

PS LA 2008/11 - Suspected fraud by a third party or tax practitioner

⚠ This cover sheet is provided for information only. It does not form part of *PS LA 2008/11 - Suspected fraud by a third party or tax practitioner*

⚠ This law administration practice statement is being reviewed as a result of the decision in *DCT v MWB [2019] VCC 1516*. It cannot be relied upon while a rewritten version is under development. For updates on progress, see item 4043 on our [Advice under Development Program](#).

⚠ This document has changed over time. This version was published on *6 May 2020*

⚠ This practice statement was originally published on 26 June 2008. Versions published from 11 September 2008 are available electronically - refer to the online version of the practice statement. Versions published prior to this date are not available electronically. If needed, these can be requested by emailing TCNLawPublishingandPolicy@ato.gov.au .



This Law Administration Practice Statement is the ATO policy on account remediation in the case of suspected fraud by a third party or tax practitioner.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

1. What is this practice statement about?

This practice statement sets out the ATO remediation policy in cases of suspected fraud where the accounts of a taxpayer are impacted without authority by a third party:

- manipulating or altering a tax return or activity statement
- misdirecting or misappropriating a refund
- misdirecting or misappropriating a payment to the ATO.

References to suspected fraud within this practice statement recognise that only a court can make a criminal finding that actual fraud has been committed.¹

Suspected fraud may be identified by either the affected taxpayer or by an ATO officer. The **Fraud Prescribed Procedures** must be followed together with this practice statement where suspected fraud has been identified.

2. Who are the parties to suspected fraud?

In most cases of suspected fraud there are likely to be at least three parties involved:

- A third party who masterminded and/or implemented suspected fraudulent behaviour.
- The victim (usually the taxpayer) whose identity, personal details, payments, refunds or lodgments have been used without authority.
- The Commonwealth, as a result of damage to the integrity of records or the financial cost of refunds claimed without lawful entitlement.

You should also consider the impacts of suspected fraud on other third parties. For example, if a suspected fraud has been committed by a tax practitioner against one of their clients, and as a result a second client has unknowingly benefited, then the second client is an affected third party.

¹ Findings of fraud or evasion by the Commissioner in the context of seeking payment of underpaid tax are considered in Law Administration Practice Statement PS LA 2008/6 *Fraud or evasion*.

STAGE 1: Identify whether there has been suspected fraud

3. What are the indicators of suspected fraud?

In determining whether there is a reasonable suspicion of fraud, you should consider the Fraud Indicators below.

These Indicators are not determinative and should be considered on a case-by-case basis to help inform a conclusion about whether there has been suspected fraud:

- (a) The suspected fraud has been reported to the relevant authorities or third parties such as the police, financial institutions or the Tax Practitioners Board (TPB).
- (b) The taxpayer has taken active steps to respond to the suspected fraud.
- (c) The refunds of multiple taxpayers are being paid into one financial institution account (which does not belong to an authorised agent).
- (d) The personal details of a taxpayer appear to have been stolen or have been reported as stolen.
- (e) The information provided (in returns or otherwise) does not match the information we hold.
- (f) The taxpayer has confirmed that they did not lodge or authorise a return or activity statement.
- (g) The taxpayer's financial institution account details have been altered between lodgment and issue of a refund.
- (h) There is a change in financial institution account details for the first time in many years.
- (i) There are multiple active tax accounts under different variations of a taxpayer's name.
- (j) There is a change in the digital credentials or digital behaviour on a taxpayer's account.
- (k) The taxpayer's payments are being paid into accounts of unrelated entities without apparent explanation.
- (l) Any other relevant matter.

STAGE 2: Referral

4. Cases must be escalated to PGH

The Public Groups and High Wealth Individuals (PGH) Tax Evasion & Crime Branch are responsible for determining if referred cases are suitable for investigation and prosecution.

In all cases where suspected fraud is identified, you are required by Chief Executive Instruction CEI 2014/05/09 *Tax Crime and External Fraud* to refer it to the PGH business line.

Each business line has a **business line gatekeeper** who is responsible for coordinating these referrals. You must follow your business line procedures for engaging your gatekeeper.

Depending on the circumstances of a case, it may be appropriate to also engage other stakeholders to assist.

Further guidance about these stakeholders can be found in Appendix A.

STAGE 3: Prevention

5. Preventative measures

Where there is a suspicion of fraudulent activity, you may need to consider appropriate measures to prevent it occurring further.

