
Chapter 1

Commissioner’s ability to retain refunds pending verification checks

Outline of chapter

1.1 Schedule X to this Bill amends the *Taxation Administration Act 1953* (TAA 1953) to provide the Commissioner of Taxation (Commissioner) with a discretion to delay refunding an amount to a taxpayer pending integrity checks of their claim.

Context of amendments

1.2 The amendment is intended to address the outcome in *Commissioner of Taxation v Multiflex Pty Ltd* [2011] FCAFC 142 (*Multiflex*). The issue central to the *Multiflex* case was whether, under section 35-5 of the *A New Tax System (Goods and Services Tax) Act 1999* and section 8AAZLF of the TAA 1953, the Commissioner had an implied reasonable time in which to refund a net amount, including such time as reasonably necessary to determine whether the amount was truly payable.

1.3 The Commissioner’s administrative practice with respect to GST amounts has been to retain certain refunds pending verification checks on the basis that the ability to do so was implied by those Acts.

1.4 The Full Federal Court found that the Commissioner is required to pay a GST refund within the time it takes to undertake the necessary administrative steps to process the taxpayer’s return and make the payment, and that the law provides no additional time for checking the validity of the claim, even if the Commissioner suspects it might be incorrect.

1.5 On 9 December 2011, the High Court of Australia dismissed the Commissioner’s application for special leave to appeal against the decision. As a result, in the absence of a legislative amendment, the Commissioner would be required to pay out GST refunds claimed by a taxpayer on their return once it had been processed, and then seek to recover the amounts if subsequent checks showed the amounts claimed to be excessive.

1.6 As there will be circumstances where the amount claimed in a return or other notification is incorrect, including due to carelessness, recklessness or fraud, it is a necessary integrity requirement that the Commissioner has the ability to delay refunding amounts in certain circumstances.

1.7 Consistent with the rest of Division 3 and Division 3A, the new provision will potentially apply to all payments and credits that exceed a primary tax debt allocated to the taxpayer's running balance account (RBA).

Summary of new law

1.8 Where the Commissioner is satisfied that it would be reasonable to verify information provided by the taxpayer relating to the amount the Commissioner would have to refund, the Commissioner may retain the refund while verifying that amount.

1.9 The Commissioner must notify the taxpayer if he or she exercises this discretion, and if the Commissioner has not refunded the amount or made (under Division 105 in Schedule 1 to the TAA 1953) or amended the assessment after a set period of time, taxpayers may object to the Commissioner's decision to retain a refund.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Commissioner may retain an amount if he or she is satisfied that information provided by the taxpayer relating to a refund amount requires verification.	There is no equivalent provision but the ability to retain a refund was considered to be implied by the law.
The Commissioner is required to notify the taxpayer when he or she retains an amount under the provision.	There is no legislative requirement that the Commissioner notify the taxpayer of a decision to withhold a refund.
Taxpayers may object against a decision of the Commissioner to retain a refund if the Commissioner has not refunded the amount, amended the taxpayer's assessment or made or amended an assessment relating to the amount under	Objection rights are not available, however, taxpayers may seek judicial review of the Commissioner's decision to retain the refund.

Division 105 in Schedule 1 to the TAA 1953 within a set period of time. Judicial review rights are not affected.	
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Detailed explanation of new law

Commissioner's power to retain refunds

1.10 Section 8AAZLGA is inserted into the TAA 1953 to legislate what has been the Commissioner's administrative practice to retain an amount pending refund integrity checks of a taxpayer's claim.

1.11 Section 8AAZLGA applies where a taxpayer has given the Commissioner a notification (such as a GST return) that affects, or may affect, the amount that the Commissioner is required to refund to the taxpayer. [*Schedule X, item 1, paragraph 8AAZLGA(1)(a)*]

1.12 The provision confers on the Commissioner a discretion to retain an amount that the Commissioner would otherwise have to pay to the taxpayer under section 8AAZLF of the TAA 1953, if the Commissioner is satisfied that it would be reasonable to require verification of information that:

- has been provided by the taxpayer in the notification [*Schedule X, item 1, subparagraph 8AAZLGA(1)(b)(i) of the TAA 1953*]; and
- relates to the amount that the Commissioner would have to refund to the taxpayer [*Schedule X, item 1, subparagraph 8AAZLGA(1)(b)(ii) of the TAA 1953*].

