



TPB Information Sheet

TPB(I) 12/2012

Insolvency practitioners: Do you need to register as a tax or BAS agent?

Disclaimer

This is a Tax Practitioners Board (TPB) Information sheet (TPB(I)). It is intended to be for information only. While this TPB(I) seeks to provide practical assistance and explanation, it does not exhaust, prescribe or limit the scope of the TPB's powers provided in the *Tax Agent Services Act 2009* (TASA) and the *Tax Agent Services Regulations 2009* (TASR).

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

Document history

The TPB released this document as a final Information sheet on 26 June 2012.

On 15 October 2015 the TPB updated this TPB(I) to incorporate tax (financial) advisers.

On 27 September 2016 the TPB updated this TPB(I) to incorporate a reference to the *Tax Agent Services (Specified BAS Services) Instrument 2016*.

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Introduction

1. This Information Sheet (TPB(I)) has been prepared by the Tax Practitioners Board (TPB) to assist insolvency practitioners to understand the operation of the tax agent services regime and whether or not they need to register with the TPB.

Background

2. The TPB administers a system for the registration of tax agents, BAS agents and tax (financial) advisers (known collectively as 'tax practitioners') under the *Tax Agent Services Act 2009* (TASA). This TPB(I) will focus on insolvency practitioners in the context of registration as a tax agent or BAS agent, although the TPB recognises that insolvency practitioners may also register as a tax (financial) adviser.
3. An entity must be registered as a tax agent if providing a 'tax agent service' for a fee or other reward.¹
4. It is important to note that the fee does not necessarily have to be separately charged to the client. It can form part of a bundle of services offered by the insolvency practitioner to the client.
5. There are no separate or specific legislative provisions relating to whether insolvency practitioners need to be registered under the TASA.

Tax agent service

6. A 'tax agent service' is any service that relates to:
 - ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a taxation law; or
 - advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or
 - representing an entity in their dealings with the Commissioner of Taxation (Commissioner); andthat is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:
 - to satisfy liabilities or obligations that arise, or could arise, under a taxation law;
 - to claim entitlements, that arise or could arise under a taxation law.²

¹ A 'tax agent service' includes a '[BAS service](#)' and '[tax \(financial\) advice service](#)'. For further information on what constitutes a tax (financial) advice service, refer to [TPB\(I\) 20/2014: What is a tax \(financial\) advice service?](#) available at www.tpb.gov.au



7. A tax agent service is defined to include, but is not limited to:
 - preparing or lodging a return, notice, statement, application or other document about a taxpayer's liabilities, obligations or entitlements under a taxation law
 - giving a taxpayer advice about a taxation law that the taxpayer can reasonably be expected to rely upon to satisfy their taxation obligations
 - dealing with the Commissioner on behalf of a taxpayer.
8. A taxation law includes BAS provisions. As such the definition of tax agent service includes BAS services.
9. Any decision about whether advice constitutes a tax agent service requires consideration of all the facts and circumstances to determine if the advice is provided in circumstances where the client can reasonably be expected to rely on that advice for one or both of the purposes outlined in paragraph 6 above.

Insolvency practitioners

10. For the purpose of this TPB(I), the term 'insolvency practitioner' will be used to describe a class of professionals who may be appointed to fulfil one or more of the following roles:
 - a person formally appointed to manage a company or its property under the provisions of Chapter 5 of the *Corporations Act 2001* as:
 - provisional liquidator
 - liquidator
 - administrator (including deed administrator and voluntary administrator)
 - controller (a receiver, or receiver and manager), or
 - trustees in bankruptcy appointed under the *Bankruptcy Act 1966*.
11. Insolvency practitioners perform their duties and functions as empowered by legislation. They fundamentally and statutorily are controllers and agents of insolvent entities, with powers over the entity under the legislation³.

² A BAS service is similarly defined, however is limited in scope to obligations, liabilities or entitlements that arise, or could arise, in relation to a BAS provision. A BAS service also includes any service which the TPB, by legislative instrument, specifies to be a BAS service – see subsection 90-10(1A) of the *Tax Agent Services Act 2009* and *Tax Agent Services (Specified BAS Services) Instrument 2016*.

