

FACT SHEET

ATO Garnishee Notices

In corporate and personal matters the ATO is in a better recovery position than other unsecured creditors because of its legislative power regarding, amongst other things, statutory garnishees, director penalty notices (“DPNs”) and PAYG withholding and SGC estimates.

Background

In mid-2010, the then Commissioner of Taxation Michael D’Ascenzo indicated that the ATO would be taking “firmer action” regarding outstanding tax debts.

The ATO has taken firmer action over the last five years, in particular utilising its garnishee power. More recently accountants and banks are reporting a sharp increase in the number of garnishee notices being issued to business bank accounts.

With the ATO owed over \$35 billion and a net debt growth of around 10% per annum, such action is likely to continue unabated.

What is a Garnishee Notice?

Where a person (third party) owes money to or holds money for a tax debtor, Section 260-5 of Schedule 1 to the *Taxation Administration Act 1953* empowers the ATO to require the third party to pay that money to the ATO rather than paying it to, or continuing to hold it for, the tax debtor.

This power is commonly referred to as a ‘garnishee power’ and a written notice issued by the ATO under Subsection 260-5(2) is referred to as a garnishee notice.

This is a powerful tool for the ATO. Serving garnishee notices on a third party is often an efficient and cost-effective way for the ATO to collect outstanding debts.

The ATO will use its coercive power of garnishee notices in circumstances where it considers that action to be the most effective method of obtaining payment of a debt.

Considerations by the ATO before and after issuing a Garnishee Notice

The current ATO policy is to have regard to the following factors:

- The financial position of the tax debtor and the steps taken by the tax debtor to make payment.
- The extent of any other debts owed by the tax debtor.
- Whether the ATO is placed at risk because of actions of the tax debtor (such as the tax debtor making payment to other creditors in preference to paying the ATO).
- The likely implications of issuing a notice on a tax debtor’s ability to provide for a family or to maintain the viability of a business.

If the tax debtor makes suitable alternative arrangements for payment, the ATO may withdraw or vary the notice.

To whom can ATO Garnishee Notices be issued?

- Banks
- Other financial institutions
- Credit card merchant facilities
- Trade debtors
- An employer or contractor (for an individual debtor) in respect of salary or wages
- A purchaser of land or property from a tax debtor
- Solicitors holding trust funds
- Superannuation funds
- A company in which a tax debtor holds shares in respect of dividends payable

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Some of the detail

1. A garnishee notice has the effect of making the ATO a secured creditor over the debts or monies due to the tax debtor. The garnishee notice creates a statutory charge which ranks as a non-circulating security interest and has priority to any previously created circulating security interests that have not crystallised prior to service of the garnishee notice (i.e. the ATO gets priority for an unsecured debt).
2. Under the present law, garnishee proceeds are not considered preferences in any subsequent liquidation or bankruptcy.
3. If a garnishee notice is issued in respect of a tax debtor and the tax debtor subsequently enters some form of insolvency, the ATO will not ordinarily withdraw the notice and it will continue to be effective against an insolvency practitioner. The notice is effective for amounts owed to the tax debtor prior to liquidation or bankruptcy.
4. The ATO will not issue a garnishee notice regarding a tax debtor in liquidation or bankruptcy.
5. In addition to when a tax debt is owed, the ATO can also issue a garnishee notice where:
 - tax has not yet become due
 - a payment arrangement has been entered into
 - negotiations with the ATO are ongoing
 - there are outstanding director penalty liabilities.
6. The ATO should not issue garnishee notices:
 - regarding joint bank accounts (even when both account holders owe a tax debt)
 - if the notice will deprive the tax debtor of virtually all income
 - to a Court
 - against Centrelink or Department of Veterans' Affairs pensions or benefits (unless requested to do so by the tax debtor).
7. Although it is legally possible for the ATO to issue garnishee notices to any third party owing money to or holding money for a tax debtor, the ATO must be in a position to identify parties upon which to issue such a notice. Not surprisingly then, the majority of notices are issued to banks and financial institutions as these entities are more readily identifiable as potentially holding funds on behalf of a tax debtor.
8. Garnishee notices can be issued to a bank to garnishee any bank account in the tax debtor's name (the bank must search for all accounts in the tax debtor's name). Further, if the tax debtor has an investment account that has not matured, the garnishee notice will remain in place until maturity.
9. Where the ATO issues a notice to an employer or contractor in respect of salary or wages, the ATO's policy is that they will usually seek to garnishee no more than 30 cents in the dollar of the amount of salary or wages payable to the tax debtor.
10. Garnishee notices issued to solicitors holding trust funds may not be effective if all such funds have become charged by a lien in respect of costs due from the tax debtor to such solicitors.
11. Garnishee notices against superannuation funds are not effective until the tax debtor's (member's) benefits are payable under the rules of the fund (usually when the member retires or dies).
12. Garnishee notices against life insurance policies are not effective until monies become payable.
13. For businesses, the ATO will usually first issue a 'Notice of Intended Legal Action/Garnishee Notice' so that the tax debtor is aware of the ATO's intended action.
14. Any third party who pays money to the ATO as required by a notice is taken to have been authorised by the tax debtor, or any other person who is entitled to all or part of that amount. A third party is indemnified for any money paid to the ATO.
15. A recipient of a garnishee notice should verify:
 - the validity of the notice, and
 - compliance with the policy considerations outlined in the various ATO Law Administration Practice Statements. The ATO's power to issue a garnishee notice is an administrative discretion and there may be a basis to cause the ATO to review its decision.
16. Prompt action is necessary as the service of a garnishee notice may have a detrimental impact on the tax debtor's cash flow.
17. A tax debtor should immediately seek advice upon receiving an ATO garnishee notice.

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