

***PS LA 2012/6 - Exercise of the Commissioner's discretion under section 8AAZLGA of the Taxation Administration Act 1953 to retain an amount that would otherwise have to be refunded***

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 This document has changed over time. This version was published on *1 November 2012*



# Practice Statement Law Administration

**PS LA 2012/6**

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**FOI status: may be released**

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*This law administration practice statement is issued under the authority of the Commissioner of Taxation. 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.*

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**SUBJECT:** Exercise of the Commissioner's discretion under section 8AAZLGA of the *Taxation Administration Act 1953* to retain an amount that would otherwise have to be refunded

**PURPOSE:** To provide guidance to tax officers on when it is reasonable to exercise the Commissioner's discretion to delay a refund amount pending verification of the taxpayer's entitlement to the amount.

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## BACKGROUND

1. This practice statement explains when the Commissioner may exercise the discretion in section 8AAZLGA of the *Taxation Administration Act 1953 (TAA)*<sup>1</sup> to retain an amount for verification purposes.
2. Section 8AAZLGA was introduced following the Full Federal Court decision in *Commissioner of Taxation v. Multiflex Pty Ltd*,<sup>2</sup> where it was held that the Commissioner had to pay refunds notified by taxpayers in business activity statements (BAS) 'forthwith'. The decision in this case compels the Commissioner to pay negative net amounts<sup>3</sup> within the administratively reasonable time it takes to process the taxpayer's return and make the payment, whether or not error or fraud is suspected. This was contrary to the then existing practice of retaining refunds in limited cases pending verification checks.
3. Section 8AAZLGA confers a power to retain, in certain circumstances, a running balance account (RBA) surplus or other credit that the Commissioner would otherwise be required to refund to the taxpayer.
4. When an amount is retained, the Commissioner must inform the taxpayer within a statutory period (14 days for an RBA surplus, or 30 days for other credits). If the taxpayer is not so informed, the amount must be paid by the day after the end of that period. Where the taxpayer has been informed, the amount may be retained, 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).
5. Decisions to retain amounts are subject to objection rights under Part IVC after amounts have been retained for a stipulated period of time.

## STATEMENT

6. Tax officers must follow the principles and guidelines outlined in this practice statement when determining whether or not to exercise the Commissioner's discretion under section 8AAZLGA.
7. It is not possible to provide guidance about all the circumstances in which the discretion may be exercised. Each case has to be considered on its merits, and on the basis of all legislative factors and the relevant facts. Tax officers must consider all relevant matters prescribed for the exercise of the discretion, and must not take into account irrelevant factors. They must exercise their own judgment in arriving at an appropriate decision in good faith and without bias.<sup>4</sup>

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<sup>1</sup> All legislative references are to the TAA, unless otherwise indicated.

<sup>2</sup> [2011] FCAFC 142.

<sup>3</sup> A negative net amount is a net amount less than zero.

<sup>4</sup> The Taxpayers' Charter 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*

## Section 8AAZLGA

8. Section 8AAZLGA applies to an amount that the Commissioner would otherwise be required to refund under section 8AAZLF.
9. Under section 8AAZLF, the Commissioner is required to refund to a taxpayer so much of an RBA surplus of a taxpayer, or a credit of the taxpayer, as the Commissioner does not allocate or apply under Division 3 of Part IIB.<sup>5</sup>

### Types of refunds covered

10. Section 8AAZLGA can apply to refunds arising under any taxation law, including income tax, goods and services tax, luxury car tax, wine equalisation tax, fuel tax, minerals resource rent tax (MRRT), and petroleum resource rent tax (PRRT).
11. Section 8AAZLGA may particularly apply where there is an entitlement under any taxation law to the refund claimed on lodgment of a return or other information ('notification') provided by the taxpayer. 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.<sup>6</sup>
12. The following table summarises when there is (or is not) an entitlement on lodgment for income tax laws, indirect tax laws, MRRT and PRRT purposes.

