



**EXPOSURE DRAFT - FOR COMMENT AND DISCUSSION ONLY | HUKIHUKI HURANGA
- MŌ TE TĀKUPU ME TE MATAPAKI ANAKE**

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Notes | Pitopito kōrero: This draft item is intended to update and replace Interpretation Statement IS0062: Shortfall penalty – evasion.

INTERPRETATION STATEMENT | PUTANGA WHAKAMĀORI

Shortfall penalty for evasion or a similar act

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IS XX/XX

This interpretation statement explains the shortfall penalty when a person evades the assessment or payment of tax, or does any of the similar acts specified in s 141E of the Tax Administration Act 1994. The interpretation statement explains what is required to satisfy the knowledge requirement, and other requirements, for evasion or a similar act.

All legislative references are to the Tax Administration Act 1994 (TAA) unless otherwise stated.

REPLACES | WHAKAKAPIA

- **IS0062:** Shortfall penalty – evasion
- **QB 10/04:** Shortfall penalty for evasion or a similar act - knowledge required and Interpretation Statement IS0062

RELATED ITEMS

- **IS XX/XX:** Shortfall penalties – requirements for a “tax position” and a “tax shortfall”
- **IS XX/XX:** Shortfall penalties – reductions and other matters
- **IS XX/XX:** Shortfall penalty for not taking reasonable care
- **IS XX/XX:** Shortfall penalty for taking an unacceptable tax position
- **IS XX/XX:** Shortfall penalty for gross carelessness
- **IS XX/XX:** Shortfall penalty for taking an abusive tax position

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Summary | Whakarāpopoto

1. Section 141E imposes a shortfall penalty of 150% of the tax shortfall for evasion or a similar act if the following requirements are satisfied:
 - The taxpayer has taken a tax position.
 - Taking the tax position has resulted in a tax shortfall.
 - The taxpayer has done an act listed in s 141E(1)(a)–(f), and an exception does not apply for para (b). Paragraph (a) is evasion of the assessment or payment of tax under a tax law. The other paragraphs outline various similar acts and omissions that require knowledge.
2. This interpretation statement does not provide a detailed explanation of when a taxpayer has taken a tax position or when taking a tax position results in a tax shortfall. The requirements for a taxpayer to have taken a “tax position” and for a “tax shortfall” to have arisen from that tax position are considered in the following item:
 - IS XX/XX: **Shortfall penalties – requirement for a “tax position” and a “tax shortfall”**
3. This interpretation statement’s focus is on the mental requirements for evasion or a similar act, and what is required for the acts outlined in s 141E(1)(a)–(f). Broadly, evasion requires intention and actual knowledge, wilful blindness, or subjective recklessness. Negligence or carelessness is insufficient. Similar acts to evasion also require actual knowledge, wilful blindness, or subjective recklessness.
4. The following facts are relevant when considering whether the mental requirements for evasion or a similar act have been met:
 - The term “evade” connotes the exercise of will in avoiding. The person must intend to evade the assessment or payment of tax.
 - There must be more than mere failure to meet a tax obligation. There must be some blameworthy act or omission on the part of the taxpayer.
 - Evasion or a similar act requires knowledge of the relevant facts or tax obligation. There must be actual knowledge, or neglect of available means of knowledge.
 - Knowledge is tested subjectively but can be inferred from objective consideration of surrounding circumstances and conduct.
 - Subjective recklessness will also satisfy the mental elements of evasion or a similar act. Subjective recklessness requires a deliberate disregard of one’s obligations, or an appreciation of a positive risk and proceeding regardless.

