PS LA 2012/6 - Exercise of Commissioner's discretion to retain a refund

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PS LA 2012/6

Exercise of Commissioner's discretion to retain a refund

This Law Administration Practice Statement explains when you may reasonably exercise the Commissioner's discretion to retain a refund for verification purposes.

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

If taxpayers rely on this practice statement, they will be protected 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 you with guidance on when you may reasonably exercise the Commissioner's discretion to retain a taxpayer's refund for verification purposes by applying section 8AAZLGA of the *Taxation Administration Act 1953* (TAA).[1]

2. What does section 8AAZLGA enable me to do?

Section 8AAZLGA enables the Commissioner to retain, in certain circumstances, a running balance account (RBA) surplus, or other credit, that we would otherwise have to refund to the taxpayer.

If you retain an amount, you (on behalf of the Commissioner) must inform the taxpayer within:

- 14 days for an RBA surplus
- 30 days for other credits.[2]

If you do not inform the taxpayer within the statutory period, the amount must be paid by the day after the end of that period.

Where the taxpayer has been informed, you can retain the amount, but only until it is either no longer reasonable to require verification or there is a change in the amount that the Commissioner is required to refund under an assessment or amended assessment once verification activities are complete (whichever is first).

When exercising this discretion, you should consider each case on its merits, and on the basis of all legislative factors and relevant facts. You must consider all relevant matters prescribed for the exercise of the discretion, and must not take into account irrelevant factors.
You must exercise your own judgment in arriving at an appropriate decision in good faith and without bias.[3]

3. When can I exercise the Commissioner's discretion under section 8AAZLGA?

There are two circumstances in which you may exercise this discretion:

1. Where it 'would be reasonable to require verification of information' contained in a notification provided to the Commissioner that affects (or may affect) the amount that would otherwise have to be refunded to the taxpayer.[4]
2. Where the taxpayer has requested the Commissioner to retain the amount for verification of the notified information, and the request has not been withdrawn.[5]

[1] All legislative references are to the TAA, unless otherwise indicated.
[2] In the case of an RBA surplus - the 14th day after the RBA surplus arose (known as the RBA interest day); In the case of a credit - the 30th day after entitlement to a refunded amount arose (see subsection 8AAZLGA(3)).
[3] Refer also to the principles in the Taxpayers' Charter which states:
We presume you tell us the truth and that the information you give us is complete and accurate unless we have reason to think otherwise. Generally, you prepare the information you need to claim your entitlements and meet your obligations, then you give this information to us. Based on this information, you either make or receive a payment. We recognise that people sometimes make mistakes. We differentiate between mistakes and deliberate actions. If you make a mistake, we give you the opportunity to explain. We listen to you and take your explanation into account. We have a responsibility to the community to ensure everyone complies with the laws we administer. These laws give us certain periods of time to review information you have given to us. Reviewing your information does not mean we think you are dishonest, but if we do find discrepancies, we take follow-up action.
[4] Paragraph 8AAZLGA(1)(a).
[5] Paragraph 8AAZLGA(1)(b).

Circumstance 1: verification[6]

In this context 'verification' means actions or enquiries to prove, ascertain or establish the truthfulness, correctness or accuracy of the information provided.[7] Verification activities may include, but are not limited to, searches of internal and external databases or other information held by the Commissioner,[8] or enquiries of the taxpayer or third parties (such as requests for information and documentation).

You can also apply section 8AAZLGA when it is reasonable to require verification of information contained in a notification that does not give rise to an entitlement to a refund for the taxpayer. This occurs when a notification affects the amount that the Commissioner would otherwise have to refund to a taxpayer under section 8AAZLF.

For further guidance on how section 8AAZLGA interacts with other provisions see section 18.

Circumstance 2: taxpayer requests the Commissioner retains an amount[9]

This type of request might occur when a taxpayer is concerned that their refund claim may be incorrect. When you receive a taxpayer request to retain a refund for verification, the making of the request itself is a relevant (and ordinarily strong) factor, in making any decision to retain the refund. However, you do not have to agree to a taxpayer request to retain the amount. You must still consider all factors listed in subsection 8AAZLGA(2) in considering whether to retain the amount.

If you grant the taxpayer's request, you must inform the taxpayer that the amount has been retained by the end of 14 or 30 days after the date of lodgment of the relevant 'notification'.[10]

Once you have made the decision to retain the amount and informed the taxpayer, you may continue to retain the amount for verification even if the taxpayer subsequently withdraws their request. You may do this when it is reasonable for you to require verification of information contained in the 'notification' and the verification relates to the amount that would otherwise have to be refunded to the taxpayer.

4. Can I exercise this discretion over any refund?

You can exercise the Commissioner's discretion under section 8AAZLGA to retain an amount that we would otherwise be required to refund under section 8AAZLF.