<b>Entitlement exists on lodgment</b>	<b>Entitlement does not exist on lodgment</b>
<p><i>Amounts under income tax laws</i></p> <ul style="list-style-type: none"> <li>• Income tax returns for full self-assessment taxpayers (principally companies and superannuation funds) for income tax purposes.</li> </ul>	<p><i>Amounts under income tax laws</i></p> <ul style="list-style-type: none"> <li>• Income tax returns for other than full self-assessment taxpayers (principally individuals) for income tax purposes.</li> <li>• Any income tax amendment requests.</li> </ul>
<p><i>Amounts under indirect tax laws</i></p> <ul style="list-style-type: none"> <li>• Original or revised Business Activity Statement (BAS) under the indirect tax self-actuating system (applies to tax periods starting before 1 July 2012).</li> <li>• Original BAS under the indirect tax self-assessment system (applies to tax periods starting on or after 1 July 2012).</li> </ul>	<p><i>Amounts under indirect tax laws</i></p> <ul style="list-style-type: none"> <li>• Amendment requests made <i>other than</i> in the form of a revised BAS under the indirect tax self-actuating system.</li> <li>• Amendment requests under the indirect tax self-assessment system.</li> </ul>

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*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.'*

<sup>5</sup> 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.

<sup>6</sup> 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*.

<p><i>Amounts under MRRT laws</i></p> <ul style="list-style-type: none"> <li>• MRRT returns under the MRRT self-assessment system.</li> </ul>	<p><i>Amounts under MRRT laws</i></p> <ul style="list-style-type: none"> <li>• Any MRRT amendment requests.</li> </ul>
<p><i>Amounts under PRRT laws</i></p> <ul style="list-style-type: none"> <li>• PRRT annual returns under the PRRT self-assessment system.</li> </ul>	<p><i>Amounts under PRRT laws</i></p> <ul style="list-style-type: none"> <li>• Any PRRT amendment requests.</li> </ul>

### Errors made in lodgment

13. 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.<sup>7</sup> It is only once the 'approved form' requirements are met that a credit can arise, and the Commissioner may then apply section 8AAZLGA to retain the amount in question.

### When the Commissioner may retain an amount

14. Where a taxpayer has given the Commissioner a notification that affects or may affect the amount that would otherwise have to be refunded to a taxpayer, the Commissioner may retain the amount in two situations. The first is where it 'would be reasonable to require verification of information' contained in the notification which relates to the amount to be refunded.<sup>8</sup> The second is where the taxpayer has requested the Commissioner to retain the amount for verification of the notified information, and the request has not been withdrawn.<sup>9</sup>
15. 'Verification' takes its ordinary meaning, and in this context means actions or enquiries to prove, ascertain or establish the truthfulness, correctness or accuracy of the information provided.<sup>10</sup> Verification activities may include, but are not limited to, searches of internal and external databases or other information held by the Commissioner,<sup>11</sup> or enquiries of the taxpayer or third parties (such as requests for information and documentation).
16. Section 8AAZLGA may also apply where it would be reasonable to require verification of information contained in a notification that does not give rise to an entitlement to a refund for the entity. This is because there are circumstances where a notification may nevertheless affect the amount that the Commissioner would otherwise have to refund to an entity under section 8AAZLF. For example, where an entity has an outstanding RBA surplus or credit that is yet to be refunded, a notification that the entity gives to the Commissioner may give rise to a tax liability. The extent of that liability may affect the amount that the Commissioner would otherwise have to refund because of the operation of the rules in Division 3 of Part IIB that deal with the offsetting of credits against tax debts. If it is reasonable to require verification of information contained in the notification that may give rise to the tax liability, a decision may be made to retain any refund that would otherwise have to be paid under section 8AAZLF.

<sup>7</sup> See subsection 117-10(1) of Schedule 1 to the TAA, paragraph 59(2)(a) of the *Petroleum Resource Rent Tax Assessment Act 1987* and section 388-50 of Schedule 1 to the TAA.