- Knowledge can also be inferred from wilful blindness, which is when a taxpayer deliberately closes their eyes to their obligations.
 - An omission can constitute evasion or a similar act if the necessary knowledge requirement is present.
 - What the person needs to have knowledge of depends on the relevant paragraph. For evasion under s 141E(1)(a), the person must know their act or omission will breach a tax obligation.
 - For the purpose of s 141E(d) to 141E(1)(f), which concern obtaining or attempting to obtain refunds or payments of tax, the taxpayer must know the relevant person is not lawfully entitled to the refund or payment. It is not sufficient to knowingly obtain or attempt to obtain the relevant refund.
 - For paras (b) and (c) in s 141E(1), knowledge of the relevant act is sufficient.
5. Unlike the other shortfall penalties, the onus of proof rests with the Commissioner to show that a taxpayer is liable for a shortfall penalty for evasion or a similar act under s 141E.
6. Where the Commissioner imposes a shortfall penalty, other matters may arise. IS **XX/XX**: **Shortfall penalties – reductions and other matters** discusses when a shortfall penalty is reduced (or increased), what happens when a taxpayer could be liable for more than one penalty, and the assessment, payment and disputing of shortfall penalties.

Introduction | Whakataki

7. Section 141E imposes a shortfall penalty for evasion or a similar act if the following requirements are satisfied:
- The taxpayer has taken a tax position.
 - Taking the tax position has resulted in a tax shortfall.
 - The taxpayer has done an act listed in s 141E(1)(a)–(f), and an exception does not apply for para (b).

141E Evasion or similar act

- (1) A taxpayer is liable to pay a shortfall penalty if, in taking a tax position, the taxpayer—
- (a) evades the assessment or payment of tax by the taxpayer or another person under a tax law; or

- (b) knowingly applies or permits the application of the amount of a deduction or withholding of tax made or deemed to be made under a tax law for any purpose other than in payment to the Commissioner; or
- (c) knowingly does not make a deduction, withholding of tax, or transfer of payroll donation required to be made by a tax law; or
- (d) obtains a refund or payment of tax, knowing that the taxpayer is not lawfully entitled to the refund or payment under a tax law; or
- (da) attempts to obtain a refund or payment of tax, knowing that the taxpayer is not lawfully entitled to the refund or payment under a tax law; or
- (e) enables another person to obtain a refund or payment of tax, knowing that the other person is not lawfully entitled to the refund or payment under a tax law; or
- (f) attempts to enable another person to obtain a refund or payment of tax, knowing that the other person is not lawfully entitled to the refund or payment under a tax law—

(referred to as **evasion or a similar act**).

- (2) No person shall be chargeable with a shortfall penalty under subsection (1)(b) if that person satisfies the Commissioner that the amount of the deduction or withholding has been accounted for, and that the person's failure to account for it within the prescribed time was due to illness, accident, or some other cause beyond the person's control.
- (2B) No person shall be chargeable with a shortfall penalty under subsection (1)(b) for taking a tax position if the person is chargeable with a shortfall penalty under section 141ED for taking the tax position.
- (3) If a taxpayer enables or attempts to enable another person to obtain a refund or payment of tax, knowing that the other person is not lawfully entitled to the refund or payment under a tax law, the taxpayer is liable to pay to the Commissioner an amount equal to the shortfall penalty that would have been imposed if the other person's tax position had been the taxpayer's tax position.
- (4) The penalty payable for evasion or a similar act described in subsection (1) is 150% of the resulting tax shortfall.

8. This item's focus is on the mental requirements for evasion and what is required for the acts outlined in s 141E(1)(a)-(f).
9. This interpretation statement refers to the shortfall penalty in s 141E for evasion or a similar act as an "evasion shortfall penalty".
10. The onus of proof rests with the Commissioner to show that a taxpayer is liable for an evasion shortfall penalty under s 141E (s 149A(2)(a)). This is different from the other shortfall penalties where the onus of proof is on the taxpayer. However, as with other shortfall penalties, it is a civil penalty, so the standard of proof is the balance of probabilities (s 149A(1)).