Section 8AAZLGA may *particularly* apply where there is an entitlement to the refund claimed on lodgment of a return or other information ('notification') by the taxpayer (see below for a summary of when there is (or is not) an entitlement on lodgment for income tax laws, indirect tax laws and PRRT purposes). Under self-assessment, this will occur when the Commissioner is deemed to have made an assessment, or treated as having made an assessment, on lodgment.[11]

Entitlement on lodgment	No entitlement on lodgment
Amounts under income tax laws	
Income tax returns for full self-assessment taxpayers (principally companies and superannuation funds) for income tax purposes.	Income tax returns for other than full self-assessment taxpayers (principally individuals) for income tax purposes. Any income tax amendment requests.
Amounts under indirect tax laws	
Original or revised Business Activity Statement (BAS) under the indirect tax self-actuating system (applies to tax periods starting before 1 July 2012). Original BAS under the indirect tax self-assessment system (applies to tax periods starting on or after 1 July 2012).	Amendment requests made other than in the form of a revised BAS under the indirect tax self-actuating system. Amendment requests under the indirect tax self-assessment system.

[6] Paragraph 8AAZLGA(1)(a).
[7] See paragraph 7.28 of the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012.
[8] This might include information about the notification provided in advance by the taxpayer.
[9] Paragraph 8AAZLGA(1)(b).
[10] The Commissioner must inform the taxpayer that he or she has retained the refund by the end of: in the case of an RBA surplus – the 14th day after the RBA surplus arose (known as the RBA interest day); or in the case of a credit – the 30th day after entitlement to a refunded amount arose (see subsection 8AAZLGA(3)). The relevant day on which the RBA surplus or entitlement to a refund amount arises is normally the day of lodgment. This will not, however, always be the case. For example if the form lodged is not in the approved form. See section 5.
[11] See section 155-15 of Schedule 1 to the TAA, section 166A of the *Income Tax Assessment Act 1936* and section 62 of the *Petroleum Resource Rent Tax Assessment Act 1987.*

Entitlement on lodgment	No entitlement on lodgment
Amounts under MRRT laws[12]	
MRRT returns under the MRRT self-assessment system.	Any MRRT amendment requests.
Amounts under PRRT laws	
PRRT annual returns under the PRRT self-assessment system.	Any PRRT amendment requests.

5. What if there are errors in the lodgment?

If a BAS, income tax return, MRRT return or PRRT return is not lodged in the 'approved form', then no entitlement to a credit arises.[13] Only when the 'approved form' requirements are met can an entitlement to a credit arise, enabling you to apply section 8AAZLGA and retain the amount in question.

6. What factors must I take into account when exercising this discretion?

You must consider all of the 10 factors listed in subsection 8AAZLGA(2) (a) – (j). These factors (shown below) are relevant to whether or not it would be reasonable to require verification of information at any particular time. You should consider these factors 'as far as the information available to the Commissioner at the time of making the decision reasonably allows'.

The 10 factors

(a) the likely accuracy of the notified information

(b) the likelihood that the notified information was affected by:

- fraud or evasion, or
- intentional disregard of a taxation law, or
- recklessness as to the operation of a taxation law

(c) the impact of retaining the amount on the taxpayer's financial position

(d) whether retaining the amount is necessary for the protection of the revenue, including the likelihood that the Commissioner could recover any of the amount if the notified information were found to be incorrect after the amount had been refunded

(e) any complexity that would be involved in verifying the notified information

(f) the time for which the Commissioner has already retained the amount

(g) what the Commissioner has already done to verify the notified information

(h) whether the Commissioner has enough information to make an assessment relating to the amount (including information obtained from making further requests for information)

(i) the extent to which the notified information is consistent with information that the taxpayer previously provided, and

(j) any other relevant matter.

See Appendix for further detail about, and examples of, these 10 factors.

7. Are some factors more important than others?

In legislation, no one factor is more important than any other. You should attribute significance to a factor dependent on the individual circumstances of each case.

8. What happens if no information is available?

In many cases, lack of information will make it impossible for you to consider a factor. Your knowledge at the time of initially considering the exercise of the discretion is also likely to be much less than at a later stage; for example, when additional information is received from the taxpayer or third parties.[14]

9. How often should I reconsider the decision to retain an amount?

You may only retain an amount until 'it would no longer be reasonable to require verification of the information'.[15] This means that you must reconsider whether the amount should be retained:

- Each time new information becomes available, or

[12] The MRRT laws have been repealed from 1 October 2014.

[13] See section 31-15 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), paragraph 59(2)(a) of the *Petroleum Resource Rent Tax Assessment Act 1987* and section 388-50 of Schedule 1 to the TAA.

[14] A third party is a person or an entity who is not the taxpayer or taxpayer's agent (including but not limited to suppliers, associates, customers, government agencies and banks). A person who represents the taxpayer in one capacity may be a third party in another capacity.

[15] Paragraph 8AAZLGA(5)(a).

- Circumstances change in a way that is relevant to your consideration of any of the 10 factors.

Given that the time for which the Commissioner has already retained the amount is a factor to be considered, you should review each retention decision from time to time by reference to the particular circumstances. However, if nothing has changed you are not obliged to review the decision. In effect, the discretion to retain an amount is assessed on an ongoing basis.

10. What tools may I use to identify potential cases for verification?

Although a number of tools and processes are in place to help you to identify cases which may require verification of information, you must continue to actively consider the 10 factors in subsection 8AAZLGA(2) to determine whether a section 8AAZLGA decision should be made. Neither the tools and processes, nor any data or material they produce (e.g. risk profiles of a refund claim), may constitute a decision to retain an amount.

Where appropriate and practicable, you should give the taxpayer an opportunity to provide further information before the time in which a decision has to be made.

