TPB Information Sheet TPB(I) 02/2011

Claiming a lien over client property

This is a Tax Practitioners Board (TPB) Information Sheet (TPB(I)). It is intended to be for information only. It provides a brief overview of the TPB's position claiming a lien over client property at the date of issue. While it seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers in the *Tax Agent Services Act 2009* (TASA).

In addition, please note that the principles, explanations and examples in this paper do not constitute legal advice and do not create additional legal rights or obligations beyond those that are contained in the TASA or which may exist at law.

Document History

The TPB released this TPB(I) as an exposure draft on 14 September 2010. The TPB invited comments and submissions in relation to the information contained in it. The closing date for submissions was 29 October 2010. The TPB has considered the submissions made and published the TPB(I) based on the TASA and the *Tax Agent Services (Transitional Provisions and Consequential Amendments) Act* 2009 and the Tax Agent Services Regulations 2022.

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What is a lien?

1. A lien is defined as the right to hold the property of another as security for the performance of an obligation or the payment of a debt.[1]

2. Liens may arise in three ways:
   - by express contract
   - by implied contract
   - by legal relations between parties.

3. There are two kinds of liens:

   a) Particular (or specific) lien

   A particular (or specific) lien is the right to retain a particular piece of property until the obligation in respect of that property has been settled by the owner.

   In most cases, registered tax or BAS agents (collectively referred to as tax practitioners) will be dealing with a particular (or specific) lien.

   b) General lien

   A general lien is the right of a particular class of persons (for example, solicitors, bankers or stockbrokers) to retain possession of property until the owner of the property has settled all their outstanding obligations to that class of persons.

   Registered tax practitioners will usually not have a right of general lien.

When can a registered tax practitioner claim a lien over client property?

4. The TPB has produced this information sheet to provide tax practitioners with a general understanding of liens. However, a lien is legal in nature and as such the TPB encourages tax practitioners to seek legal advice if they are considering exercising a lien over client property to ensure that they have a right to do so in particular circumstances.

5. A provider of professional services, such as a registered tax practitioner, may be able to claim a particular lien over client property for outstanding professional fees or charges.

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[1] *Hall v Richards* (1961) 108 CLR 84; [1964] ALR 816

6. To exercise a valid lien over client property, a registered tax practitioner must satisfy the criteria set out below:

   a) **The tax practitioner must be claiming the lien in their own right, and not merely as agent of a third person**

      The lien asserted by the registered tax practitioner must be in relation to a debt or demand due from the client to the registered practitioner. The client must be aware of the debt or demand.

   b) **The tax practitioner must have actual or constructive possession of the client's property**

      The property must have been acquired with the consent of the client.

   c) **The outstanding debt or demand must be connected to the property over which the lien is being claimed**

      The debt or demand will usually be for outstanding professional fees or charges. For example, the property may be documents such as income tax returns or business activity statements which the registered tax practitioner has prepared for lodgement with the Australian Taxation Office (ATO) and the outstanding fees relate to the preparation and lodgement of those returns or statements.

What type of property can be the subject of a lien?

7. It is widely accepted that registered tax practitioners can only claim a lien over property upon which they have expended labour and made more valuable. For example, the courts have said that a lien would attach over a general ledger, balance sheet and draft income tax return prepared by an accountant.[2]

8. A lien could also attach over electronic property such as a software data file that a registered tax practitioner has expended labour and made more valuable.

9. However, a lien would not extend to invoices or a sales journal where those documents are provided to the tax practitioner only for checking and do not embody the result of the practitioner's labour.[3]

Documents

10. A letter of engagement, which may comprise part or all of the contract between a tax practitioner and their client, may set out expressly whether the tax practitioner or client has ownership of documents in certain circumstances.

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[2] *Re Gleebs Pty Ltd (in liq)* [1933] VLR 293, 39 ALR 300

[3] *Re Gleebs Pty Ltd (in liq)* [1933] VLR 293, 39 ALR 300

11. Subject to agreement to the contrary, the following documents are likely to belong to the client:
    - source documents – such as ledgers, receipts, invoices or journals
    - correspondence between the ATO and the client and notices of assessment
    - letters of advice, books of accounts, tax returns and financial statements prepared by atax practitioner for the client (once paid for).
12. Working documents of the tax practitioner would not belong to the client unless the client specifically instructed the tax practitioner to prepare such drafts for them and had paid for them.
13. In summary, unless otherwise agreed, documents provided by a client or other person to a registered tax practitioner for the sole purpose of assisting the registered tax practitioner to undertake work for the client (and which the registered tax practitioner does not expend labour and make more valuable) remain the property of the client or other person. Generally, these documents cannot be the subject of a lien.

Liens distinguished from trust money or property

14. Liens should be distinguished from money or other property held on trust. Under the Code of Professional Conduct in the *Tax Agent Services Act 2009*, if:
    - you receive money or other property from or on behalf of a client; and
    - you hold the money or other property on trust;

    you must account to your client for the money or other property.