

# A

## ANNEX 4.11 OVERPAYMENTS

This annex discusses how, and how far, public sector organisations should seek to recover overpayments – one case of special payments outside normal Parliamentary process (section 4.11). In difficult cases it is important to act on legal advice.

**A4.11.1** Even good payment systems sometimes go wrong. Most organisations responsible for making payments will sometimes discover that they have made overpayments in error.

**A4.11.2** In principle public sector organisations should always pursue recovery of overpayments, irrespective of how they came to be made. In practice, however, there will be both practical and legal limits to how cases should be handled. So each case should be dealt with on its merits. Some overpayment scenarios are outlined in box A.4.11A.

### box A.4.11A possible reasons for overpayment

#### Contractors and suppliers

Overpayments in business transactions should always be pursued, irrespective of cause. It is acceptable to recover by abating future payments if this approach offers value for money and helps preserve goodwill. If the contractor resists, the overpaying organisation should consider taking legal action, taking account of the strength of the case, and of legal advice.

#### Grants and subsidies

Overpayments to persons or corporate bodies, should be treated as business transactions and a full refund sought. The overpaying organisation should ask recipients to acknowledge the amount of the debt in writing.

#### Pay, allowances, pensions

Overpayments to:

- civil servants
- members of the armed forces
- employees of NDPBs
- retired teachers and NHS employees
- and the dependants of any of these

should be pursued, taking proper account of how far recipients have acted in good faith. Similar cases should be treated consistently. After warning recipients, recovery through deduction from future salary or pension is often convenient. Legal advice is often wise to make sure that proper account has been taken of any valid defence against recovery recipients may have.

**A4.11.3** When deciding on appropriate action, taking legal advice, organisations should consider:

- the type of overpayment;
- whether the recipient accepted the money in good or bad faith;
- the cost-effectiveness of recovery action;
- any relevant personal circumstances of the payee, including defences against recovery;
- the length of time since the payment in question was made; and
- the need to deal equitably with overpayments to a group of people in similar circumstances.

### **Payments made with Parliamentary authority**

**A4.11.4** Sometimes overpayments are made using specific legal powers but making mistakes of fact or law. These are legally recoverable, subject to the provisions of the Limitation Acts and other defences against recovery (see below). The presumption should always be that recovery should be pursued, irrespective of the circumstances in which it arose.

### **Good faith**

**A4.11.5** The decision on how far recovery of an overpayment should be pursued in a particular case will be influenced by whether the recipient has acted in good or bad faith:

- where recipients of overpayments have acted in good faith, eg genuinely believing that the payment was right, they may be able to use this as a defence (though good faith alone is not a sufficient defence);
- where recipients of overpayments have acted in bad faith, recovery of the full amount overpaid should always be sought.

**A4.11.6** Recipients may be inferred to have acted in bad faith if they have wilfully suppressed material facts or otherwise failed to give timely, accurate and complete information affecting the amount payable. Other cases, eg those involving recipients' carelessness, may require judgement. And some cases may involve such obvious error, eg where an amount stated is very different from that paid, that no recipient could reasonably claim to have acted good faith.

**A4.11.7** In forming a judgement about whether payments have been received in good faith, due allowance should be made for:

- the complexity of some entitlements, eg to pay or benefits;
- how far the payment depended on changes in the recipient's circumstances of which he or she was obliged to tell the payer;
- the extent to which generic information was readily available to help recipients understand what was likely to be due.

## **Fraud**

**A4.11.8** If a public sector organisation is satisfied that the circumstances of an overpayment involved bad faith on the part of the recipient, it should automatically consider, the possibility of fraud - in addition to recovery action. For example, the recipient may have dishonestly given false information or knowingly failed to disclose information. If there is evidence of fraudulent intent, prosecution or disciplinary action should be undertaken where appropriate and practicable. A criminal conviction in such a case will not eliminate the public debt which had resulted from the overpayment, and so recovery of the debt should also be pursued by any available means.

### **Cost-effectiveness**

**A4.11.9** Public sector organisations should take decisions about their tactics in seeking recovery in particular cases on the strength of cost benefit analysis of the options. Decisions not to pursue recovery should be exceptional and taken only after careful appraisal of the relevant facts, taking into account the legal position. The option of abating future payments to the recipient should always be considered.

