
Update on Handling ATO Debt Strategies

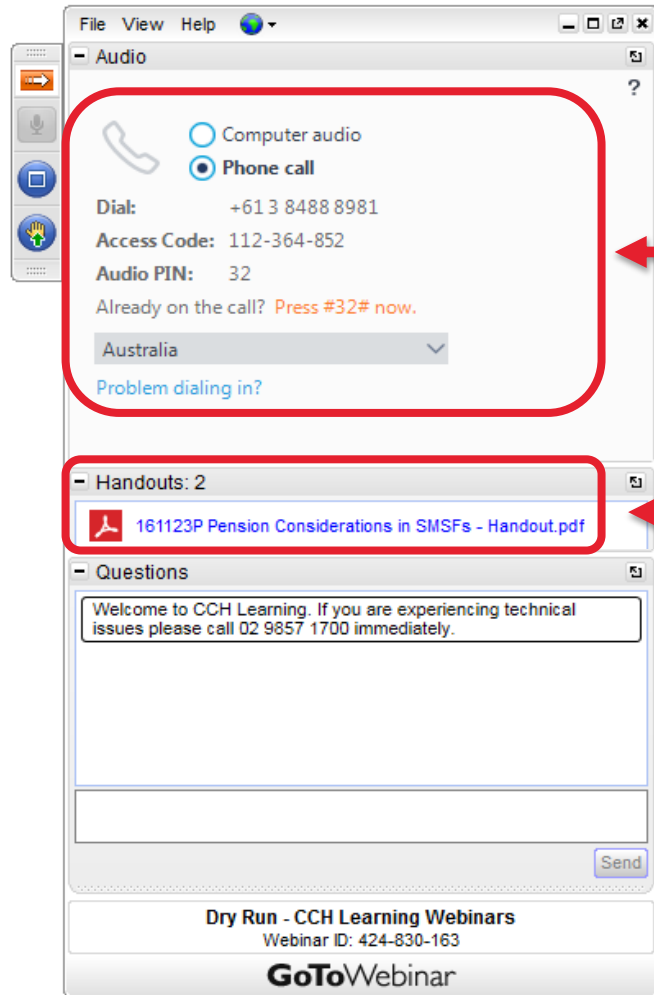
Bruce Collins

Wednesday 15 May 2024

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How to Participate Today



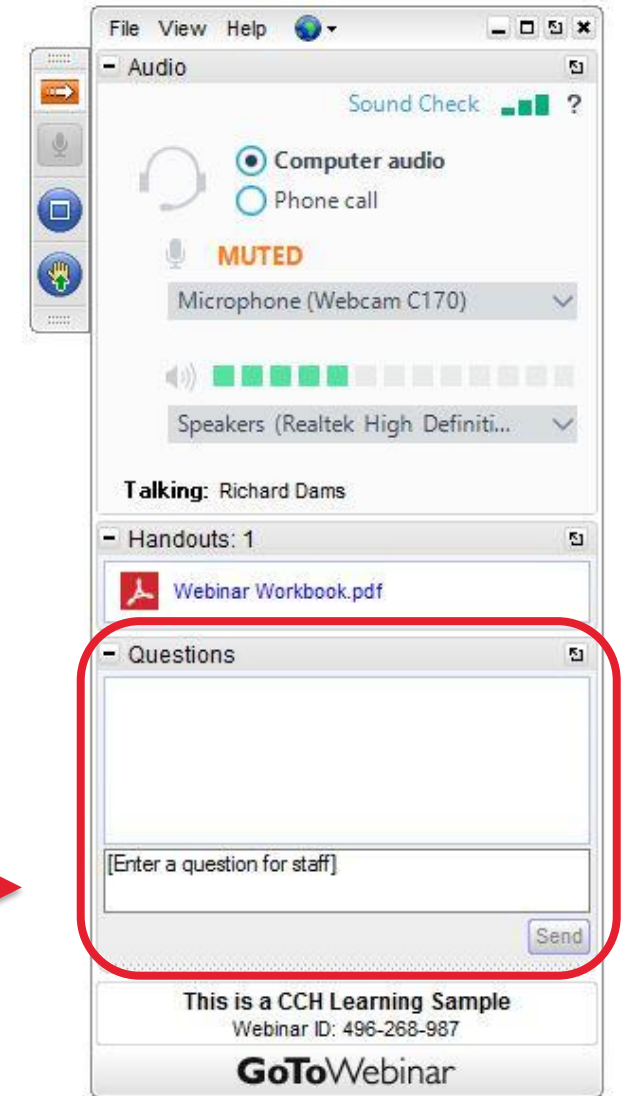
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Susannah Gynther
Moderator

