

Settlements and remissions



PREPARING A COMPREHENSIVE SUBMISSION REFLECTING THE ATO GUIDELINES WILL MAXIMISE THE PROSPECTS OF A SUCCESSFUL REDUCTION IN LIABILITIES.

You got to know when to hold em,
know when to fold em,

Know when to walk away and
know when to run ...¹

INTRODUCTION

The Australian Taxation Office distinguishes between settlement of the amount of a tax liability, compromise of a tax debt,² remission of interest and penalties, release of a tax debt,³ and write-off of a tax debt.⁴ The ATO has published extensive guidelines on the exercise of these discretions, the main body of which is published in the *ATO Receivables Policy*,⁵ the *Code of Settlement Practice* (the Code), and certain practice statements.

The ATO is empowered to settle tax disputes over the quantum of liability or interpretation of the tax law and to compromise certain tax debts. The ATO is also empowered to remit penalties and interest, and release certain amounts of tax, penalties and interest, if payment of the liability will cause serious hardship to the taxpayer, and to write off unrecoverable debt.

The Minister for the Department of Finance and Deregulation (the Minister) is also empowered to release certain tax debts.

The objective of settlement, compromise, remission, release and write-off applications is to proactively present relevant facts, tax technical analysis and policy considerations in a systematic manner that is consistent with the ATO published guidelines in order to promote

a part or total reduction in liability and to avoid litigation. Care is required in preparing submissions to distinguish clearly between the various powers and to ensure that submissions respond to the ATO's guideline requirements for the relevant powers.

The ATO is entitled to continue recovery proceedings irrespective of whether there is a tax dispute or outstanding settlement, compromise, remission and release application.⁶

This article discusses the available procedures and ATO published guidelines that are applicable to the settlement, compromise, remission, release and write-off of tax liabilities. The article does not discuss enforcement procedures or court defences to enforcement procedures.

Legislative references are to the *Income Tax Assessment Act 1936* (ITAA36), the *Income Tax Assessment Act 1997* (ITAA97), the *Taxation Administration Act 1953* (TAA53), the *Financial Management and Accountability Act 1997* (FMAA97), the *Administrative Decisions (Judicial Review) Act 1977* (ADJR77), the *Bankruptcy Act 1966* (BA66), and the *Corporations Act 2001* (CA01).

SETTLEMENT

Introduction

The ATO is empowered to settle tax disputes.⁷ In settling, the ATO must comply with the Code.⁸ Settlements of widely-based tax disputes have additional considerations and procedures.⁹ The Code applies to all laws administered by the ATO.¹⁰

It is essential for advisers to structure any settlement in accordance with the Code so that the ATO is amenable to the settlement. The ATO may accept a taxpayer's proposal, but the proposal may not be susceptible to signing a formal settlement deed which would provide the taxpayer with certainty and finality of the dispute.

Settlement of tax disputes

Only qualifying disputes are susceptible to settlement under the Code. A dispute can relate to tax, penalties, payments, franking credits and debits, foreign tax credits, indirect taxes credits and refunds, interest, general interest charge (GIC), and shortfall interest charge (SIC).¹¹

A dispute must relate to the compromise of the quantum of liability or the interpretation of a tax law. Accordingly, a compromise in respect of factual circumstance or the interpretation of a law other than a tax law does not constitute a settlement. Further, acceptance by the ATO of the taxpayer's treatment based on the factual circumstances or interpretation of the tax law does not constitute a settlement because there is no compromise.¹²

A qualifying dispute must ordinarily be a tax decision that is or would be subject to objection and review or appeal under Pt IVC TAA53.¹³ Settlement can occur at any stage in the audit, assessment, objection, review or appeal process.

The ATO will be amenable to settlement of a qualifying dispute where:

- the taxpayer can establish a reasonably arguable position in respect of the interpretation of a tax law;

- the ATO administration and litigation costs are disproportionate to the benefits of disputing the matter;
- there are contentious factual or quantum issues, evidentiary difficulties or genuine uncertainty regarding the interpretation of the law which make resolution by litigation problematic; or
- the terms of settlement will achieve compliance with the ATO view for the current and future years cost effectively.