<sup>8</sup> Paragraph 8AAZLGA(1)(a).

<sup>9</sup> Paragraph 8AAZLGA(1)(b).

<sup>10</sup> See paragraph 7.28 of the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2012 Measures No 1) Bill 2012.

<sup>11</sup> This might include information about the notification provided in advance by the taxpayer.

### ***Taxpayer request to the Commissioner to retain an amount***

17. A taxpayer may also request the Commissioner to retain an amount for the purpose of verification.<sup>12</sup> Such a request might be made where a taxpayer is concerned that their refund claim may be incorrect. Where a taxpayer requests the Commissioner to retain a refund for verification, the making of the request itself is a relevant factor (and ordinarily will be a strong factor), in making any decision to retain the refund. The Commissioner, however, has no obligation to agree to a taxpayer request to retain the amount. The Commissioner must still have regard to all factors listed in subsection 8AAZLGA(2) in considering whether to retain the amount.
18. In the event that the taxpayer request is granted, the Commissioner 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'.<sup>13</sup>
19. If the taxpayer withdraws the request, the Commissioner may continue to retain the amount. This occurs when it would be reasonable to require verification of information contained in the 'notification' and the verification relates to the amount that the Commissioner would have to otherwise refund to the taxpayer.

### **Factors that the Commissioner must take into account in deciding whether or not to retain an amount**

20. The Commissioner must have regard to all of the factors listed in subsection 8AAZLGA(2) in exercising the discretion to retain an amount under subsection 8AAZLGA(1). The 10 specific factors listed in paragraphs 8AAZLGA(2)(a) to 8AAZLGA(2)(j) are relevant to whether or not it would be reasonable to require verification of information at any particular time. Regard must be had to these factors 'as far as the information available to the Commissioner at the time of making the decision reasonably allows'.
21. The factors listed in subsection 8AAZLGA(2) are as follows:
  - (a) the likely accuracy of the notified information
  - (b) the likelihood that the notified information was affected by:
    - (i) fraud or evasion; or
    - (ii) intentional disregard of a taxation law; or
    - (iii) 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

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<sup>12</sup> Paragraph 8AAZLGA(1)(b).

<sup>13</sup> 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 refunded 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 paragraphs 39 to 43.

- (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.
22. These matters or factors are discussed in greater detail in the Explanation section at paragraphs 55 to 101 of this practice statement.
23. Each of the factors must be considered before a decision can be made to retain an amount. However, this requirement is qualified by the extent and content of any information available to the Commissioner. Also, the legislation attributes no ranking or weighting to the factors. The significance to be attributed to a factor will depend on the circumstances of each case.
24. In many cases, it will not be possible for the Commissioner to consider a factor due to the absence of information. For example, the Commissioner may have sought information from a taxpayer but not yet received the information in return. The Commissioner's 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.<sup>14</sup>
25. The Commissioner may only retain an amount until 'it would no longer be reasonable to require verification of the information'.<sup>15</sup> The practical effect of this is that the Commissioner must reconsider whether the amount should be retained each time new information becomes available or circumstances otherwise change in a way that is relevant to consideration of any of the 10 factors.
26. The discretion to retain an amount, therefore, is assessed on an ongoing basis. This does not mean that the Commissioner is otherwise required to review a decision to retain an amount in circumstances where nothing has changed since the decision was first made or later reviewed. However, given that the time for which the Commissioner has already retained the amount is a factor to be considered, retention decisions should be reviewed from time to time by reference to the particular circumstances.
27. The Commissioner must ensure that all factors are considered and must not consider irrelevant factors in making a decision to retain an amount. A record must be kept of the reasons for all decisions retaining an amount. This is imperative, as the Commissioner's decision to retain the amount is subject to section 11 of the *Freedom of Information Act 1982* (Cth) (FOI Act) and review under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act), and/or Part IVC.