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Your Presenter

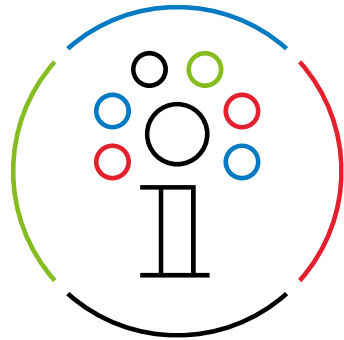


Bruce Collins is the founder and principal solicitor at Tax Controversy Partners, currently helping clients to resolve all types of tax issues with the ATO and SROs. Before moving into private practice in 2017, Bruce worked for over 35 years in the Tax Office, a third of this time as a Senior Executive in what is now Client Engagement Group, covering most ATO functions. Bruce was the leader of the Technical & Case Leadership area in Aggressive Tax Planning and then Private Wealth for several years prior to leaving the ATO, as well as having previously been the strategic and technical leader for many of the ATO's private group and adviser-focused compliance programs. In those roles, Bruce was also involved in dealing with many of the most complex settlement and debt collection negotiation cases for private group and scheme participant cases.

Bruce Collins

Founder and Principal Solicitor
Tax Controversy Partners

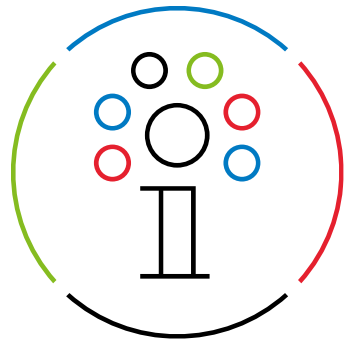
Today's session will cover



- ATO's current small business and private wealth debt collection strategies
- ATO statutory powers to collect debts
- ATO use of general creditor powers to collect debts
- Scrutineer and stakeholder feedback on the current ATO debt collection approaches
- Strategies to better manage ATO debt collection activities affecting small business and private wealth clients

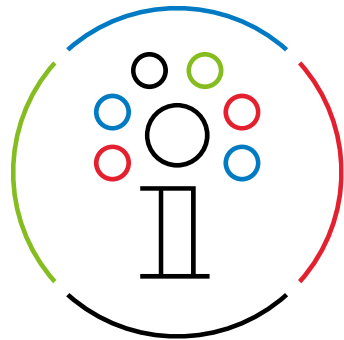
Who are you?

- a) Accountant or tax agent
- b) Lawyer
- c) Financial planner
- d) Student
- e) Other



Who are you?