The ATO will not be amenable to settlement of an otherwise qualifying dispute where:

- the compromise would be contrary to an articulated policy reflected in the law;
- the compromise would be contrary to an established and articulated ATO view, such as in a public ruling;
- the compromise would involve inconsistent treatment for taxpayers in comparable circumstances;
- the issue in dispute is clear cut;
- the issue in dispute is subject to escalation to determine the ATO view;
- the issue in dispute is being litigated through other court proceedings;
- the taxpayer's case is weak and unlikely to be reviewed or appealed;
- determination of the issue by court proceedings is in the public interest to provide judicial clarification or to facilitate flow-on public compliance; or
- the taxpayer has deliberately created circumstances resulting in the inability to pay a tax debt.

The ATO is generally resistant to global settlements by payment of a lump sum to finalise a number of unrelated issues without determining liability for each issue based on the merit of each issue. However, a global settlement may apply where the issues are related, such as where there is a common flow of funds, for example, on trust distributions.

While the settlement submissions should canvass the taxpayer's capacity to pay (particularly where the circumstances are beyond the taxpayer's control) as this addresses the cost-benefit analysis of settling or litigating the matter, the

submissions should be circumspect and should not inadvertently turn the settlement submissions into a debt compromise submission.

Settlement of widely-based tax disputes have additional administrative and procedural requirements because the terms and conditions will apply to at least 20 taxpayers involved in the arrangement.

Importantly, the terms and conditions of widely-based tax dispute settlements are reviewed and agreed by the Widely-based Settlement Panel (the Panel). The determination of the Panel is not binding on the decision-maker. However, experience suggests that it is usual for the decision-maker to follow the recommendation of the Panel.

Taxpayers and advisers cannot attend the Panel. However, any settlement submission will be provided to the Panel. Accordingly, the settlement submission should address the issues that must be considered by the Panel identified in PS LA 2007/6.

The ATO's model settlement deed contains a number of terms and conditions which require careful consideration and explanation to the taxpayer as they affect the extent to which the settlement deed is binding on the ATO. For example:

- the settlement deed is only binding on the ATO if the taxpayer has disclosed all relevant facts;
- the settlement deed authorises recovery of the total tax and not the compromised amount for breach of the payment arrangements;

- the taxpayer will be required to abandon or waive objection, review and appeal, administrative review and freedom of information disclosure rights, even if the terms of the settlement deed are breached; and

- the directors of the taxpayer may be required to provide warranties about the terms and conditions of settlement which may expose the directors to new personal liabilities.

Determining and documenting the material facts so that the settlement deed is binding may present problems during settlement negotiations. Reasonable people can differ on what constitutes a relevant or material fact. Unless fully documented or stated in the recitals to the settlement deed, it will be difficult to clearly identify whether new material information has emerged which would entitle the ATO to abandon the agreement.

Negotiations over the terms and conditions of the settlement deed can be contentious.

COMPROMISE

Introduction

The ATO is empowered to compromise certain tax debts.¹⁴ The ATO's obligations to enforce the correct interpretation of a tax law or collect tax liabilities restrict the ATO's ability to compromise debts on public policy or normal commercial or business considerations.¹⁵ The ATO gives priority to promoting voluntary compliance and deterring non-payment over the recovery of some additional

✓ Tip: settlement

1. The settlement submissions should clearly specify the quantum or interpretation issue at dispute which qualifies the matter for settlement procedures.
2. The settlement submissions should emphasise the administrative reasons favouring settlement.
3. The settlement submissions should contextualise the administrative reasons possibly precluding settlement.
4. The settlement submissions for widely-based tax disputes should address the matters that the Panel must consider as identified in PS LA 2007/6.
5. The settlement submissions should clearly specify the quantum of tax, penalty and interest to be paid.
6. The settlement submissions should be without prejudice and deny liability or admission of fact to preserve the taxpayer's position should litigation ensue.
7. Ensure that the terms of the settlement deed are negotiated to protect the taxpayer and officers of a corporate taxpayer from unnecessary settlement risks.

funds in individual cases.¹⁶ Accordingly, taxpayers are often bemused that the ATO has rejected an otherwise commercial settlement proposal.

The *ATO Receivables Policy* provides guidance on exercise of the ATO discretion to compromise debts,¹⁷ the deferral of collection proceedings,¹⁸ and the payment of a tax debt by instalments.¹⁹

Compromise of debt

The ATO distinguishes between the taxes and charges that it administers and the taxes and charges that it collects on behalf of other government agencies. For example, the ATO collects amounts under the *Higher Education Support Act 2003* and the *Student Assistance Act 1973*, but is not empowered to compromise debts under this legislation. Accordingly, it is necessary to ensure that the ATO is empowered to compromise specific tax debts.