11. Within what timeframe must I make a decision?

There is no fixed time period within which you must gather information against the 10 factors and make your decision. However, section 8AAZLGA states that any decision should be made *within an administratively reasonable time*. There is nothing, in the provision or otherwise, which requires you to make a decision to retain an amount at any particular point within what is an administratively reasonable time. This timeframe will, therefore, depend in part on the circumstances of the case.

You should not inform a taxpayer that an amount will be retained before making a formal decision.

In the absence of a statutory time limit, an obligation to pay an amount to a taxpayer requires its performance 'within a time fixed by what is reasonably necessary to make that refund'.[16] The law, however, may also regulate the manner in which the obligation to pay is to be performed.[17] Therefore section 8AAZLGA forms part of the statutory context against which performance of payment obligations by the Commissioner is considered.

[16] *Commissioner of Taxation v. Multiflex Pty Ltd* [2011] FCAFC 142; 2011 ATC 20-292; (2011) 82 ATR 153 at [40].

[17] See in particular the Full Federal Court decision [2011] FCAFC 142 at paragraphs [27] and [40].

12. What do I communicate to the taxpayer and when?

As stated in Section 2 of this document, you must inform the taxpayer that an amount has been retained within 14 days (RBA surplus) or 30 days (credit) of the surplus or credit arising.[18] Failure to do so will result in the Commissioner being unable to rely on section 8AAZLGA to retain the amount in question.

You may inform the taxpayer in a number of ways e.g. telephone, electronic mail, post[19] and text message. Where the taxpayer concerned is a company, you may inform an agent of the company authorised to receive information for the company for that purpose. Agents include the public officer, company secretary, director or registered tax agent of the company.

You are not required to disclose to the taxpayer the reasons for the retention of the amount at the time the taxpayer is informed that an amount has been retained. However, a decision by the Commissioner to retain an amount is subject to the FOI Act,[20] judicial review,[21] and objection rights.

[18] This means that the Commissioner will only be able to retain an amount until: in the case of an RBA surplus, the RBA interest day, which is generally the 14th day after the taxpayer lodged the BAS; or for credits, the 30th day after the taxpayer gives the Commissioner a notice containing the amount claimed.

[19] Subsection 8AAZLGA(3) requires the Commissioner to inform the taxpayer by serving a document on the taxpayer or by other means. If the Commissioner serves the taxpayer by post, section 29 of the *Acts Interpretation Act 1901* will be applicable. Section 29 of the *Acts Interpretation Act 1901* states that where an Act authorizes or requires any document to be served by post, whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used, then the service shall be deemed to be effected by properly addressing, prepaying and posting the document as a letter and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

[20] Under section 11 of the FOI Act, every person has a legally enforceable right to obtain access in accordance with this Act to: a document of an agency, other than an exempt document; or an official document of a Minister, other than an exempt document.

[21] Under section 5 of the *Administrative Decisions (Judicial Review) Act 1977 (*ADJR Act) a person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision.

13. When must I refund the retained amount?

You may only retain an amount under section 8AAZLGA until one of the following occurs:

- It would no longer be reasonable to require verification of the information (paragraph 8AAZLGA(5)(a)) e.g. new information comes to light[22]
- If you failed to inform the taxpayer before the required date, the end of the day after that date (paragraph 8AAZLGA(5)(b)), or
- There is a change to the value of the refund as a result of the Commissioner amending an assessment relating to that amount, or the Commissioner making or amending an assessment under Division 105 in Schedule 1 to the TAA relating to the amount (paragraph 8AAZLGA(5)(c)).

14. What records should I keep?

You must adhere to the following ATO policies and procedures:

- **Keeping records relating to decisions made under section 8AAZLGA.** All communications with the taxpayer, and documents used to make the decision to retain the amount, must be kept on the ATO's electronic filing systems.
- **Documenting the reasons for your decision.** As a minimum, the documentation must be adequate to demonstrate that all 10 factors have been considered, that no irrelevant factors have been considered, and that the decision to retain the amount is objectively reasonable in all the circumstances.

Compliance with policy and procedure is imperative, as the Commissioner's decision to retain the amount is subject to section 11 of the *Freedom of Information Act 1982* (FOI Act) and review under section 5 of the *Administrative Decisions (Judicial Review) Act 1977*, and/or Part IVC.

15. Can the taxpayer object and within what timeframe?

A taxpayer may object under Part IVC to a decision by the Commissioner to retain an amount.

The taxpayer may object 60 days (plus any applicable extensions) after the last day on which you are required to inform them of your decision to retain the amount.[23]

The 60-day period can be extended. This occurs when you request further information from the taxpayer. The extension covers the period of time between request and receipt of the requested information. For an extension to apply, the request for information must be made during the 60-day period (or the 60-day period as extended).

Any request for further information made within the initial statutory 14 or 30 day notification period does not extend the time after which an objection can be lodged.

The extension mechanism does not apply where it is necessary for you to make requests of third parties (defined in footnote 11) for verification purposes.

If you make or amend an assessment that changes the entitlement to the amount, the taxpayer may object against the assessment or amended assessment under Part IVC.

16. When must I notify the taxpayer of their right to object?

You must inform the taxpayer, in writing, of their right to object within seven days after the end of the 60-day period (plus extensions).[24] You may choose to inform the taxpayer of their objection rights at an earlier time however, they can only object to the retention of the refund after the end of the 60-day period (plus extensions).

