



Chartered Accountants  
& Business Advisers

21 February 2012

The General Manager  
Indirect Taxes Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

**By Email**

Dear Sir / Madam

**Exposure Draft - Commissioner's ability to retain refunds pending verification checks (Exposure Draft)**

You have requested written submissions in relation to the Exposure Draft legislation and explanatory memorandum released by Treasury on Wednesday, 15 February 2012 for comment.

We provide the following comments in relation to the Exposure Draft legislation and explanatory memorandum. All section references are to the *Taxation Administration Act 1953*:

1. The proposed Exposure Draft legislation provides significant new powers to the Commissioner to block or substantially delay the payment of refunds or credits to taxpayers in relation to what is a self-actuating or self-assessment taxation system.

These proposed powers are considerably biased in the favour of the Commissioner, even in relation to situations where a taxpayer is fully entitled to a refund or credit on a timely basis and has made a notification to the Commissioner in the approved manner, due to the expansive ability of the Commissioner to retain an amount where he or she is satisfied that it would be reasonable to require verification of information contained in the notification.

In particular, the proposed Exposure Draft legislation does not provide taxpayers with any opportunity to provide additional information or data to the Commissioner, in order to substantiate or verify the information originally contained in a notification, prior to the Commissioner having the legislative power to retain an amount.

2. Under proposed section 8AAZLGA(1), the Commissioner may retain an amount that he or she otherwise would have to refund to an entity under section 8AAZLF in certain circumstances.

The proposed section only requires that the Commissioner be satisfied that it would be reasonable to require verification of information contained in the notification and relating to the amount that the Commissioner would have to refund.

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In our view the drafting of the proposed section should include clarification of when it is reasonable for the Commissioner to require verification of information, and also clarification of what the terminology "verification" and "information" means in the context of the proposed section.

Additionally, the drafting of the proposed section should include a requirement that the Commissioner must have regard to relevant factors in determining whether he or she may retain an amount. These factors should be akin to those under proposed section 8AAZLGA(8)(a) - (e).

3. Under proposed section 8AAZLGA(2), the Commissioner is required to inform the entity that he or she has retained the amount under subsection (1) within certain specified timeframes.

The drafting of proposed section 8AAZLGA(2) provides no requirement that the Commissioner notify the entity in writing that he or she has retained the amount. Any such notification requirement on the Commissioner under the proposed section should be a notification in writing by the Commissioner.

Additionally, the drafting of the proposed section does not currently require the Commissioner to inform an entity that an amount has been retained under subsection (1) for between 14 and 30 days after the entity has given to the Commissioner the relevant notification.

Under the proposal, prior to the Commissioner notifying an entity that they have retained the amount, the drafting of the proposed section does not allow an entity who is unaware that the Commissioner has retained an amount but who may be able to satisfy the Commissioner that it would no longer be reasonable to require verification of the information to do so.

4. Under proposed section 8AAZLGA(3)(a), the Commissioner may retain the amount under subsection (1) until he or she becomes satisfied that it would no longer be reasonable to require verification of the information (subject to subsections (3)(b) and (c)).

In our view the drafting of the proposed section should include clarification of how the Commissioner may become satisfied that it would no longer be reasonable to require verification of the information.

Additionally, the drafting of the proposed section should include a requirement that the Commissioner must have regard to relevant factors in determining whether he or she may retain an amount. These factors should be akin to those under proposed section 8AAZLGA(8)(a) - (e).

5. The period mentioned in subsection 8AAZLGA(3)(c) may be extended under subsection 8AAZLGA(4) by any periods of time in which the Commissioner has requested further information and that information has not been provided to the Commissioner.

The proposed application of these subsections provides no incentive for complying taxpayers to provide information to the Commissioner on a timely basis, where this is no positive enticement for doing so.

In our view, the proposed legislation should be such that the period mentioned in subsection 8AAZLGA(3)(c) should only be extended under subsection 8AAZLGA(4) in circumstances where the Commissioner has requested further information from an entity and that information has not been provided to the Commissioner within an appropriate timeframe.

6. Under proposed section 8AAZLGA(6) if the Commissioner has retained an amount beyond 60 days, he or she must inform the entity that he or she has done so within 14 days after the end of the 60 day period.

In our view given that the Commissioner has, by the end of the 60 day period, already retained the amount for a period of approximately three months it is excessive that he or she should require

another 14 days to inform the entity that he has continued to retain the amount. Any such notification to an entity should be required to be provided within the 60 day period under the proposed section.

Additionally, the current drafting of proposed section 8AAZLGA(6) provides no requirement that the Commissioner notify the entity in writing that he or she has continued to retain the amount. Any such notification requirement on the Commissioner under the proposed section should be a notification in writing by the Commissioner.

7. Under proposed section 8AAZLGA(8)(f), in deciding whether to retain an amount under subsection (5) the Commissioner must have regard to any other matter that he or she considers relevant.

In our view, the proposed Commissioner's power to have regard to any other matter that he or she considers relevant significantly prejudices the taxpayer, and should be limited or conditional upon his or her consideration of the other factors (a) - (e) detailed in the section.

8. Under Schedule X, item 1, note in section 8AAZLGA it is communicated that interest on the amount retained may be payable under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*.

The operation of the provisions of the *Taxation (Interest on Overpayments and Early Payments) Act 1983* prejudices against complying taxpayers who are fully entitled to a refund or credit on a timely basis and have made a notification to the Commissioner in the approved manner, by virtue of the fact that any such interest will be payable from the RBA interest day for RBA surpluses and in any other case, 30 days after the entity notifies the Commissioner under section 8AAZLG.

Further, in the case of a complying taxpayer who is ultimately entitled to an amount of any such interest, that amount is calculated at a lower applicable rate of interest to that which would be payable by a non-complying taxpayer required to pay interest and/or penalty tax amounts as a result of an underpayment or late payment following a notification provided to the Commissioner.

If you have any queries in relation to the above, please contact either Lance Cunningham on (02) 9240 9736 or David Penpraze on (02) 9240 9933 to discuss.

Yours sincerely



**Lance Cunningham**  
Director - National Taxation