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<sup>14</sup> 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.

<sup>15</sup> Paragraph 8AAZLGA(5)(a).

### **Time within which any decision must be made**

28. The Commissioner must make any decision under section 8AAZLGA within an administratively reasonable time. What is an administratively reasonable time necessarily depends in part on the circumstances of each case. Officers need to bear in mind the obligation to inform the entity of the decision to retain within a stipulated period of the notification being given to the Commissioner, and that an amount cannot be retained if the entity has not been informed within this period.<sup>16</sup> Also, any decision to retain an amount must occur before the entity is informed that an amount will be retained. Officers should not indicate to an entity that an amount will be retained before a formal decision is made.
29. In the absence of a statutory time limit, an obligation to pay an amount to an entity requires its performance 'within a time fixed by what is reasonably necessary to make that refund'.<sup>17</sup> The law, however, may also regulate the manner in which the obligation to pay is to be performed.<sup>18</sup> In this regard, section 8AAZLGA forms part of the statutory context against which performance of payment obligations by the Commissioner is to be considered.
30. The Commissioner may gather information within what is an administratively reasonable time against the 10 statutory factors to consider whether a section 8AAZGLA decision should be made. The text of the section 8AAZLGA, the broader context and purpose of that provision, and general administrative law principles support this. There is nothing, in the provision or otherwise, which requires the Commissioner to make a decision to retain an amount at any particular point within what is an administratively reasonable time. In particular, the Commissioner is under no obligation to make any decision either at the point in time the taxpayer gives the notification, or immediately afterwards.

### **Making a decision to retain an amount**

31. The Commissioner has a number of tools and processes in place designed to assist in identifying cases in which it may be reasonable to require verification of information. Some of these tools and processes involve computer programs that provide information concerning the risk profiles of a refund claim. Neither these tools and processes, nor any data or material they produce, may constitute a decision to retain an amount.
32. Officers must actively turn their mind to the 10 factors in subsection 8AAZLGA(2) to determine whether a section 8AAZLGA decision should be made. In doing so, officers should take reasonable steps to gather relevant information before considering section 8AAZLGA. Where appropriate and practicable, the taxpayer will be given an opportunity to provide further information before the time in which a decision has to be made.

### **Obligation to inform of a decision**

33. The Commissioner must inform the taxpayer that an amount has been retained:
  - in the case of an RBA surplus – by the end of the 14<sup>th</sup> day after the RBA surplus arose (known as the RBA interest day), or
  - in the case of a credit – by the end of the 30<sup>th</sup> day after entitlement to a refund amount arose.

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<sup>16</sup> Paragraph 8AAZLGA(5)(b).

<sup>17</sup> *Commissioner of Taxation v. Multiflex Pty Ltd* [2011] FCAFC 142; 2011 ATC 20-292; (2011) 82 ATR 153 at [40].

<sup>18</sup> See in particular the Full Federal Court decision [2011] FCAFC 142 at paragraphs [27] and [40].

34. The Commissioner's obligation to inform the taxpayer may be satisfied in a number of ways, including by telephone, electronic mail, post<sup>19</sup> and text message. The ordinary meaning of the word 'inform' is to bring to the knowledge of the recipient. Where the taxpayer concerned is a company, this may be achieved by informing an agent of the company having authority to receive information for the company for that purpose. Agents here usually include the public officer, company secretary, director or registered tax agent of the company.
35. There is no requirement for the Commissioner 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,<sup>20</sup> judicial review,<sup>21</sup> and objection rights.
36. ATO policies and procedures must be observed regarding the keeping of records relating to decisions made under section 8AAZLGA, and 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.<sup>22</sup>
37. ATO policies and procedures must also be followed when determining the extent to which reasons for the decision are to be documented. As a minimum requirement, the documentation must be adequate to demonstrate administrative compliance with the legislation insofar as 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.
38. If the Commissioner fails to inform the taxpayer by the required date,<sup>23</sup> the Commissioner cannot continue to rely on section 8AAZLGA to retain the amount in question.