This is the case even if the taxpayer does not receive notification from the Commissioner about available objection rights.

17. Are there any other restrictions on the taxpayer's right to object?

A taxpayer cannot object to the retention of the refund if:

- The amount has already been refunded;
- The assessment relating to the amount has been amended; or
- An assessment has been made, or amended, relating to the amount, under Division 105 in Schedule 1 to the TAA.

[22] Paragraph 8AAZLGA(5)(a).

[23] The 60-day period commences from the day after the last day of the applicable period in subsection 8AAZLGA(3).

[24] Subsection 8AAZLGA(7).

18. How does section 8AAZLGA interact with sections 8AAZLF, 8AAZLG and 8AAZLH?

What is section 8AAZLF?

Under section 8AAZLF, we are required to refund to a taxpayer as much of an RBA surplus of a taxpayer, or a credit of a taxpayer, as is not allocated or applied under Division 3 of Part IIB.[25]

What are the provisions: sections 8AAZLG and 8AAZLH?

We are also able to retain amounts where a taxpayer has an outstanding BAS[26] or has not nominated a permissible financial institution account to receive BAS refunds.[27] PS LA 2011/22 sets out the principles and guidelines to be followed when exercising the Commissioner's discretion to retain amounts under sections 8AAZLG and 8AAZLH.[28]

How the provisions interact

A decision to retain an amount under section 8AAZLGA cannot be made whilst we retain amounts under either sections 8AAZLG or 8AAZLH. Once an amount becomes payable under section 8AAZLF, we may then exercise the discretion under section 8AAZLGA to retain the amount where it is reasonable to require verification of notified information.

The fact that an amount has been retained under sections 8AAZLG or 8AAZLH does not change the requirement to inform the taxpayer under sub-section 8AAZLGA(3) if we later exercise our discretion to retain the amount under section 8AAZLGA. However, the RBA interest day, which operates to specify the period within which a taxpayer must be informed that an RBA surplus amount has been retained, is deferred in situations where we retain the amount under sections 8AAZLG or 8AAZLH.

This means that the date by which we must inform the taxpayer of a decision to retain an amount will be calculated from the day after the refund becomes payable under section 8AAZLF, rather than from the original lodgment date of the notification by the taxpayer.

In contrast, we are not able to retain under section 8AAZLG or 8AAZLH amounts that relate to MRRT or PRRT where the taxpayer in question has outstanding returns or has not nominated a correct financial institution account.[29]

19. More information

For more information on the reasons for the introduction of section 8AAZLGA; see *Commissioner of Taxation v. Multiflex Pty Ltd* [2011] FCAFC 142; 2011 ATC 20-292; (2011) 82 ATR 153.

[25] Division 3 of Part IIB gives the Commissioner the power to allocate or apply the taxpayer's RBA surplus or credits to the taxpayer's outstanding tax debts or other amounts.
[26] Section 8AAZLG.
[27] Subsection 8AAZLH(4).
[28] Law Administration Practice Statement PS LA 2011/22 *Refunds of running balance account surpluses and credits – Commissioner's discretion to retain amounts*.
[29] This is because sections 8AAZLG and 8AAZLH do not apply to MRRT and PRRT.

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Amendment history

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1 June 2018	Contact details	Updated.
9 July 2015	All	Updated to new LAPS format and style.

References

Subject references	Commissioner's discretion Refunds
Legislative references	ITAA 1936 166A TAA 1953 Pt IIB Div 3 TAA 1953 8AAZLF TAA 1953 8AAZLG TAA 1953 8AAZLGA TAA 1953 8AAZLGA(1) TAA 1953 8AAZLGA(1)(a) TAA 1953 8AAZLGA(1)(b) TAA 1953 8AAZLGA(2) TAA 1953 8AAZLGA(2)(a) TAA 1953 8AAZLGA(2)(b) TAA 1953 8AAZLGA(2)(c) TAA 1953 8AAZLGA(2)(d) TAA 1953 8AAZLGA(2)(e) TAA 1953 8AAZLGA(2)(f) TAA 1953 8AAZLGA(2)(g) TAA 1953 8AAZLGA(2)(h) TAA 1953 8AAZLGA(2)(i) TAA 1953 8AAZLGA(2)(j) TAA 1953 8AAZLGA(3) TAA 1953 8AAZLGA(4) TAA 1953 8AAZLGA(5)(a) TAA 1953 8AAZLGA(5)(b) TAA 1953 8AAZLGA(5)(c) TAA 1953 8AAZLGA(7) TAA 1953 8AAZLH TAA 1953 8AAZLH(4) TAA 1953 Pt IVC TAA 1953 Sch 1 Div 105 TAA 1953 Sch 1 155-15 TAA 1953 Sch 1 388-50 Acts Interpretation Act 1901 29 Administrative Decisions (Judicial Review) Act 1977 5 Excise Act 1901 39G(1)(m) Freedom of Information Act 1982 11 Judiciary Act 1903 39B