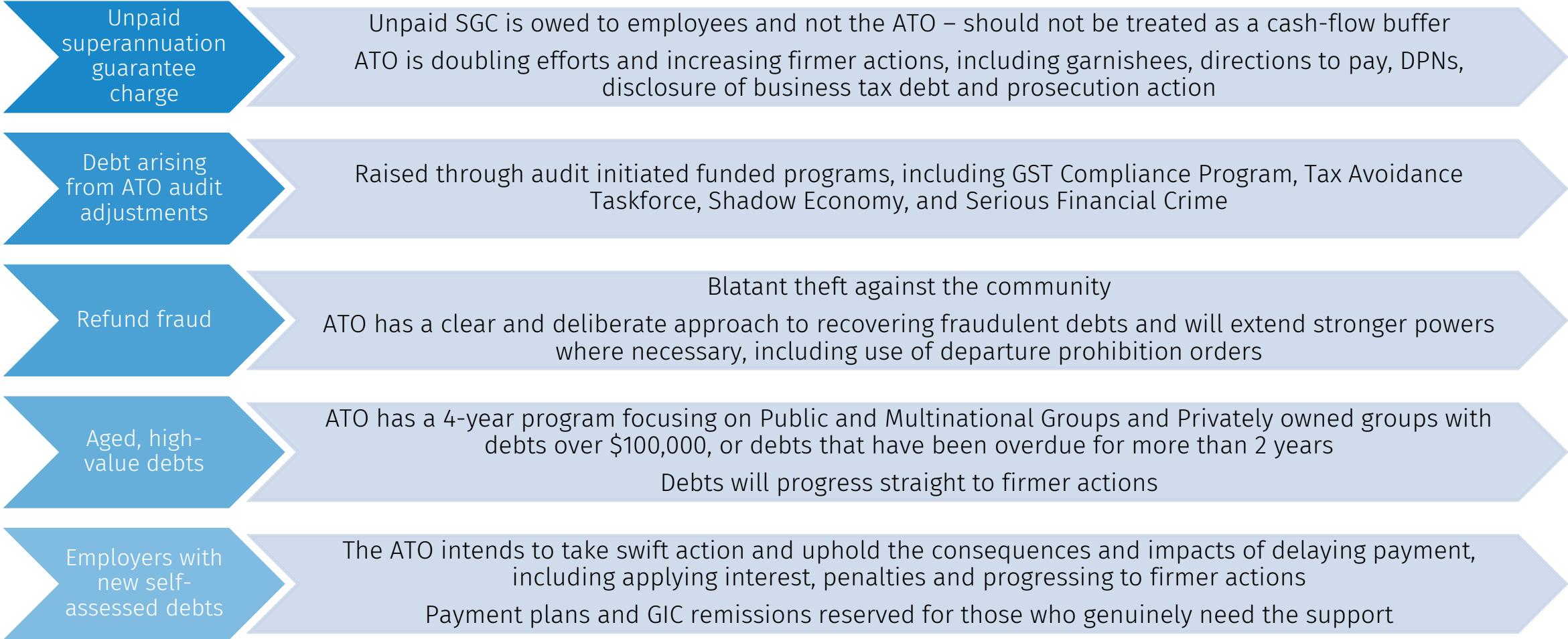
- a) In private practice, with experience in debt,
- b) In private practice, with no experience in debt
- c) In public practice
- d) Other