### **Interaction with retention of refunds under other provisions**

39. The Commissioner is also able to retain amounts where an entity has an outstanding BAS<sup>24</sup> or has not nominated a permissible financial institution account to receive BAS refunds.<sup>25</sup> 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.<sup>26</sup>

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> Under section 5 of the 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.

<sup>22</sup> See Law Administration Practice Statement PS LA 2002/16 *Mandatory use of Information Technology systems for interpretative work - inclusion in performance agreements*.

<sup>23</sup> 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 the 14<sup>th</sup> day after the taxpayer lodged the BAS; or for credits, the 30<sup>th</sup> day after the taxpayer gives the Commissioner a notice containing the amount claimed.

<sup>24</sup> Section 8AAZLG.

<sup>25</sup> Subsection 8AAZLH(4).

<sup>26</sup> Law Administration Practice Statement PS LA 2011/22 *Refunds of running balance account surpluses and credits – Commissioner's discretion to retain amounts*.

40. The interaction of these provisions means that a decision to retain an amount under section 8AAZLGA cannot be made while the Commissioner is already retaining amounts under either sections 8AAZLG or 8AAZLH. Once an amount becomes payable under section 8AAZLF, the Commissioner may then exercise the discretion under section 8AAZLGA to retain the amount where it is reasonable to require verification of notified information.
41. The fact that an amount has been retained under sections 8AAZLG or 8AAZLH does not change the requirement to inform the taxpayer under subsection 8AAZLGA(3) if the Commissioner later exercises the 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 the Commissioner retains the amount under sections 8AAZLG or 8AAZLH.
42. This means that the date by which the Commissioner 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.
43. In contrast, the Commissioner is not able to retain under section 8AAZLG or 8AAZLH amounts that relate to MRRT or PRRT where the entity in question has outstanding returns or has not nominated a correct financial institution account.<sup>27</sup>

#### **When the amount retained must be refunded**

44. The Commissioner may only retain an amount under section 8AAZLGA until:
  - it would no longer be reasonable to require verification of the information (paragraph 8AAZLGA(5)(a))
  - if the Commissioner 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 how much the Commissioner is required to 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)).whichever happens first.
45. The Commissioner must release a refund if at any time it is no longer reasonable to require verification of the notified information<sup>28</sup> because, for example, new information becomes available.
46. The Commissioner must consider additional relevant information whenever it becomes available, and decide whether it would be reasonable to continue to retain the amount for verification, having regard to the 10 factors in subsection 8AAZLGA(2).

#### **Review rights under Part IVC**

47. A taxpayer may object under Part IVC to a decision by the Commissioner to retain an amount. The time at which Part IVC objection rights arise is explained at paragraphs 48 to 52.

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<sup>27</sup> This is because sections 8AAZLG and 8AAZLH do not apply to MRRT and PRRT.

<sup>28</sup> Paragraph 8AAZLGA(5)(a).

## **Time for objection**

48. The right to object arises 60 days (plus any applicable extensions) after the last day on which the Commissioner is required to inform the taxpayer of his or her decision to retain the amount.<sup>29</sup>
49. The 60-day period is extended by any periods of time in which the Commissioner has requested further information from the taxpayer and that information has not been provided to the Commissioner. In order for an extension to apply, the request for information must be made during the 60-day period (or the 60-day period as extended).<sup>30</sup>
50. Subsection 8AAZLGA(4) enables the Commissioner, when informing the taxpayer that an amount has been retained, to 'request information that he or she is aware will be required for the purposes of verifying the notified information'. As the taxpayer must generally be informed within 14 or 30 days,<sup>31</sup> a request made during that time does not extend the time after which an objection can be lodged.
51. To ensure that taxpayers are not adversely affected by actions of parties other than themselves, the extension mechanism does not apply where it is necessary for the Commissioner to make requests of third parties for verification purposes. 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.
52. If the Commissioner has made or amended an assessment that changes the entitlement to the amount, the taxpayer may object against the assessment or amended assessment under Part IVC.

