

10 December 2020

OPAL Business Line

ATO

By email: [SDPracticeStatementConsultation@ato.gov.au](mailto:SDPracticeStatementConsultation@ato.gov.au)

Dear Sir/Madam,

## PS LA 2020/D2 - The ATO's administrative approach to the extension of the Commissioner's discretion to retain tax refunds

CPA Australia represents the diverse interests of more than 166,000 members working in over 100 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest.

The extension of the operation of section 8AAZLG of the *Taxation Administration Act 1953 (TAA)* resulting from the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* is a positive enhancement to the tools available to the ATO to deal with phoenix behaviour.

As acknowledged in Draft Law Administration Practice Statement *PS LA 2020/D2 The ATO's administrative approach to the extension of the Commissioner's discretion to retain tax refunds (the draft PS LA)*, the new subparagraph 8AAZLG(1)(b)(iii) is not restricted in its application. We support the ATO's intention to initially confine the discretion to phoenix behaviour before expanding to other high-risk behaviours. This is in line with paragraph 5.20 of the *Explanatory Memorandum* which states, "the Government envisages the Commissioner will apply the new discretion in relation to taxpayers identified as a high-risk, including those engaging in illegal phoenix activity".

This approach does, however, result in differentiated treatments under section 8AAZLG depending on the type of outstanding notification. Law Administration Practice Statement *PS LA 2011/22 Refunds of running balance account surpluses and credits - Commissioner's discretion to retain refunds and the discretion to pay refunds in a different way (PS LA 2011/22)* will continue to be used for BAS and PRRT obligations, whereas the draft PS LA will apply to any other taxation law provisions, which we expect to be mainly income tax returns.

ATO officers should document that, on the balance of probabilities, the taxpayer demonstrates phoenix or high-risk behaviours. This may entail the taxpayer's inclusion and score in the ATO's Phoenix Risk Model as well as a documented assessment against the risk factors listed at section '5. What may be considered as 'phoenix' or high-risk behaviour?' of the draft PS LA.

We also suggest that additional oversight beyond Executive Level 2 (EL2) approvals would be beneficial in the initial years. This may include review of EL2 approvals by an internal panel specialising in phoenix behaviours, as well as reporting on the use of the discretion to internal committees comprised of Senior Executives (SES). This will enable the ATO to provide confidence to stakeholders that the discretion is being applied appropriately and will allow it to identify opportunities to unify the application of section 8AAZLG across income tax, BAS and PRRT obligations.

### Notifying taxpayers

Section '7. Will the taxpayer be advised that their refund is retained for an outstanding notification?' raises a number of issues.

Given that there is no notification requirement in the legislation, we support the ATO's intention of being transparent with taxpayers. However, given that the draft PS LA is applied to taxpayers exhibiting phoenix and high-risk behaviours, we question whether such a lenient approach is necessary.

We agree that the taxpayer should, in most cases, be notified of the retained refund and the amount. However, we recommend that this notification be accompanied by a formal lodgment demand letter, rather than merely a list of outstanding lodgments. If lodgments remain outstanding, the taxpayer's failure to comply with the notice can then be prosecuted as an offence under section 8C of Schedule 1 of the *TAA* and the ATO can also seek court orders to lodge outstanding notices.

The notification should also include the taxpayers right to external review as well as any other available avenues (e.g. Freedom of Information).

We also acknowledge that there may be certain circumstances where notification may not be appropriate given the complexity of many phoenix investigations and the criminality involved. With appropriate oversight and approvals, the draft PS LA should allow for situations where notification is likely to negatively impact ATO or Phoenix Taskforce activities.

Given the context of the draft PS LA (i.e. high-risk behaviours), we question the need for the ATO to clarify to the taxpayer that "we did not come to this position lightly" or "explain what actions the taxpayer can take to prevent this from happening in the future". The indicators of phoenix and other high-risk behaviours suggest that the ATO is in fairly regular contact with the taxpayer and/or their advisers and that they would be well aware of the necessary steps towards compliance.

We also note that even Law Administration Practice Statement *PS LA 2012/6 Exercise of Commissioner's discretion to retain a refund (PS LA 2012/6)* does not require disclosure of the reasons for retaining amounts under section 8AAZLGA despite there being a requirement under that section to inform the taxpayer of the retention.

In any event, we suggest that the draft PS LA use the phrasing of paragraph 9 of PS LA 2011/22 as much as possible and afford ATO officers dealing with high-risk behaviours some flexibility in their application of section 8AAZLG, as part of their broader tactics. If ATO officers are directed to notify taxpayers under the draft PS LA, a similar requirement should be considered for paragraph 9 of PS LA 2011/22.

## **PS LA 2011/22**

We note a significant divergence between the administrative approach to subparagraphs (i) and (ii) as set out in PS LA 2011/22, and subparagraph (iii) as set out in the draft PS LA. This creates inconsistency and uncertainty, especially where the statute is essentially the same.

In relation to PS LA 2011/22, it would be beneficial for the ATO to undertake an analysis of the instances where the section 8AAZLG discretion has been used for outstanding BAS and PRRT notifications and the types of behaviours exhibited by those taxpayers. If the analysis finds the behaviours are broadly consistent with the high-risk indicators articulated in the draft PS LA, consideration should be given to aligning or consolidating the requirements of the two PS LAs.

We suggest that reviews of the draft PS LA and PS LA 2011/22 be undertaken two years after the draft PS LA's date of effect. This will enable an evaluation of the application and effectiveness of subparagraph 8AAZLG(1)(b)(iii), and to assess whether the two PS LAs should be merged.

## **Technical feedback**

- Reference is made to 'illegal phoenix activity' in section '1. What this draft Practice Statement is about?'. The remainder of the document refers to 'phoenix-type activity' or 'phoenix behaviour'. We suggest that the terminology be consistent throughout and note that the term 'illegal phoenix activity' sets a very high threshold. We recommend the use of the term 'phoenix behaviour'.
- Under section '8. When can the Commissioner consider refunding the amount?', the ability to refund the amount to an individual does not allow for circumstances outside the taxpayer's control, only hardship. The words 'for non-individuals' should be changed to 'for all entities' which is consistent with paragraph 13 of PS LA 2011/22.
- Under Section '7. Will the taxpayer be advised that their refund is retained for an outstanding notification?', "we did not" should be changed to "the Commissioner has not".
- Upon finalisation, PS LA 2011/22 should be updated to clarify the distinction between the three subparagraphs under paragraph 8AAZLG(1)(b) and to refer ATO officers to the draft PS LA in relation to subparagraph 8AAZLG(1)(b)(iii).

If you have any queries about this submission, contact Elinor Kasapidis, Tax Policy Adviser, CPA Australia, on 0466 675 194 or [elinor.kasapidis@cpaaustralia.com.au](mailto:elinor.kasapidis@cpaaustralia.com.au).

Yours sincerely,

Dr Gary Pflugrath  
Executive General Manager,  
Policy and Advocacy