### **Defences against recovery**

**A4.11.10** Defences which may be claimed against recovery include:

- the length of time since the overpayment was made;
- change of position;
- estoppel;
- good consideration;
- hardship.

### **Lapse of time**

**A4.11.11** There can be time limitations on recovery. In England and Wales, a recipient might plead that a claim is time-barred under the provisions of the Limitation Acts. Proceedings to recover overpayments must generally be instituted within six years (twelve years if the claim is against the personal estate of a deceased person) of discovery of the mistake or the time when the claimant could, with reasonable diligence, have discovered it.

**A4.11.12** If someone claims that they have overpaid a public sector organisation, they should be told promptly if the claim is time barred. But if, on its merits, the recipient organisation decides that there is a case for an ex gratia payment, it should obtain Treasury consent if the amount involved is outside the organisation's delegated powers. Similarly, there may be a case for ex gratia payments to make good underpayments to government employees unless they were dilatory in making their claims.

**A4.11.13** When public sector organisations claim against a private sector organisation or people who ignore or dispute the claim, the organisation should take legal advice about proceeding with the claim in good time so that it does not become time barred.

### **Change of position**

**A4.11.14** The recipient of an overpayment may seek to rely on change of position if he or she has in good faith reacted to the overpayment by relying on it to change their lifestyle. It might then be inequitable to seek to recover the full amount of the overpayment. The paying organisation's

reaction should depend on the facts of the case. The onus is on the recipient to show that it would be unfair to repay the money. This defence is difficult to demonstrate.

### Estoppel

**A.4.11.15** A recipient who has changed his or her position may also be able to rely on the rule of evidence estoppel if the paying organisation misled the recipient about his or her entitlement, even if the overpayment was caused by a fault on the part of the recipient. However, a mistaken payment will not normally of itself constitute a representation that the payee can keep it. There must normally be some further indication of the recipient's supposed title other than the mere fact of payment.

**A.4.11.16** The paying organisation can be prevented from recovery even where it has made no positive statement to the payee that the latter is entitled to the money received. If, following a demand for repayment, the recipient can give reasons why repayment should not be made, then silence from paying organisation would almost certainly entitle the recipient to conclude that the reply was satisfactory and that he or she could keep the money.

**A.4.11.17** It is essential for public sector organisations to seek legal advice where change of position or estoppel are offered as defence against recovery.

### Good consideration

**A.4.11.18** Another possible defence against recovery is where someone makes a payment for good consideration, i.e. where the recipient gives something in return for the payment. For example, payment might be made to discharge a debt; or where the payment is part of a compromise to deal with an honest claim. If such payments are later found to be more than was strictly due, the extent to which the paying organisation was acting in good faith should be taken into account.

### Hardship

**A.4.11.19** Public sector organisations may waive recovery of overpayments if it would cause hardship. But hardship should not be confused with inconvenience. Where the recipient has no entitlement, repayment of itself does not in itself amount to hardship, especially if the overpayment was discovered quickly. Acceptable pleas of hardship should be supported by reasonable evidence that the recovery action proposed by the paying organisation would be detrimental to the welfare of the debtor or the debtor's family.

### Collective overpayments

**A.4.11.20** If a group of people have all been overpaid as a result of the same mistake, the recipients should be treated in the same way, except that:

- it is not sensible to pursue recovery against any individuals who can claim one of the legitimate defences discussed in paragraphs A.4.11.10 to A.4.11.19; and
- it may be disproportionately expensive to enforce recovery against some individuals, for example if they are hard to trace or unable to pay.

**A.4.11.21** Public sector organisations should decide how best to handle collective overpayments so that they do not inhibit the maximum recovery possible. If it is deemed impractical to pursue recovery from some members of an equivalent group, there should be no inhibition on pursuing others who may be able to pay. There is no obligation to inform the group generally about what action is being taken against particular members since all have the same legal obligation. Any differential treatment should be based on advice.

**A.4.11.22** If a public sector organisation is minded to forgo recovery of the whole or any of a collective overpayment, it should consult the Treasury (or its sponsor department, as the case may be) before telling the recipients of the overpayments. The Treasury will need to be satisfied that a collective waiver is defensible in the public interest or as value for money. And any such waivers should be exceptional.