In compromising a debt, the ATO will consider the risks of litigation,²⁰ including:

- legal risks — specific legal, technical and administrative issues;
- revenue risks — consequential effects on the revenue base from litigation;
- operational risks — implementation of tax policies and laws to day-to-day business operations issues;
- compliance risks — implementation of systems, registrations, accounting, lodgment and compliance issues; and
- reputation risks — business, industry and personal reputation risks.

The ATO will not be amenable to the compromise of an otherwise qualifying debt where:

- the compromise offers less than the taxpayer's total net assets in satisfaction of the debt;
- the compromise would be a preference payment and prejudice other creditors;
- the compromise would prejudicially impact other recovery actions, such as under director penalty notices;
- the taxpayer could compromise the debt by a debt agreement under the BA66 at reduced costs to the ATO;

- the debt is currently being disputed or release or waiver applications are not finalised;
- the taxpayer's return and activity statement lodgments are outstanding;
- the taxpayer's payment history is very poor;
- previous debts of the taxpayer have been compromised within the previous five years;
- the only benefit in accepting the compromise is the reduction of enforcement costs attributed to the taxpayer's obstruction of collection proceedings;
- the request for compromise is based on hardship (the release procedures described below must be used); or
- the request for compromise concerns aggressive tax planning arrangements or repeated compliance defaults by the taxpayer.

The ATO is practically restricted in compromising debts where payment of the compromised debt would be a voidable preference payment under the BA66 or the CA01 because another dissatisfied creditor might be entitled to void the payment.

The ATO does not consider it permissible to compromise debts for public policy reasons, including to avert closure of:

- a business and the consequential loss of employment;
- a business serving the national or regional interests; or
- charitable activities.

Care is required when preparing compromise submissions as disclosures made in support of the compromise may evidence insolvency which can be used by the ATO in subsequent collection proceedings against the taxpayer or related parties, such as under director penalty notices. All communications should be on a without prejudice basis to restrict the use of the disclosures in other collection proceedings.²¹

The ATO's compromise deed contains a number of terms and conditions (that are similar to those in the settlement deed discussed above) which require careful

consideration and explanation to the taxpayer.

Collections

The ATO will pursue collection proceedings based on a risk assessment. Where there is little or no risk, collection proceedings may be deferred. Deferral may be conditional on entering into a 50/50 payment arrangement by which:²²

- the taxpayer pays all undisputed debts;
- the taxpayer cooperates fully in the disputes process; and
- the ATO remits 50%²³ of the GIC during the deferral period if the taxpayer is ultimately unsuccessful.

If the taxpayer does not accept the 50/50 arrangement, collection proceedings are unlikely to commence during the objection, review and appeal processes unless the circumstances of the case indicate an unacceptable level of risk.²⁴

The ATO will likely consider that there is an unacceptable level of risk to collections where:

- there are reasonable grounds to believe that funds or assets are being dissipated;
- the taxpayer does not comply with information and document requests; or
- the ATO considers that the dispute is frivolous or without merit or not genuine.

Alternatively, the ATO may not enforce the 50/50 arrangement requirement where payment would result in serious financial hardship to the taxpayer.

The ATO will only accept security rather than payment of an outstanding debt in limited circumstances, such as where the taxpayer cannot obtain a bank loan because of an inability to service repayments or meet lending requirements.

The collection by the ATO of cross-border debts owed by non-residents or assets held in other jurisdictions have specific complications. Chapter 38 of the *ATO Receivables Policy* provides guidelines on the collection of cross-border debts. The collection of cross-border debts may be more limited than the *ATO Receivables Policy* indicates.²⁵

*Jamieson v CIR*²⁶ held that Australian courts will not enforce the tax debts of foreign governments and Div 263 TAA53 has no effect unless there is a double tax agreement in force which contains a specific article relating to assisting with the collection of foreign tax debts. The same principle generally applies in other countries to Australian tax debts.²⁷

The Finland, New Zealand, France, Norway and South Africa double tax agreements include a mutual assistance in the collection of taxes Articles. Importantly, the Japan, United States of America and United Kingdom double tax agreements do not include a mutual assistance in the collection of taxes Article.

Australian bankruptcy enforcement²⁸ is not limited by the revenue debts collection prohibition. The BA66 can be used to indirectly permit registration of a court-ordered request for assistance to enforce cross-border collections once a person is bankrupt.

Instalment payments

The ATO is empowered to accept payment of a tax debt by instalments.²⁹ The ATO is empowered to accept an instalment payment deed for certain remittance taxes.³⁰ A director will become personally liable for a breach of an instalment payment deed by a corporate taxpayer.