Analysis | Tātari

Intention and knowledge requirements for evasion or a similar act

11. The evasion shortfall penalty is unique among the shortfall penalties in that it requires the mental elements of intention and knowledge (often referred to as mens rea in legal contexts).¹
12. Section 141E(1) concerns two types of behaviour. The first is evasion, which is set out in para (a). For the purposes of s 141E(1)(a), the person must intentionally evade the assessment or payment of tax, knowing their actions will breach a tax obligation.² This is sometimes referred to as acting with evasive intent.³
13. The second type of behaviour is set out in the remaining paragraphs of s 141E(1) and requires that the breaches set out in those paragraphs occurred “knowingly” or, in other words, with knowledge.⁴ It is this knowledge requirement that makes a breach of one of these paragraphs a “similar act” to evasion.

Intention

14. Section 141E(1)(a) requires the taxpayer to endeavour or intend to avoid the assessment or payment of tax. In *Taylor v Attorney-General*, McGregor J stated that the word “evade” connotes the exercise of will in avoiding.⁵ He also said:

It involves, in my opinion, **the intentional avoidance of payment in circumstances indicating to the party that he is or may be under some obligation to pay duty**. The circumstances may consist of knowledge, or neglect of available means of knowledge, that the omission to pay is or may be in contravention of the Customs law ... [Emphasis added]

¹ The distinction requiring mens rea or mental elements for evasion, as opposed to gross carelessness, was highlighted by Judge Barber in *Case W4* (2003) 21 NZTC 11,034 at [45]. In *Meulen's Hair Stylists Ltd v CIR* [1963] NZLR 797 (SC) at 799, Barrowclough CJ noted that mens rea was an essential element of “knowingly” misapplying a deduction.

² *Taylor v Attorney-General* [1963] NZLR 261 at 262.

³ *R v Rowley (No 2)* [2012] NZHC 1778.

⁴ *Meulen's Hair Stylists*.

⁵ At 262.

15. In *Case N47*, Judge Bathgate said there must be some blameworthy act or omission on the part of the taxpayer.⁶ In *CIR v Peterson*, Hammond J stated that evasion occurs when a taxpayer seeks to reduce tax through fraudulent misrepresentation:⁷

30 It has long been recognised that there are three broad categories by which taxpayers may seek to reduce the burden of tax. The first is outright taxation evasion. This is really a form of fraudulent misrepresentation, and is subject to heavy penalties, and even the criminal law.

16. While intention for evasion does not necessarily involve any underhand dealing, it involves more than a mere omission or neglect to pay.⁸ Similarly, carelessness will not satisfy the intention requirement.⁹
17. In *Case H90*, Judge Barber said that intent (and knowledge) can be established by direct evidence or by inference.¹⁰

Knowledge

18. The standard for “knowledge” does not change regardless of the paragraph of s 141E(1) in issue. However, what the person must have knowledge of differs in some cases between paragraphs.
19. For evasion under s 141E(1)(a), the person must know their act or omission will breach a tax obligation.¹¹
20. For s 141E(1)(d) to s 141E(1)(f), which relate to obtaining or attempting to obtain a refund or payment of tax, the person must know that they are acting unlawfully. This is because these paragraphs explicitly state that the person must act “knowing that the [taxpayer/other person] is not lawfully entitled to the refund or payment”.
21. For s 141E(1)(b) and (c), which refer only to “knowingly” doing an act, knowledge of the existence of the facts in question is sufficient.¹² The person does not need to know the act is explicitly unlawful or act with any specific intent.¹³

⁶ *Case N47* (1991) 13 NZTC 3,388 at 3,393.

⁷ *CIR v Peterson* (2002) 20 NZTC 17,589 (HC).

⁸ *Taylor* at 262.

⁹ *Case W3* (2003) 21 NZTC 11,014 at [53].

¹⁰ *Case H90* (1986) 8 NZTC 619 at 624.

¹¹ *Taylor* at 262.

¹² *Case W3* at [53], citing *CIR v Gordon* (1989) 11 NZTC 6,082.

¹³ *CIR v Gordon* at 6,084.