	Petroleum Resource Rent Tax Assessment Act 1987 59 (2)(a) Petroleum Resource Rent Tax Assessment Act 1987 62 Value Added Tax Act 1994 43C (UK)
Case references	Commissioner of Taxation v. Multiflex Pty Ltd [2011] FCAFC 142; 2011 ATC 20-292; (2011) 82 ATR 153 Cosic v. Director of Housing [2007] VSC 486 Multiflex Pty Ltd v. Commissioner of Taxation [2011] FCA 1112; 2011 ATC 20-284; (2011) 81 ATR 347 Prudential Assurance Co Ltd v. Revenue & Customs [2006] UKVAT V19607 Re Martino and Australian Taxation Office (No 2) [2002] AATA 1242 Re Pemberton Brewing Company Pty Ltd as Trustee for the PBC Unit Trust and Commissioner of Taxation [2011] AATA 11; (2011) 81 ATR 889 Xansa Barclaycard Partnership Ltd v. CCE [2005] BVC 2085
File references	1-3XGMHFQ
Related public rulings	MT 2008/1
Related practice statements	PS LA 1998/1 PS LA 2006/8 PS LA 2008/6 PS LA 2011/22
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Appendix

The 10 statutory factors: further explanation and examples

As stated in section 6 of this practice statement, you must consider the 10 factors listed in paragraphs 8AAZLGA(2)(a) to 8AAZLGA(2)(j) when deciding whether or not it is reasonable to retain an amount under the provision.

We discuss each factor in more detail below. We also provide examples of each factor. The examples illustrate how different factors may impact on a decision whether or not to retain an amount in various situations. The examples are indicative rather than conclusive or exhaustive. The mere fact that information may be available similar to that which appears in one of the examples may not be sufficient alone to support a decision to retain an amount.

In some circumstances, and particularly where there is little information available to you, one factor alone might be sufficient to support a decision to retain the amount. However, in all cases you must consider each of the factors, and determine whether there is information available relevant to each one. You should then objectively consider each factor and determine whether it is reasonable in all the circumstances to retain the amount.

Factor 1 – Likely accuracy of notified information[30]

When considering the likely accuracy of the notified information, you should evaluate whether any of the information available to you indicates the potential that, and possible extent to which, the notified information is incorrect. A short (and not exhaustive) list of factors that may affect 'likely accuracy' is:

- variance from previous net amount patterns
- comparisons to industry benchmarks; and
- the size of the refund claimed relative to the taxpayer's turnover.

The presence of these indicators does not necessarily involve the provision of inaccurate information. They may, for example, reflect an extraordinary transaction undertaken during the period. Nevertheless, they may still point to an increased risk in relation to the accuracy of the notified information.

Example 1 – Likely accuracy of notified information

A taxpayer is registered as a commercial fisherman. He has reported on his BAS large claims for fuel tax credits and input tax credits on the capital acquisition of a vessel, which are significantly outside industry norms. The Commissioner holds no other information regarding the notified information. A decision is made that it is reasonable to retain the refund for verification as there is some doubt as to the likely accuracy of the notified information.

The Commissioner later requests a copy of purchase documents for the vessel, a copy of the vessel's certificate of survey, copies of the taxpayer's catch records and copies of the taxpayer's fuel tax receipts. The taxpayer has yet to provide any of the requested information. This would be a factor in favour of it being reasonable to continue to retain the refund for verification.

Example 2 – Likely accuracy of notified information

A taxpayer registered as a commercial land developer lodges a BAS reporting an input tax credit on the acquisition of a block of land. A property search is conducted based on information given by the taxpayer and the search results indicate that the land may not have been purchased by the taxpayer. This would be a factor in favour of it being reasonable to retain the refund for verification.

[30] Paragraph 8AAZLGA(2)(a).

Example 3 – Likely accuracy of notified information

A taxpayer registered as a property developer lodges a BAS reporting an input tax credit on the purchase of land. An examination of the vendor's BAS shows that the amount of GST reported at label 1A on the BAS is significantly less than what is claimed by the property developer purchaser. This tends to indicate that the land may have been supplied under the margin scheme, and that an input tax credit would not be available to the purchaser. This would be a factor in favour of it being reasonable to retain the refund for verification.

Example 4 – Likely accuracy of notified information

A taxpayer company, operating a small business from a home office, lodges an income tax return reporting a number of deductions, resulting in a refund of all the PAYG instalments for the year. During a phone conversation with the taxpayer's tax agent, it becomes apparent that the taxpayer company may not have correctly identified their expenses and may have included the expenses of the principal shareholder, such as the acquisition of a motor vehicle, utility bills, insurance payments and capital expenditure on home renovations. This would be a factor in favour of it being reasonable to retain the refund for verification.

Factor 2 – Likelihood that information was affected by fraud or evasion, intentional disregard or recklessness[31]

When assessing this factor, consider the degree to which information available to you makes it likely that the notified information is affected by fraud or evasion, intentional disregard of a taxation law, or recklessness as to the operation of a taxation law.

Intentional disregard and recklessness take their ordinary meanings.[32] A taxpayer will be taken to have intentionally disregarded a taxation law if the taxpayer has consciously decided to disregard clear obligations under a taxation law. For example, this would include claiming an input tax credit based on a tax invoice known to be falsified.

A taxpayer will have been reckless as to the operation of a taxation law if the taxpayer's conduct shows disregard of, or indifference to, consequences or risks that are reasonably foreseeable to result from the taxpayer's actions. For example, this would include providing information in an income tax return or in a BAS where the taxpayer knows there is a real risk that the information may be incorrect, or is indifferent to whether the information is incorrect.