Recent history on debt held by the ATO

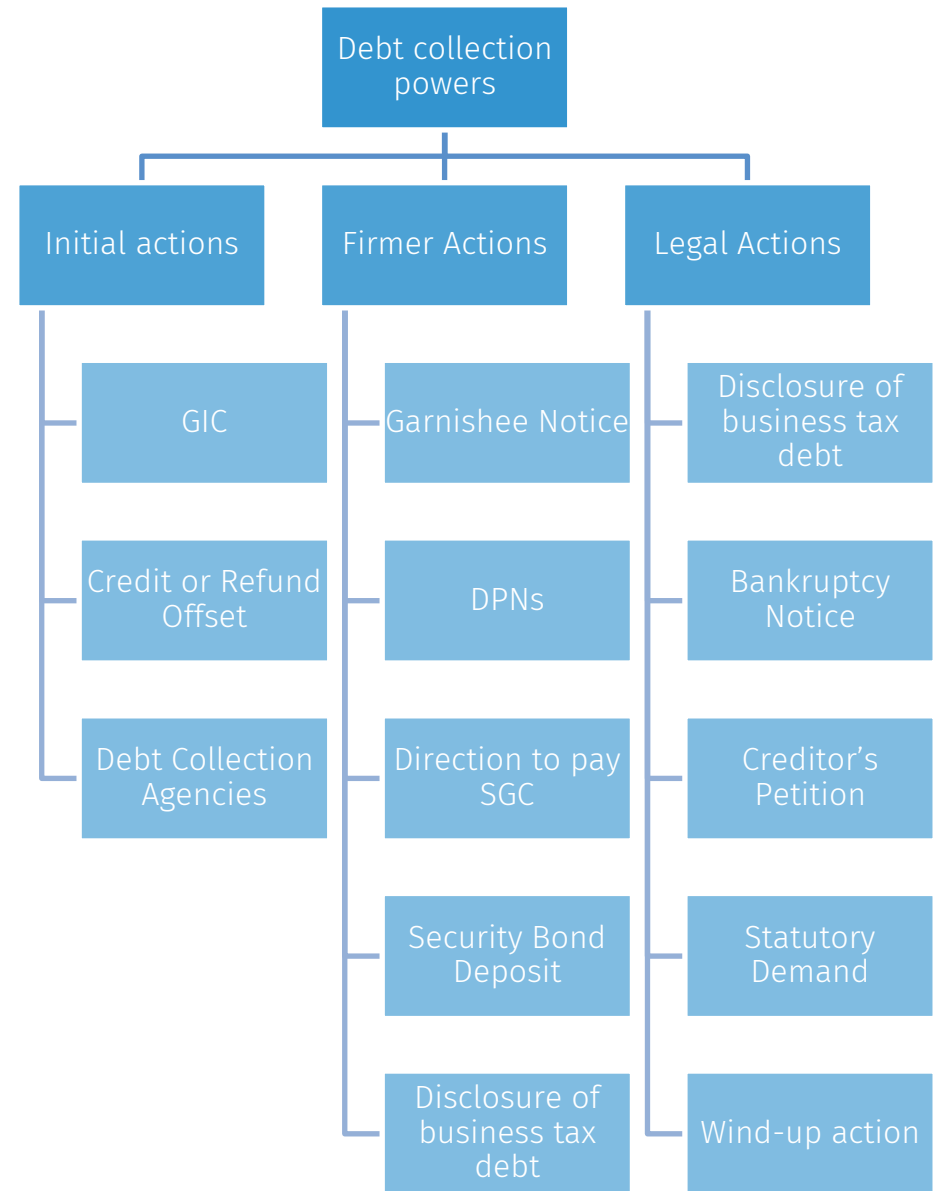
- Between June 2019 to June 2023, collectable tax debt rose from \$2.65b to \$50.2b
- Collectable debt for businesses accounts for 90% of the total collectable debt
 - SME Unpaid activity statement debt - \$23b
 - SME Unpaid Superannuation guarantee - \$1.8b
- Tax Summit 2023 – Vivek Chaudry (Lodge & Pay DCT) outlined the ATO's return to stronger debt collection approach
- ATO should be creating a level playing field for those who pay on time vs those who are not paying/choose to not pay tax debts
- The most effective payment plans will aim to put businesses back to square before their next reporting cycle and new debts accumulate (meaning 90 days to 12 months...)

Current Focus Areas



ATO's Debt Collection Powers

- ATO has a range of powers to collect outstanding tax debts, ranging from charging interest to encourage payment, to firmer actions to seek payment to legal actions where payments remain outstanding
- As debt continues to grow or age, the ATO will begin using stronger actions to recover the debt



Initial Actions

- GIC
 - Is automatically imposed on overdue debts but can be remitted
- Credit of Refund Offset
 - ATO is required to offset any credits or refunds otherwise payable to a taxpayer against any tax debts outstanding
- Debt Collection Agencies
 - Where a taxpayer does not engage with the ATO on the payment of outstanding debts, the debt may be referred to an external debt collection agency
 - From 29 January 2024, the ATO is referring matters to RecoveriesCorp (a debt management solution)