22. The following outlines what will satisfy the knowledge requirement generally for evasion or a similar act.
23. Section 141E requires either actual knowledge or “neglect of available means of knowledge”.¹⁴ Neglect of available knowledge is also referred to as subjective recklessness, discussed from [30].
24. Knowledge is tested subjectively, which means it must be shown that the taxpayer actually knew the relevant facts.¹⁵ It is not sufficient that a reasonable person in those circumstances ought to have known. However, subjective knowledge can be tested objectively from consideration of surrounding circumstances.¹⁶
25. Consistent with this, *Case P79* concerned whether a taxpayer was liable to a penalty for evading GST.¹⁷ The taxpayer knew of his obligation to make the relevant GST payment but misunderstood when the GST should be paid. Judge Willy said that a mistake or a misunderstanding of the law could never amount to evasion.¹⁸ Similarly, a mistake or misunderstanding would not satisfy the knowledge requirement for any of the similar acts. For example, if a person deducted PAYE but evidence indicated they simply forgot to file and pay the PAYE on time, this would not satisfy the knowledge requirement for s 141E(1)(b).

Knowledge can be inferred from wilful blindness

26. Knowledge can also be inferred through wilful blindness. In *R v Chahine-Badr*, in dismissing the taxpayer’s appeal of his conviction for evading income tax, O’Connor J in the Ontario Superior Court of Justice said that wilful blindness may be equivalent to actual knowledge:¹⁹

[29] In any event, whether raised by the Crown or the court during the trial, **the concept of wilful blindness is not an alternative theory of culpability. It is inherent in the concept of knowledge.** As with any criminal offence, the Crown must prove beyond a reasonable doubt the accused had the necessary knowledge of his wrongdoing and the intent to carry it out, i.e. the mens rea, to commit the offence. In *R. v. Harding* (2001), 160 C.C.C. (3d) 225 (Ont. C.A.), Weiler J.A. said at paragraph 66 that “Criminal law treats wilful blindness as equivalent to actual knowledge because the accused ‘knew or strongly suspected’ that inquiry on his part respecting the consequences of his acts would fix him with the actual knowledge he wished to avoid.” **Thus the requisite knowledge of wrongdoing can be either actual or inferred through wilful blindness.** [Emphasis added]

¹⁴ *Taylor* at 262.

¹⁵ *Case W3* at [53].

¹⁶ *Lloyds Bank Ltd v Marcan* [1973] 2 All ER 359 at 367, 368.

¹⁷ *Case P79* (1992) 14 NZTC 4,534.

¹⁸ *Case P79* at 4,537 and 4,538.

¹⁹ *R v Chahine-Badr* [2006] 2 CTC 243; 79 OR (3d) 671 and see also *Westminster City Council v Croyalgrange Ltd* [1986] 2 All ER 353, 359 (CA).

27. In *Case N47*, Judge Bathgate decided that the taxpayers had not evaded tax.²⁰ Judge Bathgate said that although the taxpayers may have been careless, they were not recklessly careless to the extent that they closed their eyes to their responsibilities with the intent to evade the payment of tax.²¹
28. In *Westminster City Council v Croyalgrange Ltd*, the House of Lords said that a finding of knowledge on the part of a person could be based on evidence that the person had deliberately shut their eyes to the obvious or refrained from inquiry to avoid having their suspicions confirmed.²²
- ... it is always open to the tribunal of fact, when knowledge on the part of the defendant is required to be proved, to base a finding of knowledge on evidence that the defendant has deliberately shut his eyes to the obvious or refrained from inquiry because he did not want to have his suspicion confirmed.
29. While these cases concerned the knowledge required for an intention to evade tax, wilful blindness is equally applicable to knowledge for the similar acts in other paragraphs of s 141E(1), as it is “inherent in the concept of knowledge”.²³

Recklessness is sufficient for the mental elements

30. In addition to actual knowledge, courts have also held that in some cases recklessness will also satisfy the knowledge requirements for evasion or a similar act and the intention requirement for evasion. In *Babington v CIR (No 2)*, Turner J held that “evasive intent involves knowing that the act or omission intended is wrong or acting deliberately or recklessly as to whether or not the act or omission is wrong”.²⁴ In *Case W3*, Judge Barber stated that recklessness as to whether the PAYE has been paid is sufficient to amount to a known failure to pay.²⁵
31. The term “recklessness” can refer to two inconsistent concepts: objective or inadvertent recklessness and subjective recklessness. Subjective recklessness requires some degree of knowledge on the part of the person of the risk of their behaviour, whereas

²⁰ *Case N47* at 3,393-3,394.