These measures may include:

- (a) applying additional security to a taxpayer's account
- (b) revoking access to online platforms such as ATO Online, the Business Portal or Tax Agents Portal
- (c) increasing scrutiny of lodgments and account activity through audit or review
- (d) utilising the Reserve Bank of Australia's EFT recall facility to reclaim unprocessed refunds
- (e) referring appropriate cases to the TPB, Australian Securities and Investments Commission (ASIC), other government regulators and law enforcement agencies.

STAGE 4: Determine if the Commissioner will remediate the suspected fraud

6. Principles to consider when remediating taxpayer accounts affected by suspected fraud

We generally undertake remediation action on the basis that we are satisfied account activity has occurred without the authority of the taxpayer, or that funds can be clearly identified as having been misdirected from their proper recipient.

The circumstances of each case will vary, as well as the factors which influence a decision to remediate. In some cases, remediation will not be possible.

7. When will the Commissioner remediate?

Unauthorised lodgments

Generally, we will presume that tax returns and activity statements lodged on behalf of a taxpayer were lodged by or with the authority of that taxpayer. This also applies to amendment requests.

However, this presumption can be challenged. If we can determine (based on available evidence) that the return was lodged without the taxpayer's authority, the return and any associated assessment are invalid.

In these cases, we will generally remediate by cancelling the appropriate return or assessment. A corresponding debit or credit will also be made to the taxpayer's account to reverse the outcome of the lodgment.

Where a taxpayer is required to lodge a return or activity statement for a given period, they must lodge a replacement return and you should process this return in accordance with existing procedures.

Recovery of overpayments

We are entitled to pursue recovery of any unauthorised refund from the party who received it.

If we can identify a party who has received a refund without authority, an administrative overpayment (AMOP) debit should be raised against that party's account for the amount they have received. This amount will be subject to the usual debt recovery process.

If we cannot identify the party who has received a refund without authority, a Miscellaneous Amounts – Administered Account (MAAA) should be created and escalation should occur in accordance with this practice statement, the Fraud Prescribed Procedures and your business line requirements.

For further guidance on situations where the Commissioner will remediate, see Appendix B.

8. When does the Commissioner have discretion to remediate?

Where we have received a payment which seems to have been misappropriated from a taxpayer, we have the discretion to remediate. The factors which should be considered include:

- (a) Whether the taxpayer appears to have taken steps to mitigate the loss.
- (b) Whether the funds can be traced back to the taxpayer.

- (c) Whether the taxpayer has provided sufficient supporting evidence.
- (d) Whether the taxpayer has reported the suspected fraud to relevant authorities.

In some cases it will be unclear if discretion should be exercised. These cases should be escalated to the Operational Policy, Assurance and Law (OPAL) team. The Assistant Commissioner of OPAL (AC OPAL) will make the final determination about the exercise of discretion in such cases.

For further guidance on situations where the Commissioner has the discretion to remediate, see Appendix B.

9. When is the Commissioner not able to remediate?

There will be some cases where the Commissioner is not able to take remedial action. Aggrieved taxpayers should be advised to seek independent advice about recourse through the courts, or contact government agencies such as the consumer affairs bodies.

Civil matter where Commissioner cannot intervene

We will generally not be able to intervene in civil matters where:

- (a) we are satisfied that any lodgment or assessment is valid
- (b) any refunds owing to the taxpayer have been paid to the destination instructed by the taxpayer or their authorised representative.

These matters should be resolved privately between the parties involved and we cannot take any further action to remediate.

For example, a taxpayer or their authorised representative may lodge an income tax return that directs us to pay a refund to another person's bank account (such as an agent or a relative). If that person does not pass on the refund, then it is a private matter between the taxpayer and that other person and the Commissioner will not intervene.

Insufficient evidence

In some cases, there will be insufficient evidence for us to be satisfied that there is suspected fraud or to trace funds that have been misdirected or misappropriated. In these cases, we will not be in a position to remediate taxpayer accounts.

10. What assistance can we provide to victims of suspected fraud?

During the process of remediating their account, we may provide assistance to taxpayers who have been

the victim of a suspected fraud. However, if there is a tax liability which remains undischarged we may take appropriate action to collect that liability.

Remission of general interest charge (GIC)

In cases where remediation of suspected fraud leaves a taxpayer with a remaining liability, we will generally remit GIC between the due date of the liability and 21 days after the taxpayer becomes aware of their liability.

Further remissions of GIC may be appropriate in certain cases and should be considered based upon Law Administration Practice Statement PS LA 2011/12 *Remission of General Interest Charge*.

Arrangements to pay by instalments

A requirement to pay liabilities which remain after remediation work has occurred may cause some taxpayers financial difficulties. We will generally give sympathetic consideration in granting arrangements to pay liabilities by instalments in these circumstances.

