

Fact Sheet - ATO Garnishee Notices

Problem

Section 260-5 of the Taxation Administration Act 1953 empowers the Commissioner of Taxation to collect taxes due by a taxpayer by attaching to monies owed to the taxpayer and monies the taxpayer holds in bank accounts.

How Assets Are Seized

The Commissioner of Taxation will collect the taxpayers debtors by providing them with a letter requiring that the monies owed are not to be paid to the taxpayer, but instead, to the Commissioner of Taxation.

The Commissioner of Taxation will collect the monies that the taxpayer holds in a bank account by providing notice to the Financial Institution requiring that monies held in a designated bank account, by the taxpayer, be paid forthwith to the Commissioner of Taxation.

ATO Have Statutory Charge Over Assets Seized

It has been held by the Courts that the effect of the Commissioner issuing correspondence to attach to debts owing to the taxpayer or monies held by the taxpayer with a Financial Institution, is to create a Statutory Charge in favour of the Commissioner. The Statutory Charge does not provide absolute priority, but is subject to the ordinary rules of equity, for example, against competing charges

ATO Can Not Attach To Assets Once Liquidation or Bankruptcy Occur

It has been held by the Courts that the Commissioner of Taxation is not able to attach to a taxpayers debtors or funds held with a Financial Institution if the taxpayer has become bankrupt, or been placed into liquidation. The effect of bankruptcy/liquidation is to convert the Commissioners right to be paid by the taxpayer to a right to lodge a proof of debt in the insolvency administration

ATO Can Not Attach To Assets Not Yet In Existence

The Commissioner cannot attach to assets not yet in existence. For example, where the taxpayer sues an entity for negligence, there is no asset until a decision is made by the Court that damages are payable.

Assets Seized by ATO Can Not Be Claimed Back by a Liquidator or Trustee in Bankruptcy

The Courts have held that a Trustee in Bankruptcy is not able to recover monies paid to the Commissioner following the Commissioner attaching to the said monies, as outlined above. The Court held that 'relation back' does not apply and the Trustee in Bankruptcy can not utilize Section 118 of the Bankruptcy Act to recover monies paid to the Commissioner. Further, the Court has held that monies received by the Commissioner do not represent a Preference pursuant to Section 122 as the bankrupt was not a party to the taxation.

ATO Must Consider The Tax Payer

However, the Court has held that the Commissioner of Taxation must have regard to consequences for the taxpayer or other creditors in issuing a statutory notice. This extraordinary power must be exercised with fairness. In the matter of Edelsten -v- Wilcox, the Court held that a notice requiring payment of all of the taxpayer's income was unreasonable. The Court held that the amount to be paid to the Commissioner be restricted to 46% of the amounts due to Edelsten

What a Section 260-5 Notice Looks Like

[Click Here to view a sample copy of a '260-5 Notice' Legislation](#)

[Click Here for a copy of section 260-5 which is relied upon by the Commissioner of Taxation for for a taxpayers assets to be seized](#)

Further Action

Should you have any questions regarding 260-5 Notices, , do not hesitate to email Alan Nicholls at alan@nichollSCO.com.au