1.13 If the Commissioner retains the amount under subsection 8AAZLGA(1), he or she must notify the taxpayer:

- in the case of a running balance account (RBA) surplus, before the RBA interest day. [*Schedule X, item 1, paragraph 8AAZLGA(2)(a) of the TAA 1953*, or
- for other credits, within 30 days of the taxpayer giving the Commissioner a notice containing the amount claimed. [*Schedule X, item 1, paragraph 8AAZLGA(2)(b) of the TAA 1953*]

Example 1.1

Laura runs a sushi bar and is registered for GST. On 28 October 2013, Laura lodges her GST return for the tax period ending 30 September 2013 and her net amount is a refund of \$50,000.

Given that in preceding tax periods, Laura's net amount has always resulted in an amount payable to the Commissioner, the Commissioner forms the opinion that the information contained in Laura's GST return require verification. If the amount in Laura's GST return is later found to be incorrect, then the Commissioner would be required to refund an amount less than the \$50,000 claimed in Laura's return.

On 10 November 2013 (the day before the RBA interest day), the Commissioner writes to Laura informing her that he has retained the refund under subsection 8AAZLGA(1).

1.14 The test provided for in paragraph 8AAZLGA(1)(b) is an ongoing test that must be considered by the Commissioner throughout the period he or she retains the refund. The Commissioner may retain a refund under subsection 8AAZLGA(1) until the earlier of:

- when the Commissioner becomes satisfied that it would no longer be reasonable to require verification of the information [*Schedule X, item 1, paragraph 8AAZLGA(3)(a) of the TAA 1953*];
- when the Commissioner amends the taxpayer's assessment relating to the amount and the amendment changes the amount that the Commissioner would otherwise have to refund [*Schedule X, item 1, paragraph 8AAZLGA(3)(b) of the TAA 1953*];
- when the Commissioner makes (under Division 105 in Schedule 1 to the TAA 1953) or amends the taxpayer's assessment which relates to the amount, and the assessment or amendment changes the amount that the Commissioner would otherwise have to refund [*Schedule X, item 1, paragraph 8AAZLGA(3)(c) of the TAA 1953*]; or
- 60 days after the day on which the Commissioner is required to notify the taxpayer of his or her decision to retain the refund [*Schedule X, item 1, paragraph 8AAZLGA(3)(d) of the TAA 1953*].

1.15 The 60-day period is extended by any periods of time in which the Commissioner has requested further information and that information

has not been provided to the Commissioner. *[Schedule X, item 1, subsection 8AAZLGA(4) of the TAA 1953]*

Retaining the refund after 60 days

1.16 The Commissioner may only continue to retain an amount beyond the 60-day period referred to in paragraph 8AAZLGA(3)(c) (plus any extensions) if it would be reasonable to require further verification of the information contained in the notification. *[Schedule X, item 1, paragraph 8AAZLGA(5) of the TAA 1953]*

Relevant factors

1.17 In deciding whether it would be reasonable to continue to retain the amount, the Commissioner must consider a number of factors, including:

- the likelihood that the information provided by the taxpayer is inaccurate, and the likely extent of the inaccuracy *[Schedule X, item 1, paragraph 8AAZLGA(8)(a) of the TAA 1953];*
- the likelihood that the information was affected by fraud or evasion, intentional disregard of a taxation law or recklessness as to the operation of a taxation law *[Schedule X item 1, paragraph 8AAZLGA(8)(b) of the TAA 1953];*
- whether retaining the amount is necessary for protection of the revenue, including whether the Commissioner would be able to recover a refunded amount if the information was subsequently found to be incorrect *[Schedule X, item 1, paragraph 8AAZLGA(8)(c) of the TAA 1953];*
- the complexity that would be involved in verifying the information *[Schedule X, item 1, paragraph 8AAZLGA(8)(d) of the TAA 1953];*
- the impact of retaining the amount on the entity's financial position *[Schedule X, item 1, paragraph 8AAZLGA(8)(e) of the TAA 1953];* and
- any other matter the Commissioner considers relevant *[Schedule X, item 1, paragraph 8AAZLGA(8)(e) of the TAA 1953].*