Extensions of time to lodge a replacement return

Generally in cases where a taxpayer is required to lodge a replacement return or activity statement, we will grant them an extension of time for 30 days from the date they are notified that a replacement return or activity statement is required. This period may be extended based on the circumstances of the case.

Fraudulently negotiated cheques

Generally, we will presume that a cheque we have sent has been delivered to (and then cashed by) the intended recipient in the ordinary course of mail.

If a cheque was misdelivered due to an ATO error (for example, using an unauthorised address), then we will reissue the cheque to the intended recipient and pursue recovery action for the original.

If a cheque was sent to an authorised address but the taxpayer claims it was not delivered then they must provide sufficient evidence to satisfy us that it was not delivered before we will reissue the cheque.

Where the Commissioner does not reissue a cheque, you may assist the taxpayer to recover the proceeds of their cheque by either:

- disclosing the name of the bank and branch (but not the account) at which the cheque was presented
- providing a copy of the front and back of the processed cheque

- requesting Client Account Services to commence a wrongful negotiation claim through the Reserve Bank of Australia.

11. More information

For more information, see:

- [PS LA 2008/6](#) *Fraud or evasion*
- [PS LA 2011/5](#) *Recovery of administrative overpayments*
- [PS LA 2011/14](#) *General debt collection powers and principles*

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APPENDIX A – WHO ARE OTHER RELEVANT STAKEHOLDERS IN CASES OF SUSPECTED FRAUD?

Outline

We must report cases of suspected fraud to the PGH business line.

In some cases, you should engage additional stakeholders within the ATO. This allows us to take a holistic approach to dealing with suspected third party fraud and ensures that appropriate strategies are put in place to take account of a whole-of-system impact.

This Appendix provides further information about some of these stakeholders, which may assist in ensuring that the right areas of the ATO are engaged at the right time.

The Fraud Prescribed Procedures also include a directory which contains information on some specific escalation processes and templates which are relevant to cases of suspected fraud.

The IAL Tax Practitioner Compliance team

Cases involving tax practitioners should be referred to the [Tax Practitioner Compliance Team](#) within the Intermediaries and Lodgment (IAL) business line.

This team acts as a coordination point where there is suspected fraud involving a tax practitioner and aims to coordinate our various structures and systems to facilitate targeted compliance for agents presenting a risk.

This may involve:

- collecting information from intelligence sources across the ATO and using their expertise in tax practitioner risks to identify trends in behaviour
- coordinating IAL treatment pathways such as ongoing monitoring or the withdrawal of online agent services
- supporting existing treatment strategies such as profiling, law enforcement referrals and communications.

Tax Practitioners Board

Cases involving tax practitioners may also need to be referred to the TPB. The TPB is a national body responsible for the registration and regulation of tax practitioners, as well as for ensuring compliance with the *Tax Agent Services Act 2009*, including the *Code of Professional Conduct*.

Where the TPB finds that a tax practitioner has failed to comply with the *Tax Agent Services Act 2009*, they may impose an administrative sanction or apply to the

Federal Court for an injunction or an order requiring a tax practitioner to pay a civil penalty.

The Client Engagement and Service Delivery groups have nominated [business line gatekeepers](#) for referrals to the TPB. These gatekeepers have responsibility for review and endorsement of referrals before they are escalated to the IAL-TPB Gatekeeper team.

The IAL-TPB Gatekeeper team is responsible for managing the working relationship and information exchange between the Commissioner and the TPB. All referrals made to the TPB should be via this team through the relevant gatekeeper.

Service Delivery

Client Account Services

Where a taxpayer's account requires remediation action, you will need to involve Client Account Services (CAS). CAS is responsible for processing work undertaken to restore integrity to accounts of affected taxpayers and establishing liabilities on the accounts of perpetrators of suspected fraud which Debt will pursue.

Remediation that CAS is responsible for includes:

- cancelling invalid lodgments
- raising fraud credits and other remedial processing
- issuing replacement Tax File Numbers
- AMOP debits and associated accounting.

The Refund Fraud & Identity Crime Management (RFICM) Branch within CAS is the Service Delivery gatekeeper for Identity and Data Integrity matters. RFICM is responsible for remediation in cases involving suspected identity fraud.

Debt

You may need to involve Debt early during the investigation and remediation process to ensure that any flow-on effects can be appropriately managed. Debt is accountable for the management and recovery of liabilities, and is responsible for processes which include:

- providing strategic advice and assistance during the course of audits or investigations
- recovery actions against a perpetrator of suspected fraud or other parties
- implementation of non-pursuit processes where appropriate.

OPAL

If you are unsure whether the Commissioner's discretion to remediate should be exercised, you should contact OPAL. The OPAL team provides technical and administrative policy guidance to Service Delivery on issues impacting administration, accounting and debt recovery.