Firmer Actions – Garnishee Notice

- Section 260-5 of *Schedule 1* of the *Taxation Administration Act 1953* gives the Commissioner the power to collect unpaid tax debts by servicing a garnishee on an entity which includes, persons, financial institutions and trade debtors
- This is a statutory power, and the Commissioner does not need approval from a third-party or court
- A garnishee can be issued if there are reasonable grounds to believe that the person:
 - a) Is an entity by whom the money is due or accruing to the debt; or
 - b) Holds the money for or on account of the debtor; or
 - c) Holds the money on account of some other entity for payment to the debtor; or
 - d) Has authority from some other entity to pay the money to the debtor
- A person who does not comply with a valid garnishee notice without a lawful excuse commits an offence and may be liable for a penalty of 20 penalty units

Firmer Actions – Director Penalty Notice

- Division 269 of the *Taxation Administration Act 1953* gives the Commissioner the power to collect certain tax debts incurred by a company directly from the directors of a company by issuing a DPN
- The notice requires the director to take certain actions or become personally liable for the company's tax debts
- The following company debts can be recovered personally from the director from a DPN:
 - Pay As You Go Withholding (**PAYGw**)
 - Goods and Services Tax (**GST**)
 - Superannuation Guarantee (**SG**)
 - Wine equalization Tax (**WET**) and
 - Luxury Car Tax (**LCT**)
- A DPN can be issued to one or more current or previous directors for the same amounts. Such liabilities can therefore affect both the company and perhaps several individuals

Firmer Actions – Direction to Pay SGC

- Section 265-90 of the *Taxation Administration Act 1953* allows the Commissioner to issue a written notice to an employer who has failed to pay SG for their employees directing them to pay the amount of SGC that is outstanding
- The direction notice must:
 - Set out the amount the employer is required to pay
 - Set out the relevant quarter
 - Specify the period before the end of which the employer must comply with the direction (this must be at least 21 days after the day the direction is given)
 - Explain the consequences of failing to comply with the direction, and
 - Explain how the employer can have the Commissioner's decision to give the direction reviewed
- The maximum penalty for failing to comply with a directions notice is 50 penalty units, imprisonment for 12 months or both

Firmer Actions –Security Bond Deposit

- From 1 July 2010, the Commissioner is able to seek security where there is a serious risk of tax-liability not being paid (s255-100 of Schedule 1 to *Taxation Administration Act 1953*) – existing or future liabilities where there is a limited time enterprise
- Security deposits cannot be allocated to a running balance account and the GIC is not applied to taxpayers who fail to provide security within the required timeframe
- Amount of, kind of and when to ask for security is up to the Commissioner
- Decision to require security can be reviewed or appeal. As it is an administrative decision, review/appeal is subject to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*
- The only two decisions testing the decision so far:
 - *Keris Pty Ltd v Deputy Commissioner of Taxation* [\[2017\] FCAFC 164](#)
 - *Fastbet Investments Pty Ltd v Deputy Commissioner of Taxation* [\[2019\] FCA 2073](#)

Firmer Actions – Disclosure of Business Tax Debt

- Section 355-75 of the *Taxation Administration Act 1953* allows the Commissioner to disclosure tax debts to a Credit Report Bureau
- Disclosure can be made where ethe taxpayer has:
 - An ABN, and
 - Outstanding tax debts totaling at least \$100,000 that have overdue for 90 days
- The following amounts are not included in the \$100,000 tax debt threshold:
 - Debts that are covered by a payment arrangement that is being complied with
 - Disputed debt
 - Amounts included in a hardship application

Legal Actions

- Disclosure of Business Tax Debt
 - ATO can file a statement of claim or summons to have the court recognise the debt owed
 - Court can impose judgement debt interest and is not tax deductible
- Bankruptcy Notice
 - Bankruptcy is a legal declaration that a person is unable to pay their debt
 - After receiving a notice, taxpayer has 21 days to pay debt in full or agree to a payment plan, if not, ATO can file a creditor's petition to make taxpayer bankrupt
- Creditor's Petition
 - Application made to Federal or Magistrates court for a sequestration order
- Statutory Demand
 - Issued to company, requiring payment within 21 days or agree to a payment plan
- Wind-up Action
 - Liquidator appointed to sell off company's assets to pay company's creditors