³ Refer to section 13 of the *Bankruptcy Act 1966* and the following sections of the *Corporations Act 2001* section 420 (Receivers); section 437A (administrators); section 477 (liquidators).



12. For example, section 437A of the *Corporations Act 2001* defines the role of an administrator as follows:

437A Role of administrator

- (1) *While a company is under administration, the administrator:*
- (a) *has control of the company's business, property and affairs*
 - (b) *may carry on that business and manage that property and those affairs*
 - (c) *may terminate or dispose of all or part of that business, and may dispose of any of that property*
 - (d) *may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.*
- (2) *Nothing in subsection (1) limits the generality of anything else in it.*

Are insolvency practitioners required to register under the TASA?

13. Whether an insolvency practitioner is required to register under the TASA, will depend on whether:

- the insolvency practitioner is providing a tax agent or BAS service, as defined
- the client can reasonably be expected to rely on that service
- the insolvency practitioner receives a fee or other reward for their service.

14. For the purposes of determining whether an insolvency practitioner needs to register with the TPB, it is convenient to look at whether the insolvency practitioner has been engaged in a pre-appointment or post-appointment role.

Post-appointment role

15. Insolvency practitioners perform a wide range of functions under the terms of their appointments. In the course of their appointments, there may be instances where insolvency practitioners perform functions which involve the following:

- ascertaining of an entity's liabilities, obligations or entitlements under taxation laws
- advising about liabilities, obligations and entitlements that could arise under a taxation law
- representing an entity in dealings with the Commissioner.

16. However, these functions are not *services*⁴ to the insolvent entity because the insolvent entity has not required or sought them; rather, they are performed in accordance with the duties and responsibilities of the insolvency practitioner under the terms of the relevant legislation.

⁴ Refer Macquarie Concise Dictionary definition of "service" (relevantly): the supplying of activities required or demanded, or to the public.



17. Therefore, an insolvency practitioner in this position would not generally be regarded as providing a tax agent service as defined. The insolvency practitioner essentially stands in the shoes of the insolvent entity (therefore not considered to be an agent of the insolvent entity) and undertakes any work as the insolvent entity. The situation may be considered analogous to that of a self-preparing entity.

Pre-appointment role

18. If an insolvency practitioner provides advice about tax issues before the formal appointment of a person to manage the company, such as a liquidator, and that advice is relied on and a fee is paid to the insolvency practitioner, then that insolvency practitioner must register with the Board.

19. Examples of work that an insolvency practitioner may undertake in a pre-appointment role include:

- advising on the tax issues and tax debts under review
- assisting a debtor in negotiations with the ATO, and any other relevant parties
- advising on director penalty notices.

20. In these examples, it is likely that the insolvency practitioners will need to register with the TPB.

Use of contractors by insolvency practitioners

21. If the insolvency practitioner managing an entity were to bring in outside consultants such as accountants or bookkeepers to deal with the entity's tax or BAS issues, then those consultants would be providing tax agent or BAS services to the insolvency practitioner and/or to the entity in respect of which the insolvency practitioner is performing his or her functions.

22. Where such consultants provide tax agent or BAS services for a fee or other reward and there is reliance on their services to satisfy liabilities or claim entitlements under a taxation law or BAS provision, those consultants would need to be registered under the TASA. For further information, refer to the TPB Information Sheet *TPB(I) 08/2011 Reports or other advice incorporating tax agent services provided by a third party* available on the TPB website at www.tpb.gov.au



Registering with the Tax Practitioners Board

23. If an insolvency practitioner wishes to become registered as a tax agent, they will need to meet certain legislative requirements. For individual applicants, this includes being a fit and proper person and having appropriate qualifications and relevant experience. For partnership and company applicants, this includes the requirement to have a sufficient number of registered individuals to provide tax agent services to a competent standard and to carry out supervisory arrangements.

24. Further information about the registration requirements is available on the TPB website at www.tpb.gov.au