The AC OPAL is responsible for determining the extent to which we will exercise discretion to remediate taxpayer accounts in complex cases.

APPENDIX B – EXAMPLES

Example 1: Where the Commissioner will remediate

1.1: A tax practitioner lodges a fraudulent return or statement without authorisation

Tom is a registered tax practitioner. Alex engages Tom to complete her income tax return, supplies all the relevant information and signs a declaration authorising Tom to lodge the return on her behalf.

Tom alters the return to increase the amount of refund and lodges it. The refund is paid to Tom. Tom passes some of the refund on to Alex but keeps the remainder.

Alex logs onto her ATO Online account and notices the discrepancy. She calls the ATO to discuss her account and provides sufficient supporting evidence for the Commissioner to determine that the return was lodged without her authority.

The tax officer dealing with Alex's case refers it to their BSL Gatekeeper, who will assess the referral and approve it for escalation to PGH. After approval of the referral by the BSL Gatekeeper, PGH may allocate the case for further investigation.

CAS in the meantime cancels the unauthorised return, which results in a debit on Alex's income tax account, and then allocates a corresponding 'fraud credit'. An administrative overpayment debt is raised on Tom's account for the amount of the over-claimed refund, which will be pursued using ordinary Debt processes.

PGH or CAS may also engage relevant stakeholders such as the Agents of Concern program and IAL-TPB Gatekeeper team.

1.2: A third party lodges a fraudulent return or statement by creating a taxpayer account without authorisation

Victor steals Phoebe's handbag, but his identity is not known to Phoebe or to the police. The handbag contains sufficient identity information to enable Victor to create an ATO Online account in Phoebe's name. He uses that account to lodge a false return for the 2017 year and claim a substantial refund.

When Phoebe unsuccessfully attempts to link her ATO Online account to lodge her 2017 return, she calls the ATO for a linking code. The tax officer can see that Phoebe already has a linked ATO Online account, and in the course of conversation becomes aware of the potential identity fraud. Her case is escalated to the BSL Gatekeeper, who will assess the referral and approve it for escalation to PGH. If the referral is approved by the BSL Gatekeeper, PGH may allocate the case for further investigation.

Meanwhile, the CAS RFICM area has coordinated preventative steps to disable the account Victor has created, and applied additional protection to Phoebe's accounts.

Phoebe provides sufficient supporting evidence for the Commissioner to determine that the return was lodged without her authority. Once satisfied that the 2017 year return was lodged without authority, CAS will cancel the false return, restore integrity and security to Phoebe's accounts, and create a MAAA to account for the unauthorised refund claimed by Victor until he is able to be identified.

Example 2: Where the Commissioner has discretion to remediate

2.1: A tax practitioner misappropriates clients' funds and the funds can be traced back to the relevant client

Jill is a registered tax practitioner. She prepares a tax return on behalf of Hayley, who is her client. That return results in a liability payable to the ATO.

Jill requests that Hayley draws a cheque in favour of Commissioner of Taxation and leaves it with her for payment of the tax liability. However, Jill fails to forward that payment to the ATO.

Jill later becomes aware that ATO debt recovery action is about to commence against another client of hers, Anthony, in relation to a BAS that Jill had prepared on his behalf. She presents Hayley's cheque to an Australia Post branch and uses it to pay Anthony's tax owing.

The ATO contacts Hayley about her outstanding tax debt. Hayley confirms that she provided a cheque to Jill for payment of the debt, and provides the ATO with details of the cheque.

CAS identifies the payment made using Hayley's cheque. However, it is unclear whether the Commissioner should exercise discretion to remediate due to the flow-on effects to Anthony. The case is referred to AC OPAL, who determines the appropriate level of remediation work.

2.2: A third party misappropriates clients' funds and those funds can be traced back to the relevant client

Chris runs a business and employs David. David accesses Chris' business bank account and uses funds to pay his own individual tax debt directly from the business account. Chris discovers this and asks the ATO to return the funds.

CAS is responsible for refunds and payments, but it is unclear whether discretion to remediate should be exercised because the case is different to those they usually encounter.

The case is referred to AC OPAL, who determines that there is sufficient evidence to show that the funds belong to Chris, that they were paid to the ATO by David without authorisation, and that the situation warrants remediation.

CAS will coordinate a transfer of those funds from David's tax account to one of Chris' tax accounts, and then a refund from that account back to Chris. The Debt business line will pursue David for recovery of his undischarged tax liabilities.

APPENDIX C – END-TO-END PROCESS

The following decision-tree may assist with determining whether or not remediation should take place.

