PS LA 2011/5 - Recovery of administrative overpayments

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This law administration practice statement is being reviewed as a result of the decision in DCT v MWB Accountants [2019] VCC 1516.

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Australian Government
Australian Taxation Office

PS LA 2011/5
Recovery of administrative overpayments

This Law Administration Practice Statement provides guidelines on the circumstances and factors to consider when taking action to recover administrative overpayments.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. 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.

1. What is this practice statement about?

This practice statement provides guidance to you about how you should recover administrative overpayments.

An administrative overpayment is an amount that we have paid to a person by mistake and that the person is not entitled to.[1] This administrative overpayment is a debt due to the Commonwealth by the person to whom the payment was made and is payable to the Commissioner.[2]

Paying an amount to a person by mistake may result from our actions or omissions and usually relate to processing errors, such as:

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

Paying an amount to a person by mistake may also result from a taxpayer's and/or their representative's actions or omissions, such as:

- making a genuine mistake when fulfilling their taxation obligations
- omitting relevant information on a form
- making false and misleading statements
- fraud.[3]

2. When can you use the administrative overpayment legislation?

The legislation applies to administrative overpayments made on or after **1 July 1999**.

Exception – indirect taxes

You cannot use the administrative overpayment legislation to recover overpaid amounts relating to:

- goods and services tax (GST)[4]
- luxury car tax (LCT)[5]
- fuel tax credits (FTC)[6]
- wine equalisation tax (WET).[7]

This is because there is specific legislation which deals with overpaid amounts of these taxes, where the overpayment was made on or after 24 March 2010.

This legislation treats overpaid amounts as amounts of tax which are due and payable from the day that the overpayment was made. General interest charge (GIC) accrues from the beginning of the day that it was paid.

Exception – overpayment to a third party

Prior to the introduction of the administrative overpayments legislation, administrative overpayments were recovered under the common law.

The administrative overpayment legislation does not cover **all** situations that the common law does because it only applies to the person that the administrative overpayment was made to. It does not cover third parties who may have received or benefited from the overpaid amount.

[1] Subsection 8AAZN(3) of the *Taxation Administration Act 1953* (TAA).
[2] Subsection 8AAZN(1) of the TAA.
[3] Law Administration Practice Statement PS LA 2008/6 *Fraud or evasion* provides guidance on dealing with taxpayers that have committed or are suspected of having committed fraud or evasion.

[4] Section 35-5 of the *A New Tax System (Goods and Services Tax) Act 1999*.
[5] Section 17-5 of the *A New Tax System (Luxury Car Tax) Act 1999*.
[6] Section 61-5 of the *Fuel Tax Act 2006*.
[7] Section 17-25 of the *A New Tax System (Wine Equalisation Tax) Act 1999*.

Because of this, if the circumstances are not covered by the legislation, then you can still use common law causes of action to recover administrative overpayments.

For example, where an overpaid amount is transferred by the initial recipient to a third party, you may need to rely on a common law cause of action to recover the amount from the third party.

3. Options for recovering an administrative overpayment

Issuing a notice

The administrative overpayment legislation provides that we can give a notice to the person who received the administrative overpayment.

The notice must specify a due date for payment which must be at least thirty days after the notice is given. GIC will accrue on any amount unpaid from the beginning of the due date specified in the notice.

You should issue a notice to the person who received the administrative overpayment. This ensures that the person does not have the benefit of interest-free money if they fail to pay by the due date.

Other methods of recovering an overpayment

Issuing a notice is not the only way that you can collect an administrative payment, and you can use multiple methods to recover an amount concurrently.

Other ways you can recover administrative overpayments include:

- contacting the recipient and negotiating the return of the overpaid amount
- commencing legal recovery proceedings.

However, because GIC will accrue on any amount unpaid from the beginning of the due date specified in the notice we consider that you should issue the notice in addition to any other recovery method.

Where the amount of the overpayment has resulted from an ATO processing error, remission in part or in full of the GIC incurred may be considered.

The circumstances and level of risk in each case will influence what other method of recovery may be appropriate to use, and when you issue the notice.

The compliance model states that the method of recovery must be proportionate to the level of risk to the revenue and the willingness of the recipient to repay the amount.

For example, if there is a risk of the amount paid by mistake being passed onto a third person or dispersed, it could be appropriate to commence legal recovery proceedings straight away, in addition to issuing a notice.

Law Administration Practice Statement PS LA 2011/6 *Risk management in the enforcement of lodgment obligations and debt collection activities* provides guidance on dealing with the risks associated with litigation action to recover debts.

4. More information

For more information, see:

- PS LA 2008/6 *Fraud or evasion*
- PS LA 2011/6 *Risk management in the enforcement of lodgment obligations and debt collection activities*

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