²¹ *Case N47* at 3,394.

²² *Westminster City Council v Croyalgrange Ltd* [1986] 2 All ER 353 at 359 (CA).

²³ *R v Chahine-Badr* at [29].

²⁴ *Babington v CIR (No 2)* [1958] NZLR 152 (HC), cited with support in *Case 9/2015* (2015) 27 NZTC 3,008. The TRA’s understanding of the test for recklessness for an evasion shortfall penalty was upheld on appeal in *Edwards v CIR* (2016) 27 NZTC 22,064 (HC). For further examples where recklessness has been held to be sufficient to constitute evasion, see *Case N6* (1991) 13 NZTC 3,043 at 3,046; *Case N53* (1991) 13 NZTC 3,419 at 3,420; *Case Q19* (1993) 15 NZTC 5,104 at 5,107; and *Case Q20* (1993) 15 NZTC 5,108 at 5,111.

²⁵ *Case W3* at [53], *Case R31* (1994) 16 NZTC 6,171

objective recklessness does not require any knowledge of the risk, and turns on whether the behaviour was reckless from the perspective of a reasonable person.

32. In *Case P29*, Judge Willy considered case law in the tax context and New Zealand criminal law cases on recklessness. He held that recklessness was to be tested subjectively:²⁶

Although those expressions of what is the proper test to be applied in New Zealand relate to specific provisions of the Crimes Act I nevertheless think they are of general guidance ... **there is still an ingredient of moral turpitude in a finding of recklessness. It must never in my view be confused with mere negligence or inattention. Before recklessness can be said to exist some degree of knowledge must be present.** As it is put by Mr Simon France in his article "A reckless approach to liability" 1988 18 VUWLR 144 at p 146 the person must:

Have ignored a risk they knew to be present so as to avoid the unpleasantness of having their suspicions confirmed.

... Where recklessness is alleged the Commissioner must prove beyond reasonable doubt that the facts which were actually known to the taxpayer were such that they must have put him on enquiry that the income returned for tax purpose was understated. Faced with those facts the Commissioner must then show that the taxpayer made the conscious decision to ignore them and to return the understated income without making any further enquiry. [Emphasis added]

33. Judge Willy's adoption in *Case P29* of the subjective meaning of recklessness is consistent with Judge Barber's approach to recklessness taken in *Case S100*, that a "deliberate disregard" of one's obligations or an appreciation of a positive risk and proceeding regardless may amount to recklessness.²⁷
34. It is noted that in contrast, an objective approach to recklessness was taken in *Case M117*.²⁸ This case concerned whether the taxpayer knowingly applied PAYE deductions for any purpose other than payment to the Commissioner (under the predecessor to what is now a shortfall penalty under s 141ED). In *Case M117*, Judge Barber relied on the objective approach to recklessness taken in the criminal law context in *R v Caldwell*,²⁹ later applied in New Zealand in *R v Howe*.³⁰ Judge Barber quoted the Court of Appeal in *Howe* in a passage which relevantly stated:³¹

²⁶ *Case P29* (1992) 14 NZTC 4,213 at 4,222.

²⁷ *Case S100* (1996) 17 NZTC 7,626 at 7,627.

²⁸ *Case M117* (1990) 12 NZTC 2,749.

²⁹ *R v Caldwell* [1981] 1 All ER 961 (HL).

³⁰ *R v Howe* [1982] 1 NZLR 618 (CA).

³¹ *Case M117* at 2,755.