1.18 It should be noted that no single factor is determinative. A balance is required between risks to the revenue and the taxpayer's entitlement to be paid the amount, and the Commissioner must take into account all the circumstances of the case.

Likelihood that information is inaccurate and likely extent of inaccuracy

1.19 It would generally be reasonable to retain the amount when the Commissioner considers it highly likely that the information provided by the taxpayer is inaccurate to a significant extent. However, the Commissioner would be required to consider the other factors before making that decision. In assessing the likelihood of the information being inaccurate, the Commissioner could consider factors such as the amount of the refund claimed compared to the refund amounts previously (or usually) claimed by the entity.

Likelihood that information affected by fraud or evasion, intentional disregard or recklessness

1.20 Similarly, a high likelihood that the information provided by the taxpayer has been affected by fraud or evasion, intentional disregard or recklessness, would usually indicate it would be reasonable to retain the amount.

1.21 'Intentional disregard' and 'recklessness' take on their ordinary meanings. 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. This could include producing false records, such as a false tax invoice.

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

1.23 In assessing the likelihood of there being fraud or evasion, intentional disregard or recklessness, the compliance history of the entity may be relevant. Where the taxpayer has a good compliance history, this would be an indicator that fraud or evasion, intentional disregard or recklessness is unlikely. In the absence of any other factor suggesting a contrary conclusion, it might indicate that the refund should not be retained beyond the 60-day period.

Possible impact on the revenue

1.24 Where there is a high risk to the revenue that the refund may not be recoverable once paid out, this will generally support a finding that it would be reasonable to continue to retain the refund. One example of where the Commissioner would be expected to exercise the discretion provided by the provision is where the Commissioner suspects that the

taxpayer may be involved in fraudulent activity and if the refund is released, it would be difficult to recover any overpayment made to the taxpayer.

Complexity involved in verifying information

1.25 Where there would be a high level of complexity involved in verifying an amount, this may be an indicator in favour of the Commissioner retaining an amount beyond the 60-day period. Complex arrangements, such as those involving multiple supply chains and multiple entities, will generally require more time and resources than a straightforward arrangement where information can be verified more quickly. The more complex the investigation, the more this would support a finding that it is reasonable for the Commissioner to retain the amount whilst carrying out the investigation.

Impact of retaining refund on taxpayer's financial position

1.26 Where retaining the refund would significantly impact on the taxpayer's financial position, in the absence of one of the other factors such as the likelihood that the information was affected by fraud or evasion, intentional disregard or recklessness, this may lend support to a finding that the amount should be refunded. Relevant considerations would be whether retaining the refund would cause serious financial hardship for the taxpayer, such that it would compromise its business viability. However, even where there would be such an impact, if another factor, such as the risk to the revenue, outweighed such considerations, it might still be reasonable for the Commissioner to retain the amount beyond the 60-day period.

Timing and notification

1.27 If, after having regard to the factors, the Commissioner is satisfied that it would be reasonable to retain the amount beyond the 60 days (plus any extensions), he or she may continue to retain the amount until the earlier of the Commissioner:

- becoming satisfied that it would no longer be reasonable to require verification of the information [*Schedule X, item 1, paragraph 8AAZLGA(7)(a) of the TAA 1953*];
- amending the taxpayer's assessment [*Schedule X item 1, paragraph 8AAZLGA(7)(b) of the TAA 1953*]; or
- making (under Division 105 in Schedule 1 to the TAA 1953) or amending the taxpayer's assessment relating to the amount [*Schedule X, item 1, paragraph 8AAZLGA(7)(c) of the TAA 1953*].

