed by section 105-50 of Schedule 1 to the TAA. (There may be cases, such as computer errors, which generate an incorrect refund where the circumstances or quantum of the refund may not be seen as bearing any realistic connection with the ascertainment of GST or a net amount. In these cases, the time limit in subsection 105-50(2) of Schedule 1 to the TAA would not apply.)

44. In summary, the Commissioner will, wherever possible, adopt the following approach:

- In instances where the amount of the overpayment has resulted from a processing error, the ATO may contact the recipient and attempt to negotiate the return of the amount overpaid. Where appropriate, favourable consideration will be given to a repayment arrangement by instalments without the issue of a notice under subsection 8AAZN(2) of the TAA. Where a notice under subsection 8AAZN(2) has been issued, remission in part or in full of the GIC incurred may be considered.
- Where the ATO does issue a notice under subsection 8AAZN(2) of the TAA, it is appropriate to wait for the expiration of the 30 day period after the notice was issued before any recovery proceedings are commenced.
- On the other hand, in the more serious cases where the revenue is at risk and the ATO seeks to secure the amount overpaid, the Commissioner may choose to immediately recover the debt as an administrative overpayment under paragraph 8AAZN(1)(a) of the TAA by allocating to an RBA. Where this occurs, the 30 day notice under subsection 8AAZN(2) of the TAA should not be given as GIC applies automatically to the RBA deficit debt at the end of a day (usually from the original date of the refund of the administrative overpayment). As a matter of general practice, the person concerned should be advised that the administrative overpayment has been allocated to their RBA even though this is not a mandatory requirement at law.

45. The ATO may utilise any of the available measures to secure and recover an administrative overpayment and depending on the individual circumstances of each case, may take one or more of the following actions:

- Recover the administrative overpayment from a debtor by issuing a notice under section 260-5 of Schedule 1 to the TAA (a 'garnishee') to a third party who is taken to owe money to the debtor. (See Law Administration Practice Statement PS LA 2011/18 *Enforcement measures used for the collection and recovery of tax related liabilities and other amounts.*)
- Issue a summons or writ under either or both the statutory causes of action provided under section 8AAZN of the TAA or common law, as appropriate.
- Apply to the court for a freezing order to preserve the money where it can be traced to third parties and where appropriate, apply to the court for declaratory orders in aid of recovery. (See PS LA 2011/18.)
- Refer the matter to the Australian Federal Police for investigation with a view to requesting the Commonwealth Department of Public Prosecutions (CDPP) to lay charges against the recipient for 'Defrauding or conspiracy to defraud the Commonwealth' and where appropriate, apply for restraining orders under the *Proceeds of Crime Act 2002* to preserve the money or assets upon which the recipient of the overpayment has effective control, thereafter seeking the appropriate forfeiture order against those assets upon conviction. (See Corporate Management Practice Statement PS CM 2007/02 *Fraud control and the prosecution process.*)
- Refer the matter to the CDPP to pursue prosecution action under the TAA for making false or misleading statements to the Commissioner and where appropriate apply to the court for restitution.

Release from payment

46. Division 340 of Schedule 1 to the TAA empowers the Commissioner to provide release from particular liabilities on the grounds of serious hardship. Section 340-10 of Schedule 1 to the TAA specifically outlines the particular liabilities to which the provisions apply.

47. As administrative overpayments that arise under section 8AAZN of the TAA are excluded from the scope of Division 340 of Schedule 1 to the TAA, recipients of administrative overpayments cannot utilise this form of relief.

48. Accordingly, where a debtor has applied and been granted full release from payment of all of their liabilities, except for the administrative overpayment, consideration should be given to whether it would be economical to pursue recovery of the unpaid administrative overpayment. (See Law Administration Practice Statement PS LA 2011/17 *Debt relief.*)

Amendment history

Date of amendment	Part	Comment
7 February 2013	General	Updated to current ATO publication style; new sub-headings added; cosmetic changes to improve readability.
	New paragraph 8	Reinforces tax officers obligations to follow the Taxpayers' Charter and Corporate Management Practice Statements.
	Paragraph 20 – new dot points 3 and 4	Inclusion of additional categories of mistakes that can be made by taxpayers and their representatives.
	New paragraphs 26 to 29	Inclusion of policy on the imposition of GIC in the context of over claimed refundable tax offsets and over claimed PAYG withholding credits due to system constraints.
	Paragraph 41 - last sentence	Additional information regarding an exception to the rule where system constraints prevent an AMOP being allocated to an RBA.
	New paragraph 43	Updated to note that section 8AAZN should not be relied upon to circumvent the operation of the 4 year time limit prescribed by section 105-50 of Schedule 1 to the TAA.
30 June 2014	Footnote 6; legislative references	Updated references to *Financial Management and Accountability Act 1997* with relevant provisions in the *Public Governance, Performance and Accountability Rule 2014;* updated contact details.

ATOLaw topic	Income Tax ~~ Administration ~~debt recovery and insolvency
Legislative references	TAA 1953 8AAZA TAA 1953 8AAZF TAA 1953 8AAZF(1) TAA 1953 8AAZH TAA 1953 8AAZN TAA 1953 8AAZN(1) TAA 1953 8AAZN(1)(a) TAA 1953 8AAZN(2) TAA 1953 8AAZN(3) TAA 1953 Pt IVC TAA 1953 Sch 1 105-50 TAA 1953 Sch 1 105-50(2) TAA 1953 Sch 1 260-5 TAA 1953 Sch 1 Pt 4-25 TAA 1953 Sch 1 Div 340 TAA 1953 Sch 1 340-10 AIA 1901 28A ANTS(GST)A 1999 35-5 PGPA Rule 2014 11 FTA 2006 61-5 ITAA 1997 67-23 LCTA 1999 17-5 Proceeds Of Crime Act 2002 Taxation (Interest on Overpayments and Early Payments) Act 1983
Related practice statements	CEI 2015/03/01 (internal link only) CEI 2014/06/034 (internal link only) CEI 2014/05/09 (internal link only) CEI 2014/05/08 (internal link only) PS LA 2011/6 PS LA 2011/17 PS LA 2011/18 PS LA 2012/4 PS LA 2012/5
Case references	David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 175 CLR 353; 92 ATC 4658; (1992) 24 ATR 125 Commonwealth v. Burns [1971] VR 825; [1972] ALR 154 Auckland Harbour v. R [1924] AC 318
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