...[recklessness] is not limited to deliberate risk-taking but includes failing to give any thought to an obvious and serious risk...

35. However, the weight of authority, and more recent authority, supports a subjective approach to recklessness. For example, the subjective approach to recklessness was recently endorsed by the Supreme Court in *Cameron v R*.³²
36. It follows that for an evasion shortfall penalty, the taxpayer must be subjectively reckless to meet the knowledge or intention requirement. If a taxpayer is objectively reckless, by failing to give thought to an obvious and serious risk, this will not meet the mental requirements for evasion, but may meet the requirements for a lesser shortfall penalty, such as for gross carelessness or for not taking reasonable care.³³

Summary

37. In summary, for the mental requirements for evasion or a similar act:
- The term “evade” connotes the exercise of will in avoiding. The person must intend to evade the assessment or payment of tax.
 - There must be more than mere failure to meet a tax obligation or to do a particular act. There must be some blameworthy act or omission on the part of the taxpayer.
 - Evasion or a similar act requires knowledge of the relevant facts or tax obligation. There must be actual knowledge or neglect of available means of knowledge.
 - Knowledge is tested subjectively but can be inferred from objective consideration of surrounding circumstances and conduct.
 - Subjective recklessness will satisfy the intention and knowledge requirements. Subjective recklessness occurs when facts actually known to the taxpayer must have alerted them to the relevant risk, and the taxpayer makes a conscious decision to ignore the risk and proceed with the act or omission without making any further inquiry.

³² *Cameron v R* [2018] 1 NZLR 161 at [72], [73]. For other criminal cases supporting a subjective approach to recklessness see *R v Harney* [1987] 2 NZLR 576 at 579; *Bottrill v A* [2001] 3 NZLR 622 (CA) at [170]; *R v H* (1989) 4 CRNZ 461, 464 and *R v Stephens* (unreported, High Court, T 91/83, Auckland, 8 December 1983).

³³ Under ss 141C and 141A respectively; *Case W4* at [45]. See IS **XX/XX: Shortfall penalty for gross carelessness** for more information about the requirements for this shortfall penalty.

Other requirements for evasion or a similar act

38. The following provides specific guidance on other requirements in each of the relevant paragraphs in s 141E(1).

Section 141E(1)(a) – Evading the assessment of tax

39. Section 141E(1)(a) applies when a person evades the assessment or payment of tax by them or another person under a tax law.
40. As stated at [12], evasion under s 141E(1)(a) requires a person to intentionally evade the assessment or payment of tax, knowing their actions will breach a tax obligation. An omission (failure to act) may constitute evasion if the necessary intention is present.³⁴
41. The “or” in “assessment or payment” indicates that the section will apply if the taxpayer evades the assessment of tax **or** the payment of tax. The section will be satisfied where both the assessment and payment of tax are evaded, but it is not necessary to establish that both are evaded.³⁵
42. It is the Commissioner’s view that where a company and director are both potentially liable for an evasion shortfall penalty under s 141E(1)(a), only one shortfall penalty should be imposed, and where possible, that shortfall penalty should be imposed on the company. However, the Commissioner will impose a shortfall penalty on the director in circumstances where the penalty cannot be imposed on the company, such as where the company is struck off.
43. A person who uses an electronic sales suppression tool (such as software for manipulating sales information) to evade the assessment or payment of tax is also liable to pay a separate electronic sales suppression penalty of \$5,000.³⁶
44. Example | Tauira 1 and Example | Tauira 2 illustrate scenarios where a person evades the assessment and payment of tax, and how the intention and knowledge requirements for evasion might arise over time.

³⁴ *R v G* [2013] NZCA 146 at [27]–[29].

³⁵ *Gilchrist v R* [2007] 1 NZLR 499 (SC) at [15].

³⁶ Section 141EE. Acquisition or possession of an electronic sales suppression tool for such a purpose is sufficient to trigger liability for this penalty.