An application for instalment payment should:

- explain the reasons for non-payment;
- provide supporting evidence substantiating the inability to pay by the due date;
- provide supporting evidence of the taxpayer's current financial position and the steps taken to raise funds to pay the debt by the due date;
- provide supporting evidence that other expenses are not being paid in priority to the tax debt; and
- provide a payment summary to discharge the debt in the shortest time frame possible while meeting future tax liabilities.

Generally, the ATO will require a lump sum initial payment with regular instalments, and any collection costs to be reimbursed.³¹ Experience suggests that

proposals exceeding 12 months to finalise the debt are unlikely to be accepted by the ATO.³²

The ATO may not be amenable to an instalment proposal where:

- the prospect of collections is diminished by the proposal;
- the taxpayer does not acknowledge the debt and give an undertaking to enter judgment for the full debt for default of the payment proposal; or
- the taxpayer does not agree for the allocation of payments against different outstanding accounts in an order to the advantage of the Commonwealth.

REMISSION

Introduction

The ATO is empowered to remit penalties and interest. ATO publications provide remission guidelines, including the basis and the extent of the remission.

The ATO can initiate a remission or the taxpayer can request remission.

Penalty remission

The uniform administrative penalty provisions apply to statements made, returns lodged and schemes entered into from 1 July 2000.³³ Administrative penalties include penalties for failure to lodge or provide documents,³⁴ and tax shortfalls relating to false and misleading statements³⁵ or entering into a tax avoidance scheme.

The uniform administrative penalty provisions also impose penalties for failure to withhold³⁶ or remit³⁷ to the ATO amounts under the Pay-As-You-Go (PAYG) withholding regime.

The extent of the base penalty imposed is determined by the degree of care or culpability of the taxpayer and the taxpayer's advisers. For example, for misstatements, the ATO can impose a penalty for failure to take reasonable care to comply with a tax law (25%), recklessness as to the operation of a tax law (50%), or intentional disregard of a tax law (75%).

The ATO has discussed the concepts of reasonable care, recklessness and intentional disregard,³⁸ reasonably arguable

position,³⁹ and voluntary disclosure.⁴⁰ For the purposes of discussion:

- reasonable care requires a taxpayer to exercise the care that a reasonable, ordinary person would exercise in the circumstances of the taxpayer to fulfil the taxpayer's tax obligations;
- recklessness involves something more than mere inadvertence or carelessness. Recklessness is gross carelessness — the doing of something which in fact involves risk (whether known by the taxpayer) and the taking of that degree of risk would be described as reckless or unjustifiable;
- intentional disregard of a tax law requires the taxpayer to be aware of the tax obligation and to choose to disregard the obligation and intentionally decide to bring about a state of affairs by the taxpayer's own act of volition; and
- where a taxpayer adopts an interpretation of a tax law that is "reasonably arguable"⁴¹ (which is subsequently found to be incorrect), the taxpayer may be obliged to pay any unpaid tax and interest on that tax. However, penalties should not be imposed on that unpaid tax.⁴²

The ATO has a general discretion to further remit uniform administrative penalties.⁴³

A remission of the base penalty amount may be appropriate where:

- the taxpayer has a good compliance history;⁴⁴
- the taxpayer has made an isolated honest and unintended mistake not associated with an extraordinary event or transaction;⁴⁵
- the shortfall amount arising from lack of reasonable care represents a tax deferral rather than tax permanently avoided;⁴⁶
- the taxpayer makes an unprompted voluntary disclosure before review/audit;⁴⁷ or
- a shortfall amount omitted by one entity was included as assessable in another group entity, so any penalty is applied to the overall net shortfall for the group.⁴⁸

A taxpayer that makes a voluntary disclosure in the approved form to the ATO may have tax shortfall penalties and scheme shortfall penalties reduced,⁴⁹ or administrative penalties reduced by 80% if made or deemed to be made before audit or 20% if made during audit.

In addition to the taxpayer making submissions regarding the culpability of the taxpayer and the taxpayer's advisers, the taxpayer can request further remission of the base penalty.

Other relevant ATO publications on penalty remission (which are not discussed in this article) include:

- remission of penalties during implementation of the new tax system for the period to 30 June 2002;⁵⁰
- remission of penalties for failure to register for GST;⁵¹
- remission of penalties for failure to withhold under PAYG withholding;⁵² and
- remission of superannuation guarantee charge (SG charge) and SG charge choice shortfall.⁵³

While these other ATO publications on penalty remissions are consistent with the ATO's general remission policies, there are subtle differences because of the structure of the particular taxes.