## **Notification of an entitlement to object under section 8AAZLGA**

53. The Commissioner has up to seven days after the end of the 60-day period (plus extensions) to inform the taxpayer, in writing, of their right to object.<sup>32</sup> However, the Commissioner may choose to inform the taxpayer of their objection rights at an earlier time. The taxpayer 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.

## **Restrictions on the taxpayer's right to object**

54. A taxpayer cannot object to the retention of the refund if the Commissioner has already refunded the amount, amended the assessment relating to the amount, or made or amended an assessment relating to the amount, under Division 105 of Schedule 1.

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<sup>29</sup> The 60-day period commences from the day after the last day of the applicable period in subsection 8AAZLGA(3).

<sup>30</sup> The extension mechanism does not apply if the request for information is made within the period that the Commissioner must notify the taxpayer of the decision to retain the amount being 14 or 30 days. However, if a follow up request is sent after the 14 or 30 days, this would extend the period.

<sup>31</sup> The period in which a taxpayer has to be informed that an amount is being retained for verification is extended in some situations - see the discussion at paragraph 41.

<sup>32</sup> Subsection 8AAZLGA(7).

## EXPLANATION

### Factors the Commissioner must have regard to in deciding to retain an amount

55. As stated in paragraph 20 of this practice statement, the 10 factors listed in paragraphs 8AAZLGA(2)(a) to 8AAZLGA(2)(j) must be considered when deciding whether or not it is reasonable to retain an amount under the provision. Each of the factors is discussed in more detail below.
56. Examples are also provided below to illustrate how different factors may impact on a decision whether or not to retain an amount in various situations. 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. The examples provided are merely indicative rather than conclusive or exhaustive.
57. In some circumstances, and particularly where there is little information available to the Commissioner, one factor alone might be sufficient to support a decision to retain the amount. However, in all cases there is a need to consider each of the factors, and to determine whether there is information available relevant to each one respectively. It will then be necessary to 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<sup>33</sup>**

58. When considering the likely accuracy of the notified information, it will be necessary to look at whether any information available to the Commissioner tends to show the potential that, and possible extent to which, the notified information is incorrect. It is not possible to exhaustively state what things may affect 'likely accuracy', but they may include:
- variance from previous net amount patterns
  - comparisons to industry benchmarks; and
  - the size of the refund claimed relative to the taxpayer's turnover.
59. This is not to suggest that the presence of these indicators necessarily involves 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*

60. *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 is reasonable to retain the refund for verification as there is some doubt as to the likely accuracy of the notified information.*
61. *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.*

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<sup>33</sup> Paragraph 8AAZLGA(2)(a).

*Example 2 – Likely accuracy of notified information*

62. *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.*

*Example 3 – Likely accuracy of notified information*

63. *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*

64. *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<sup>34</sup>**

65. In assessing this factor, consideration would extend to include the degree to which information available to the Commissioner makes it likely that the notified information was affected by fraud or evasion, intentional disregard of a taxation law, or recklessness as to the operation of a taxation law.
66. Intentional disregard and recklessness take their ordinary meanings.<sup>35</sup> 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.
67. 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.

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<sup>34</sup> Paragraph 8AAZLGA(2)(b).

<sup>35</sup> 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*.

68. In assessing the likelihood of there being fraud or evasion,<sup>36</sup> 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*

69. *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*

70. *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.*

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

71. *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*

72. *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.*

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<sup>36</sup> See Law Administration Practice Statement PS LA 2008/6 *Fraud or evasion*.