In assessing the likelihood of there being fraud or evasion,[33] intentional disregard, or recklessness, the compliance history of the taxpayer may be relevant. A good compliance history is an indicator that fraud or evasion, intentional disregard, or recklessness is less likely. On the other hand, where there has been a history of non-compliance with taxation laws, this could indicate that there is a higher likelihood of intentional disregard or recklessness (if not fraud or evasion in appropriate cases).

Example 5 – Likelihood that information was affected by fraud or evasion, intentional disregard or recklessness

A sole trader taxpayer operating a road freight business reports an extremely large fuel tax credit claim on their BAS. Third party checks through Motor Registrations reveal that the taxpayer has not registered any heavy vehicles in the last 10 years. This would be a factor in favour of it being reasonable to retain the refund for verification.

Example 6 – Likelihood that information is affected by fraud or evasion, intentional disregard or recklessness

A tax agent who is currently under investigation, and has been identified as having lodged information on behalf of clients who were involved in fraud or evasion in the past, lodges a company income tax return on behalf of a new client that is outside industry norms and would lead to a large refund of the company's PAYG instalments. This would be a factor in favour of it being reasonable to retain the refund for verification.

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[31] Paragraph 8AAZLGA(2)(b).
[32] The terms 'intentional disregard' and 'recklessness' are explained in detail in Miscellaneous Taxation Ruling MT 2008/1 *Penalty relating to statements: meaning of reasonable care, recklessness and intentional disregard*.
[33] See Law Administration Practice Statement PS LA 2008/6 *Fraud or evasion*.

Example 7 – Likelihood that information is affected by fraud or evasion, intentional disregard or recklessness

A taxpayer registered as an exporter reports GST-free export sales on their BAS at labels G2 and G1. During the verification process, it is discovered that the amounts reported on the activity statement and shipping documents provided by the taxpayer do not correspond with external data matching. This suggests that the documents provided by the taxpayer may have been falsified. This would be a factor in favour of it being reasonable to continue to retain the refund for verification.

Example 8 – Likelihood that information is affected by fraud or evasion, intentional disregard or recklessness

A taxpayer operating a business of property development lodges a BAS claiming a substantial refund. Information held by the Commissioner indicates a prior history of fraud or evasion by the taxpayer, so the BAS is identified for review and the amount of the refund claimed is retained. Although the taxpayer claims not to have sold a particular block of new residential apartments, a property search later reveals that they have in fact been sold during the period in review. As the taxpayer has not reported the GST payable on their BAS, an amended assessment is made and section 8AAZLGA is no longer relevant.

Factor 3 – Impact of retaining the amount on a taxpayer's financial position[34]

Information relevant to this factor may include evidence of financial hardship suffered by the taxpayer (whether an individual or corporate), such that it would compromise the taxpayer's business viability.[35] Relevant evidence may include material provided by the taxpayer and relevant information otherwise available. You should evaluate the taxpayer's financial position and the impact of a retention decision on their immediate cash flow, solvency and borrowing needs. The size of the amount claimed may also be a relevant consideration in the context of particular taxpayer circumstances. However, the mere fact that a taxpayer will be deprived of a refund will not be a determinative factor against it being reasonable to retain an amount for verification.

Example 9 – Impact of retaining the amount on a taxpayer's financial position

A BAS is identified for review by the Commissioner and financial hardship is raised by the taxpayer. However, no evidence is provided by the taxpayer, nor does the Commissioner have any evidence available to support this claim. In the circumstances, it is reasonable for the Commissioner to continue to retain the refund for verification.

Example 10 – Impact of retaining the amount on a taxpayer's financial position

A company lodges an income tax return that is identified for review. The company is expecting a large refund and claims that the refund is required to fund business reconstruction following a recent natural disaster. Bank statements and other documents show that the viability of the business will be compromised if the refund is retained. This would be a factor against it being reasonable to continue to retain the refund.

[34] Paragraph 8AAZLGA(2)(c).
[35] cf *Cosic v. Director of Housing* [2007] VSC 486 at paragraphs 40-44; see also PS LA 2011/22.

Factor 4 – Protection of the revenue[36]

When assessing this factor consider whether retaining the amount 'is necessary for the protection of the revenue'.[37] It includes the 'likelihood that the Commissioner could recover any of the amount if the notified information was found to be incorrect after the amount had been refunded'. A range of things may affect the likelihood of later recovery from a taxpayer, including solvency issues, hardship, suspected fraud, their compliance history, and available assets. Information available to the Commissioner which raises revenue protection concerns is often relevant to one or more other factors to be considered.

The size of the amount in question may also be relevant, but evaluation of this factor must be made against taxpayer circumstances. While a smaller amount might indicate a lesser risk to the revenue and a larger amount a greater risk, there is no threshold amount which would prevent or require retention of an amount otherwise to be refunded.

Example 11 – Protection of the revenue

A taxpayer company, whose sole director has been previously associated with companies that were put into liquidation after accumulating large tax debts, lodges a BAS reporting a refund amount of $2 million. The amount of the refund is not consistent with previous BAS returns nor with the volume of sales reported. The past associations of the director are an indicator that there may be difficulty in recovering the amount if it is refunded and later found to be incorrect. This would be a factor in favour of it being reasonable to retain the refund for verification.