All communications should be on a without prejudice basis.⁵⁴ It is unclear whether without prejudice discussions can be used when determining culpability under a subsequent remission request.⁵⁵

Interest remission

The ATO charges interest on outstanding tax debts to encourage the timely payment of tax debts and to remove the financial advantage and compensate the community for late payment.

Interest (periods up to 30 June 1999 inclusive), GIC (1 July 1999 to 30 June 2004 inclusive) and SIC (periods on and from 1 July 2004) apply to income tax shortfalls in respect of those periods. GIC applies for fringe benefits tax, indirect taxes and PAYG withholding shortfalls.

Broadly, GIC is a variable base rate plus 7%,⁵⁶ and SIC is a variable base rate plus 3%. Interest, GIC or SIC is charged from the date that the tax debt was payable. The

ATO is empowered to remit all or part of the interest, GIC⁵⁷ or SIC.⁵⁸

PS LA 2006/8 provides the remission guidelines for income tax shortfalls. Chapter 93 of the *ATO Receivables Policy* provides remission guidelines for SG charge, excess contributions tax, PAYG withholding, and other taxes and charges. Remission of interest, GIC and SIC apply the same rules.⁵⁹

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All communications should be on a without prejudice basis to restrict the use of the disclosures in other collection proceedings.

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The ATO has a general policy to remit the GIC rate to the SIC rate on and from 1 July 2005 in respect of all income tax shortfalls accruing before 1 July 2005.⁶⁰

A full remission of GIC or SIC is provided:

- for a period of ATO inactivity of at least 30 days both before and after the notified expected audit completion date (as adjusted);⁶¹
- for the period of taxpayer delay attributed to natural or other disasters, the serious illness of the taxpayer or key personnel, or absences from the jurisdiction outside the taxpayer's control;⁶²
- for the period of ATO delay in processing and issuing amended assessments for self-amendments or voluntary disclosures that exceeded the ATO processing time standards;⁶³
- for the period after payment of GIC or SIC and before issue by the ATO of the amended assessment;⁶⁴
- for the period before the ATO has changed relevant authorities and precedential material (cases, rulings, ATO publications) that the taxpayer has relied on, provided the taxpayer has lodged an amended assessment application within a reasonable time after the change;⁶⁵ or

- for the period before the taxpayer amends an original return or activity statement where the amendment was necessary because of a future event and the taxpayer did not know and could not have known that the shortfall would arise (such as a compensation payment received in a subsequent tax period which is referable to an earlier tax period or a retrospective change in legislation).⁶⁶

A remission of GIC or SIC to the base rate is provided for the period of delay where:

- the ATO did not commence any audit within a period equivalent to half of the relevant review period;⁶⁷
- the ATO exceeded the notified audit completion date (as adjusted);⁶⁸
- a large corporate audit extended beyond two years;⁶⁹
- the ATO or the taxpayer experienced delay in obtaining information from a third party not otherwise available to the taxpayer;⁷⁰
- the ATO (and arguably the taxpayer) experienced delay in analysing complex issues underlying the shortfall which resulted in the case exceeding the notified expected audit completion date;⁷¹
- the taxpayer has been granted an extension of time to provide additional information or to make legal professional privilege claims;⁷²
- the taxpayer has made a voluntary disclosure of a shortfall amount and:
 - the voluntary disclosure was made in a timely manner after the error was first detected;

- the voluntary disclosure was made before notification of an audit or a voluntary disclosure initiative;
 - the previous failure to disclose was contributed to by the Commonwealth;
 - the size of the shortfall is relatively modest; or
 - taxpayer has a favourable tax compliance history; and
- the taxpayer has a related credit or overpayment due from the ATO concurrently with the tax shortfall amount and it is fair and reasonable to provide a remission.⁷³

Specific remissions may be provided for particular compliance programs, such as the offshore voluntary disclosure initiative.⁷⁴

The ATO will not provide remission of GIC or SIC in fraud or evasion cases⁷⁵ or where the taxpayer has unreasonably delayed, obstructed or obfuscated the progress of the audit.⁷⁶

The ATO has a general power to remit GIC or SIC where it is fair and reasonable to remit.⁷⁷

The taxpayer may object to certain SIC remission decisions⁷⁸ but can only obtain review of GIC remission decisions under ADJR77.