**Factor 3 – Impact of retaining the amount on a taxpayer's financial position<sup>37</sup>**

73. Information relevant to this factor may include evidence of financial hardship suffered by the taxpayer (whether an individual or corporate),<sup>38</sup> such that it would compromise the taxpayer's business viability. Evidence in this regard may include material provided by the taxpayer and relevant information otherwise available. The consideration of a taxpayer's financial position requires an evaluation to be made of the impact of a retention decision on the taxpayer's 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*

74. *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*

75. *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.*

**Factor 4 – Protection of the revenue<sup>39</sup>**

76. This factor requires consideration of whether retaining the amount 'is necessary for the protection of the revenue'.<sup>40</sup> 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.

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<sup>37</sup> Paragraph 8AAZLGA(2)(c).

<sup>38</sup> cf *Cosic v. Director of Housing* [2007] VSC 486 at paragraphs 40-44; see also PSLA 2011/22.

<sup>39</sup> Paragraph 8AAZLGA(2)(d).

<sup>40</sup> 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

77. 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*

78. *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*

79. *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<sup>41</sup>**

80. Complex arrangements, such as those involving multiple supply chains and multiple entities, may 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.<sup>42</sup>

*Example 13 – Complexity involved in verifying notified information*

81. *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 entities. 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.*

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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]).

<sup>41</sup> Paragraph 8AAZLGA(2)(e).

<sup>42</sup> [2011] FCA 1112; 2011 ATC 20-284; (2011) 81 ATR 347 at [27].

*Example 14 – Complexity involved in verifying notified information*

82. *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*

83. *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.*
84. *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.*
85. *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<sup>43</sup>**

86. Consideration of the time which has already elapsed since the Commissioner first retained the refund is relevant here. This factor may also be relevant to the 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*

87. *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.<sup>44</sup>*

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<sup>43</sup> Paragraph 8AAZLGA(2)(f).

<sup>44</sup> 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 PSLA 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**<sup>45</sup>

88. This would involve considering 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.
89. 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.
90. 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*

91. *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**<sup>46</sup>

92. Depending on the information available, the Commissioner 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.
93. The Commissioner 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*

94. *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.*

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<sup>45</sup> Paragraph 8AAZLGA(2)(g).

<sup>46</sup> Paragraph 8AAZLGA(2)(h).

**Factor 9 – Consistency of information with previously provided information<sup>47</sup>**

95. This could include a consideration of 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*

96. *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.*

*Example 20 – Consistency of information with previously provided information*

97. *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<sup>48</sup>**

98. 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, the Commissioner 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.
99. 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.

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<sup>47</sup> Paragraph 8AAZLGA(2)(i).

<sup>48</sup> Paragraph 8AAZLGA(2)(j).

*Example 21 – Any other relevant matter*

100. *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*

101. *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.*

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 1 117-10(1) 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)
Related public rulings	MT 2008/1
Related practice statements	PS LA 1998/1; PS LA 2002/16; PS LA 2006/8; PS LA 2008/6; PS LA 2011/22

Case references	<p>Commissioner of Taxation v. Multiflex Pty Ltd [2011] FCAFC 142; 2011 ATC 20-292; (2011) 82 ATR 153</p> <p>Cosic v. Director of Housing [2007] VSC 486</p> <p>Multiflex Pty Ltd v. Commissioner of Taxation [2011] FCA 1112; 2011 ATC 20-284; (2011) 81 ATR 347</p> <p>Prudential Assurance Co Ltd v. Revenue &amp; Customs [2006] UKVAT V19607</p> <p>Re Martino and Australian Taxation Office (No 2) [2002] AATA 1242</p> <p>Re Pemberton Brewing Company Pty Ltd as Trustee for the PBC Unit Trust and Commissioner of Taxation [2011] AATA 11; (2011) 81 ATR 889</p> <p>Xansa Barclaycard Partnership Ltd v. CCE [2005] BVC 2085</p>
Other references	The New Shorter Oxford English Dictionary, 3rd edition, 1993 Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012
File references	1-3XGMHFQ
Date issued	1 November 2012
Date of effect	1 November 2012