Example 12 – Protection of the revenue

A taxpayer's BAS is identified for review. It subsequently becomes apparent that the taxpayer is a non-resident on a business owner (provisional) visa purporting to own and operate a small café. Since becoming registered for GST one year ago, the business has reported very few sales compared to large claims for input tax credits, resulting in a consistent refund position. This would be a factor in favour of it being reasonable to continue to retain the refund while the basis for the claim to input tax credits is investigated.

Factor 5 – Complexity involved in verifying notified information[38]

Complex arrangements, such as those involving multiple supply chains and multiple entities, generally require more time and resources to verify than more straightforward or linear arrangements. In *Multiflex Pty Ltd v. Commissioner of Taxation,* it was accepted that the investigation being undertaken was complex and difficult.[39]

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[36] Paragraph 8AAZLGA(2)(d).

[37] The term 'necessary for the protection of the revenue' was considered in *Re Martino and Australian Taxation Office (No 2)* [2002] AATA 1242 in the context of cancellation of tobacco producer licences under excise provisions. The Tribunal observed (at [50-51]) that the phrase had not previously been considered, and that it connoted action reasonably required to keep safe or take care of moneys to which the Crown is entitled. In *Re Pemberton Brewing Company Pty Ltd as Trustee for the PBC Unit Trust and Commissioner of Taxation* [2011] AATA 11, the Tribunal regarded *Re Martino and Australian Taxation Office* as concluding that use of the phrase in paragraph 39G(1)(m) of the *Excise Act 1901* meant ensuring that the Commonwealth receives all that it should in the form of any excise that is ultimately payable in respect of excisable goods. The phrase also appears in section 43C of the *Value Added Tax Act 1994* (UK) and other UK provisions. In *Xansa Barclaycard Partnership Ltd v. CCE* [2005] BVC 2085, the VAT tribunal accepted (at [32]) that the phrase is 'clearly designed to secure the payment by a person so the tax or duty for which he is accountable … or to negate an attempt to avoid liability for tax'. The tribunal also said (at [36]) that the phrase is to be given a wide meaning, that it involves no de minimis principle, that it extends to straightforward cases of 'avoidance and abuse', and that it involves a 'balancing exercise' - cf *Prudential Assurance Co Ltd v. Revenue & Customs* [2006] UKVAT V19607 (at [6]).

[38] Paragraph 8AAZLGA(2)(e).

[39] [2011] FCA 1112; 2011 ATC 20-284; (2011) 81 ATR 347 at [27].

Example 13 – Complexity involved in verifying notified information

A BAS is lodged by a taxpayer who, based on information held by the Commissioner, is suspected of entering into non-arm's length transactions with a number of related entities. Following consideration of the ten factors the refund is retained for verification. The verification process requires a detailed examination of each of the related entities and the transactions entered into between them. During the verification process, the Commissioner identifies a series of complex and not fully documented transactions between associated entitles. As a result, the Commissioner cannot readily determine and establish the facts. This would be a factor in favour of it being reasonable to continue to retain the refund for verification.

Example 14 – Complexity involved in verifying notified information

A taxpayer lodges five quarterly BAS returns at the same time, each claiming a refund. Comparable industry data supports it being reasonable to retain the refunds for verification. In order to verify all the BAS returns, the Commissioner must request information such as transaction lists, bank statements, tax invoices and other substantiating documentation across each tax period. This would be a factor in favour of it being reasonable to continue to retain the refunds for verification.

Example 15 – Complexity involved in verifying notified information

A taxpayer registers for GST as a wine producer and lodges a BAS reporting a large wine equalisation tax credit claim, including a wine producer rebate. During the verification process, a number of issues become apparent.

ATO systems checks do not show any previous experience by the taxpayer in the winemaking industry. A telephone enquiry of the taxpayer reveals that the wine that the taxpayer produces is made for them by a well-established winery under the terms of a verbal agreement. Under that verbal agreement, the taxpayer's wine is produced from grapes that are sourced from the same vineyard that supplies the established winery. The Commissioner also discovers that the taxpayer has a number of other business and personal relationships with the established winery and entities and individuals associated with it. This leads the Commissioner to believe the taxpayer may be a vehicle that is being used by the established winery to improperly access a wine producer rebate greater than the $500,000 annual threshold.

The complex nature of the relationship and the transactions between the two parties would be a factor in favour of it being reasonable to continue to retain the refund for verification.

Factor 6 – Time for which the amount has already been retained[40]

You should consider the time which has already elapsed since the Commissioner first retained the refund. This factor may also impact on the taxpayer's financial position and complexity of the investigation. Undue delay in an investigation considered in the light of new information may in some cases be a factor against continuing to retain the refund.

Example 16 – Time for which the amount has already been retained

A BAS is identified for review in April 2014 and the refund is retained by the Commissioner. At the same time, the taxpayer is requested to provide further information, which is done promptly. By July 2014, however, no new information has been requested either from the taxpayer or from any third parties. As a result, the case is identified as not having progressed in a timely or satisfactory manner. This would be a factor in favour of it not being reasonable to continue to retain the refund for verification.[41]

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[40] Paragraph 8AAZLGA(2)(f).