Feedback on current ATO debt collection approaches

- Commonwealth Ombudsman, ACT Ombudsman and Inspector General of Taxation, Taxation Ombudsman released their 'guide' on how Government should notify people about debts

Why

Be transparent and accountant

What

Tell people what the debt is and where it comes from

How

Provide clear information for requesting review, debt waivers and repayment arrangements

Help

Provide contacts for people to find out more information

Learn

Learn and improve

Strategies to better manage ATO debt collection

Communicate with the ATO

It's always better to communicate with the ATO as early as possible if a taxpayer believes that a future/existing debt is unable to be paid

Payment Plans

Need to ensure that current and new debts can also be paid while maintaining the payment plan

Compromise of Debt

Generally a last resort step for the ATO after considering other payment options

Request for release from tax debt

Only available to those with genuine hardship, unable to pay their debt

Small Business Restructuring

Used where the business is commercially viable but struggling to pay the current tax debt

Strategies to better manage ATO debt collection – Payment plans

- What? A payment plan breaks down the tax owing into small amounts to be paid over a period of time as instalments
- Who? Individuals, sole traders, businesses and registered tax/BAS agents on behalf of their clients
- Remember! GIC is still required to be paid on the debt where it is not paid in full by the original due date
- Remember! Taxpayer needs to lodge future obligations and pay future liabilities on time
- Any future tax credits/refunds will be used to reduce the tax debt
- Additional voluntary payments can be made to pay the debt off earlier
- If under \$200,000, can be set up online or by phone by the taxpayer or tax agent
- Interest-free payment plans are available for overdue activity statement amounts where eligibility requirements are met

Strategies to better manage ATO debt collection – Compromise of debt

- PS LA 2011/3 *Compromise to undisputed tax related liabilities and other amounts payable to the Commissioner*
- Obtaining a compromise of debt is not straightforward and is a last resort, after the ATO has considered all other options for payment including:
 - Remitting penalties and interest
 - Payment plans
 - Release from certain tax debts
 - Placing debts on hold
 - Bankruptcy and liquidation options
- ATO will not agree to a compromise if:
 - The tax debts are subject to dispute
 - Application to waive the debt has not been finalised
 - Application for release from payment of an income tax or FBT debt has not been finalised
 - taxpayer could lodge a debt agreement under Part IX of the *Bankruptcy Act 1966*
 - Within 5 years before the proposal, taxpayer has been bankrupt or party to a Part IX or X agreement

Strategies to better manage ATO debt collection – Small business restructuring

- If business is commercially viable but struggling – restructuring debts offers option to continue trading
- Three-phase process:
 1. Proposal phase where the directors and restructuring practitioner work on a plan for up to 20 business days
 2. Acceptance phases where creditors have up to 15 business days to vote, approving or rejecting the plan
 3. Plan implementation phase which is limited to a 3-year term but may be completed soon depending on the term of the plan
- Restructuring plan creditors will consider:
 - Commercial terms compared to a hypothetical return in a liquidation
 - Ability to make proposed payments
 - Compliance history of taxpayer and group entities
 - Behaviours of directors – specifically loan accounts
 - Potential breaches of the *Corporations Act 2001*

Questions?

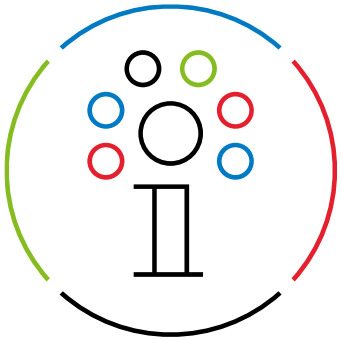


Susannah Gynther
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- 28 May - 2024 Year End Conversations for ALL SMSF Clients
- 28 May - Agile Mindset and Mental Fitness

Questions?



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