A taxpayer can deduct the GIC incurred from their assessable income.⁷⁹ GIC is “incurred” in the year the taxpayer first becomes liable to pay it, not in the year it is actually paid.⁸⁰ GIC is incurred daily and before payment.⁸¹ Accordingly, GIC can be deducted annually by amendment of a

✓ **Tip: remission submission**

1. The remission submissions should address penalty and interest.
2. The remission submissions should refer to the relevant ATO publications for particular tax types.
3. The remission requests should identify the basis for exercise of the remission discretion and the extent of the remission provided by the relevant ATO publications.
4. The remission submissions should identify other extenuating circumstances that may justify a greater remission than provided by the relevant ATO publications.

return or an activity statement. Any GIC that has not previously been deducted is deductible at the time an amended assessment is issued.

If the taxpayer has previously claimed a deduction for the GIC, and GIC is remitted by the amended assessment, the taxpayer must include as income in the taxpayer’s assessment that amount as a recoupment to preserve the equitable operation of the provisions for deduction.⁸²

Some cash flow advantages may be achieved by amending assessment to deduct GIC in an earlier income year. SIC is deductible on a similar basis.

RELEASE

Introduction

The ATO is empowered to release certain amounts of tax, penalties and interest if payment of the liability will cause serious hardship. The minister is empowered to waive certain debts on equitable grounds.

ATO serious hardship release

The ATO is empowered to release an individual or a trustee of a deceased estate from certain tax liabilities, penalties and interest if payment would cause serious hardship.⁸³ The *ATO Receivables Policy* provides guidance on exercise of the ATO discretion to release debts.⁸⁴

The ATO can release income and fringe benefits tax, PAYG and fringe benefits tax instalments, Medicare levy and surcharge and additional tax, administrative penalties, penalties and general interest charge in respect of those liabilities. Generally, withholding and remission-type taxes and charges (PAYG withholding, indirect taxes and superannuation charges) are not susceptible to release because the amounts are withheld and remitted as a custodian on behalf of another taxpayer.

The ATO will consider the net income/ outgoings and net assets/liabilities of the taxpayer to determine whether payment would result in serious hardship such that payment would deprive the person of necessities according to normal community standards.⁸⁵ Necessities include the reasonable acquisition of food, clothing, accommodation, medical supplies, education for children and other basic requirements of life. Excessive outgoings or outgoings of a luxury nature

or standard are not considered necessities. For example, outgoings on education are a necessity, but not if the outgoing represents private school fees.

The ATO may review or investigate the quantum of income and outgoings or value of assets and nature of liabilities in exercise of the release discretion. Modest equity held in residential property, non-luxury cars, household furniture and chattels, tools of trade and cash deposits are usually excluded from being realised to pay the debt.⁸⁶ These exclusions must be reconciled with statements made in compromising debts.⁸⁷

The ATO will not be amenable to the release of an otherwise meritorious debt application where:

- the taxpayer has disposed of funds or assets without making provision for tax debts;
- the release would not alleviate the hardship because there are significant other debts;
- the taxpayer has made preference payments to other creditors;
- the taxpayer has not reasonably pursued collections of receivables;
- the hardship is expected to abate within a short term;
- the taxpayer has a poor compliance history;
- the taxpayer has not lodged all returns and activity statements; or
- the taxpayer has not made adequate provision for future debts.

The ATO may defer rather than release payment where the taxpayer is likely to derive future income (such as compensation, insurance proceeds or deferred sale proceeds).

The taxpayer can apply for an ATO internal review or a merits review by the Small Taxation Claims Tribunal of an unfavourable release decision. Further release applications can be made where a change in circumstances can be demonstrated.

Minister’s waiver

The minister is empowered to waive a tax debt due to equity or ongoing financial hardship considerations.⁸⁸ The ATO

Receivables Policy provides guidance on exercise of the minister's discretion to waive debts.⁸⁹

The Minister has an unfettered discretion to waive a tax debt including, for example, where:

- the ATO's administration of the tax laws have caused the taxpayer to incur an unintended debt;
- the operation of a tax law has caused the taxpayer to incur an unintended debt the recovery of which would produce an anomalous or inequitable result; or
- repayment of the debt would cause genuine and significant financial hardship.

A submission to the minister is often made concurrently with an ATO serious hardship submission. The ATO will coordinate with the minister the determination of the submission.

The taxpayer should give the ATO express authority to exchange information with the minister (despite any secrecy provisions) in order to facilitate consideration of the submission to the minister.