1.28 If the Commissioner decides it is reasonable to continue to retain the amount under subsection 8AAZLGA(5), he or she must notify the taxpayer of this decision within 14 days of the end of the 60-day period referred to in subsection 8AAZLGA(3). [*Schedule X, item 1, subsection 8AAZLGA(6) of the TAA 1953*]

Review rights under Part IVC

1.29 A taxpayer may object under Part IVC of the TAA 1953 to the Commissioner's decision to retain the refund under subsection 8AAZLGA(5). The right to object arises at the earlier of when the Commissioner informs the taxpayer of the decision to retain the amount, or 14 days after the 60-day period referred to in subsection 8AAZLGA(3) (plus any extensions). This ensures a taxpayer's objection rights are triggered even where the Commissioner fails to inform the taxpayer of his or her decision, as required by subsection 8AAZLGA(6). [*Schedule X, item 2, paragraph 14ZW(1)(aad) of the TAA 1953*]

Example 1.2

Duncan runs a shoe shop and is registered for GST. On 28 July 2014, Duncan lodges his GST return for the tax period ending 30 June 2014. Duncan's net amount for that period is a refund of \$15,000. The RBA interest day would be 11 August 2014.

Duncan's past compliance history has been poor and at times he has been found to have been reckless when lodging his GST returns. On this occasion, his claim for a refund does not correspond with his recent lodgment activity. As a result, the Commissioner is satisfied that it would be reasonable to require the amounts in Duncan's GST return to be verified and on 8 August 2014 informs Duncan that he has decided to retain the refund under subsection 8AAZLGA(1).

On 8 September 2014, the Commissioner requests additional information from Duncan. Duncan provides this information to the Commissioner on 30 October 2014.

In investigating the correctness of the amount claimed by Duncan in his return, the Commissioner discovers that the acquisitions to which the refund claim relates are part of a complex supply chain.

Having regard to the complexity involved and the likelihood that Duncan may again be acting recklessly, the Commissioner is satisfied that it would be reasonable to continue to retain the refund after 9 November 2014 (60 days from the RBA interest day plus the 30 days Duncan took to provide the requested information to the Commissioner). The Commissioner is required to notify Duncan of this decision by 23 November 2014.

If by 23 November 2014, the Commissioner still has not refunded the amount, made an assessment of Duncan's net amount or informed Duncan of the decision, Duncan may object to the Commissioner's decision to retain the amount under Part IVC of the TAA 1953.

1.30 If the Commissioner has refunded the amount, amended the taxpayer's assessment, or made or amended an assessment for the taxpayer relating to the amount under Division 105 in Schedule 1 to the TAA 1953, then the taxpayer may no longer object under subsection 8AAZLGA(9). Instead, if the taxpayer wishes to dispute the assessment, he or she must object to the assessment or amended assessment. *[Schedule X, items 2 and 3, paragraph 14ZW(1)(aad) and subsection 14ZW(4) of the TAA 1953]*

Delayed refund interest

1.31 As with other delayed payments of refunds and RBA surpluses, there is an imperative on the Commissioner to act promptly and not delay refunds unnecessarily as he or she will be required to pay interest under the *Taxation (Interest on Overpayments and Early Payments) Act 1983* on refunds paid or credited following the expiry of a period set out in that Act. *[Schedule X, item 1, note in section 8AAZLGA of the TAA 1953]*

1.32 Interest will be payable from the RBA interest day for RBA surpluses and in any other case, 30 days after the day the entity notifies the Commissioner under section 8AAZLG of the TAA 1953.

1.33 RBA interest day is defined in section 12AF of the *Taxation (Interest on Overpayments and Early Payments) Act 1983* as being the 14th day after the later of:

- the day on which the surplus arises;
- the day on which a notification is given to the Commissioner under section 8AAZLG of the TAA 1953; or
- the day on which the taxpayer nominates a financial institution account for the purposes of section 8AAZLH of the TAA 1953.

Application and transitional provisions

1.34 The amendments commence on the day the Act receives the Royal Assent.

Consequential amendments

1.35 None.