[41] The facts in this example are hypothetical and for illustrative purposes only. They are in no way to be taken as reflecting any practice maintained or condoned by the Commissioner. In some cases, unreasonable delay or periods of inactivity may warrant some remission of General Interest Charge where imposed. See paragraph 58 of Law Administration Practice Statement PS LA 2006/8 *Remission of shortfall interest charge and general interest charge accrued during shortfall periods.*

Factor 7 – What has already been done to verify the information[42]

When assessing this factor, consider what action the Commissioner has already taken in verifying the information. The Commissioner will take prompt, reasonable and appropriate action when seeking to resolve any uncertainty there might be about the correctness of an amount to be refunded.

Reasonable action in this regard may involve requesting information from the taxpayer and/or third parties and/or accessing all information already available to the Commissioner, as well as publicly available information.

Consideration of this factor will usually be conducted in conjunction with the length of time for which a refund has already been retained.

Example 17 – What has already been done to verify the information

A taxpayer's claim to input tax credits has been undergoing verification for a number of months. The taxpayer has been previously notified that their refund has been retained for verification. During this time, the Commissioner has requested information from the taxpayer and searched external databases to confirm the validity of the claims made on the BAS. The external database searches show several inconsistencies in the taxpayer's claim, but without further information from the taxpayer or from third parties insufficient information is held to make an assessment. This would be a factor in favour of it being reasonable to continue to retain the refund for verification.

Factor 8 – Commissioner has enough information to make an assessment[43]

Depending on the information available, you may be in a position to make an assessment or amended assessment. Ordinarily, whenever this is the case, it is to be expected that an assessment will be made. When an assessment is made, the taxpayer can exercise objection and review rights in relation to the assessment.

You may not continue to hold the refund simply because of a disagreement about how the law applies to the facts. If the facts are not in dispute between the Commissioner and the taxpayer, it cannot at that stage be reasonable to require verification of information. An assessment reflecting the Commissioner's view of the law should be made in these circumstances.

Example 18 – Commissioner's ability to make an assessment

A taxpayer company which operates a café lodges an income tax return claiming substantial deductions leading to a refund of its PAYG instalments. When asked for information to substantiate the claims made, the taxpayer provides information that indicates that they are not entitled to the deductions. As a result, the Commissioner has enough information to make (and makes) an amended assessment.

Factor 9 – Consistency of information with previously provided information[44]

Consider things such as the amount of the refund claimed compared to the refund amounts previously or commonly claimed by the taxpayer. This enables the patterns in lodged information to be taken into account, recognising that in many cases an unusual variation might be readily explicable on the basis of an extraordinary transaction taking place during the tax period or financial year. This factor is also considered relevant when considering the likely accuracy of the information.

Example 19 – Consistency of information with previously provided information

A small business taxpayer with a current GST turnover of $500,000 has been GST registered for five years as a corner-store operator. During this time, the taxpayer has consistently reported a net amount payable. However, the taxpayer lodges a BAS claiming input tax credits of $1 million, which results in a significant refund otherwise payable. This would be a factor in favour of it being reasonable to retain the refund for verification.

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[42] Paragraph 8AAZLGA(2)(g).
[43] Paragraph 8AAZLGA(2)(h).
[44] Paragraph 8AAZLGA(2)(i).

Example 20 – Consistency of information with previously provided information

A small business taxpayer who has been GST registered for five years as a coffee cart operator and who consistently reports 5% GST-free sales (of bottled water) lodges a BAS reporting 50% GST-free sales. This results in a refund being payable. This would be a factor in favour of it being reasonable to retain the refund for verification.

Factor 10 – Any other relevant matter [45]

There may be other matters peculiar to the particular taxpayer's circumstances that the Commissioner must take into account. It is not possible to list in advance what other matters may be relevant in a particular case. However you must consider in each case whether there are other relevant matters to be taken into account. Care needs to be taken in all cases that irrelevant considerations are not taken into account.

Other relevant matters may include but are not limited to:

- the likelihood that the Commissioner would take a different view to the taxpayer regarding what factual conclusions, relevant to the application of the law, should be drawn from the evidence.
- if the taxpayer has requested the Commissioner to retain the amount for verification of the notified amount.
- when there is no internal or publicly available evidence of the existence of the taxpayer's enterprise and the taxpayer is unable to be contacted by phone or via other forms of communication.

Example 21 – Any other relevant matter

A taxpayer carries on an enterprise as a handyman. He lodges a BAS claiming a large refund, and the BAS is identified for review. A decision is made that is reasonable to retain the refund for verification. A tax officer phones the taxpayer and asks for further information. The following day, the taxpayer provides a 'year to date' transaction list showing several incorrectly claimed input tax credits (such as medical expenses and residential rent). The scope of the verification process is soon after extended to include all other tax periods for the financial year in question. The provision of the list would be an 'other relevant matter' and a factor in favour of it being reasonable to continue to retain the refund.

Example 22 – Any other relevant matter

A tax agent lodges a BAS on behalf of their client, a firm specialising in the settlement of property transactions, and reports an input tax credit of $3 million. The taxpayer advises that the refund relates to an acquisition of the right to represent an individual in their future possible property settlements. The tax agent has been identified as being involved in a tax arrangement which the Commissioner does not consider to be effective relating to a supply of rights. This factor would support it being reasonable to retain the refund for verification.

[45] Paragraph 8AAZLGA(2)(j).