The taxpayer should request a copy of the ATO's report to the minister and the minister's decision (which is usually provided in any event), and request the opportunity to provide submissions in response to the ATO's report to the minister.

ATO write-off

The ATO is empowered to write-off a debt where the amount is irrecoverable or uneconomical to pursue.⁹⁰ As the debt is written-off and not released, it may subsequently be reinstated and recovery proceedings commenced where the taxpayer's circumstances change. The *ATO Receivables Policy* provides guidance on exercise of the ATO's discretion to write-off debts.⁹¹

A debt is irrecoverable at law, for example, where the amount is a provable pre-sequestration debt of a discharged bankrupt or the balance was compromised under a court scheme of arrangement or creditor deed of arrangement for a company.

A debt is uneconomical to pursue where the likely costs of recovery actions and any awards of costs exceed the anticipated return of collections or where the debtor cannot be located.

Generally, withholding and remission-type taxes and charges are not susceptible to release because the amounts are withheld and remitted as a custodian on behalf of another taxpayer.

The debt is likely to be reinstated where the taxpayer files a subsequent income tax return with a tax credit or to set-off a subsequent running balance account credit.

Where a debt is reinstated, GIC and SIC will be reinstated so a GIC or SIC remission

submission should be made to the ATO for the period that the debt was written-off.

CONCLUSION

Settlement and remission applications require substantial disclosure of information and provision of supporting evidence to discharge the taxpayer's onus of satisfying the preconditions to exercise of the ATO's discretions.

Some applications can be quite complex, with detailed submissions justifying the exercise of the ATO's discretions. Alternate compromise, remission and waiver applications may be necessary to ensure that all of a debt, penalty and interest are dealt with in the application.

Care is required when preparing applications to distinguish clearly between the various powers and to ensure that submissions respond to the ATO's guideline requirements for the relevant powers. All applications should be drafted carefully to avoid inadvertent admissions against the taxpayer's interests and, in any event, should be on a without prejudice basis to restrict the use of the disclosures in other collection proceedings.

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References

- 1 Kenny Rogers, *The Gambler, The Gambler*, United Artists, 1978.
- 2 PS LA 2007/5 at [7].
- 3 *ATO Receivables Policy*, ch 24.
- 4 *ATO Receivables Policy*, ch 26.
- 5 law.ato.gov.au/atoLaw/view.htm?locid='RMP/RP/ATOTOC'#ATOTOC (viewed 1 September 2010).
- 6 *DFCT v Niblett* (1965) 8 FLR 134; and *DFCT v Mackey* 81 ATC 4571.
- 7 S 8 ITAA36; and *Grofam P/L v FCT* (1997) 36 ATR 493 at 503 and 512.
- 8 PS LA 2007/5 at [5].
- 9 PS LA 2007/6.
- 10 Code at [4].
- 11 Code at [13].
- 12 Code at [15], [16].
- 13 Code at [12].
- 14 For example, s 8 ITAA36 (income tax), s 3A TAA53 (PAYG), and s 356-5 TAA53 (indirect taxes).
- 15 *ATO Receivables Policy* at [27.40].
- 16 *ATO Receivables Policy* at [27.67].
- 17 *ATO Receivables Policy*, chs 27, 39.
- 18 *ATO Receivables Policy*, chs 28, 38.
- 19 *ATO Receivables Policy*, ch 10.
- 20 *ATO Receivables Policy*, ch 39.
- 21 *Bruse v FCT* [2010] AATA 404.

✓ Tip: release and waiver submission

1. All release submissions should be on a without prejudice basis.
2. The release submissions should address the serious hardship consequences of the debt.
3. The release submissions should refer to the relevant ATO publications.
4. The release submissions should identify other extenuating circumstances that may justify a release of the debt.
5. The release submissions should include a detailed:
 - income and outgoings statement for the last 12 months;
 - current assets and liabilities statement;
 - statement of property disposals in the preceding 3 years;
 - statement of anticipated or future interests in income or property (such as deceased estates)
6. The release submission should be made under the ATO serious hardship release and the minister's waiver.
7. The release submissions should include evidence of attempts to obtain funds to pay the debt (eg bank loan refusals).

- 22 *ATO Receivables Policy* at [28.38].
- 23 This may be 75% where the matter is subject to test case funding.
- 24 *ATO Receivables Policy* at [28.35]-[28.36].
- 25 M Dirkis, "Being caught up by the past: the enforcement of foreign revenue debts", (2009) 19 *Revenue LJ*, issue 1, article 3.
- 26 *Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324.
- 27 *Government of India v Taylor* [1955] AC 491.
- 28 S 29(4) BA66.
- 29 S 255-15 TAA53.
- 30 S 222ALA ITAA36.
- 31 *ATO Receivables Policy* at [10.10].
- 32 The ATO acknowledges that an instalment payment may extend beyond one, two or more financial years; *ATO Receivables Policy* at [10.18].
- 33 Pt. 4-25 TAA53.
- 34 Div 286 TAA53.
- 35 Div 284 TAA53.
- 36 Div 12 TAA53.
- 37 Div 13 TAA53.
- 38 TR 94/4 (withdrawn 14 May 2008) and replaced by MT 2008/1 (12 November 2008).
- 39 TR 94/5 (withdrawn 14 May 2008) and replaced by MT 2008/2 (12 November 2008).
- 40 TR 94/6 (withdrawn 14 May 2008) and replaced by MT 2008/3 (12 November 2008).
- 41 S 284-15 TAA53; MT 2008/2; and *Walstern v FCT* (2003) 54 ATR 423 at [108]. A matter is "reasonably arguable" if it would be concluded in the circumstances, having regard to relevant authorities, that what is argued for is about as likely to be correct as incorrect (or more likely to be correct than incorrect).
- 42 S 284-75 TAA53.
- 43 S 298-20 TAA53; PS LA 2006/2 at [150]; MT 2008/3 at [27].
- 44 PS LA 2006/2 at [137].
- 45 PS LA 2006/2 at [139].
- 46 PS LA 2006/2 at [143].
- 47 PS LA 2006/2 at [149].
- 48 PS LA 2006/2 at [153].
- 49 S 284-225 TAA53; MT 2008/3 (formerly TR 94/6).
- 50 PS LA 2000/9; PS LA 2002/8.
- 51 PS LA 2007/4.
- 52 PS LA 2003/11.
- 53 PS LA 2006/1; PS LA 2006/13; and PS LA 2006/6
- 54 *Bruse v FCT* [2010] AATA 404.
- 55 *Brown v FCT* [2002] FCA 318.
- 56 *ATO Receivables Policy* at [93.11], but may have been 8% at [93.13].
- 57 S 8AAG TAA53.
- 58 S 280-160 TAA53.
- 59 PS LA 2006/8 at [31].
- 60 PS LA 2006/8 at [43].
- 61 PS LA 2006/8 at [58]-[59].
- 62 PS LA 2006/8 at [72]-[73].
- 63 PS LA 2006/8 at [86]-[87].
- 64 PS LA 2006/8 at [89].
- 65 PS LA 2006/8 at [113]-[118].
- 66 PS LA 2006/8.
- 67 PS LA 2006/8 at [49]-[50].
- 68 PS LA 2006/8 at [52]-[56].
- 69 PS LA 2006/8 at [65]-[69].
- 70 PS LA 2006/8 at [60].
- 71 PS LA 2006/8 at [64].
- 72 PS LA 2006/8 at [76], [80].
- 73 PS LA 2006/8 at [93].
- 74 PS LA 2006/8 at [88]; see also R Jorgensen, "Voluntary disclosures", (2010) 44(9) *Taxation in Australia* 519.
- 75 PS LA 2006/8 at [70].
- 76 PS LA 2006/8 at [74].
- 77 For example, s 8AAG(2)-(5) TAA53.
- 78 S 280-170 TAA53.
- 79 S 25-5 ITAA97.
- 80 ATO ID 2002/757; *Nilsen Development Laboratories Pty Ltd* (1981) 144 CLR 616; and *W Neville & Co Ltd v FCT* (1937) 56 CLR 290.
- 81 S 8AAE and s 8AAC TAA53.
- 82 ATO ID 2002/758 (withdrawn because it was a straightforward application of the law).
- 83 Div 340 TAA53.
- 84 *ATO Receivables Policy*, ch 24.
- 85 *ATO Receivables Policy* at [24.21].
- 86 *ATO Receivables Policy* at [24.30].
- 87 See *ATO Receivables Policy* at [27.26] which states that the fact the debtor must dispose of a home to pay the debt does not justify accepting less than the full amount of the debt.
- 88 S 34 FMAA97.
- 89 *ATO Receivables Policy*, ch 25.
- 90 S 47 FMAA97.
- 91 *ATO Receivables Policy*, ch 25.

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