Example | Taura 1 – Mental requirements for evasion

Amelia, a small-business person, did not include several items of income in her accounts or tax return as she felt she could not afford to pay tax on this income. While Amelia knew she should have included these amounts in her return, she assumed it “wouldn’t be a big deal” as she would not be able to afford to pay tax on the rest of the income anyway.

Should an evasion shortfall penalty be imposed?

Yes. The mental elements of evasion relate to intentionally breaching a known tax obligation or a tax obligation which the taxpayer strongly suspects may exist. Amelia knew that she should have included the items of income in her return, but she deliberately omitted them from her return to avoid paying more tax than she could afford. By doing this, she evaded the assessment and payment of tax. Her actions went beyond a mere failure to pay or return the amounts.

It is not relevant that Amelia felt she could not afford to pay tax on the amounts. There are options for tax relief available if a person is concerned that they may not be able to meet their tax obligations. In these circumstances, the person should contact Inland Revenue as soon as possible to discuss their situation. It is also not relevant that she did not think it would be a big deal.

Example | Taura 2 – Mental requirements arising over time

Tomoe starts streaming herself playing video games as a hobby in her free time. She is very good at a game called Flying Car Football (FCF) and gains popularity playing it.

In her first two years of streaming FCF, her popularity grows and she starts getting money from advertising revenue, subscriptions and donations. At first, the amounts are small and infrequent, but she starts getting regular payouts from her streaming platform, from Google for advertising revenue from edited videos uploaded to YouTube, and from a separate subscription platform. Tomoe assumes during this period that these amounts are not taxable income because she is not intending to profit – it is just a fun hobby for her. While she is receiving regular payouts, she thinks of them as a way to help fund her hobby by paying for things like new computer parts and in-game items.

In her third year of streaming, as her channel and popularity continues to grow, she starts to suspect the regular amounts she receives are taxable income. She talks to other streamer friends in Aotearoa New Zealand and finds out they all pay tax on the

income they receive. She makes further enquiries and finds out that Inland Revenue has guidance on tax issues for digital content creators (see [QB 17/05](#) and [IS 21/08](#)). A friend advises this guidance covers situations similar to hers. At this point, Tomoe strongly suspects she should be returning the income she receives from streaming FCF. She deliberately avoids reading any guidance or reaching out to a lawyer or accountant because she does not want her suspicions confirmed, and does not return any income from streaming for her third and fourth years.

Should an evasion shortfall penalty be imposed?

Yes, but only for tax shortfalls arising from the income years that correspond to her third and fourth years of streaming. The mental elements of evasion relate to intentionally breaching a known tax obligation or a tax obligation which the taxpayer strongly suspects may exist. For the first two years, there is no intent to evade a known or suspected obligation, so the behaviour does not amount to evasion, although the taxpayer may be liable to another lesser shortfall penalty, such as for gross carelessness under s 141C, or for not taking reasonable care under s 141A.

However, the behaviour later becomes evasion. From the third year, Tomoe strongly suspected an obligation may exist, but she chose not to investigate further (for example, by making enquiries of Inland Revenue or getting advice from an accountant or lawyer) as she did not want to have her suspicions confirmed. Tomoe chose to close her eyes to this issue by deliberately and intentionally refraining from taking any steps to discover the tax status of the income she received. This disregard of a suspected obligation from her third year of streaming amounts to subjective recklessness. This satisfies the mental elements of evasion.

Accordingly, an evasion shortfall penalty of 150% of Tomoe's resulting tax shortfall should be imposed starting from the income year that corresponds to her third year of streaming. She may be liable for lesser shortfall penalties for the previous years.

Section 141E(1)(b) – Failure to pay amount of deduction or withholding

45. Section 141E(1)(b) applies if a person knowingly applies an amount deducted or withheld under a tax law for any other purpose other than in payment to the Commissioner. This includes where the taxpayer permits an amount to be applied in this way, and also applies to amounts deemed to be deducted or withheld. As stated

by Judge Barber in *Case W3*, the test under s 141E(1)(b) is whether the failure to account for the deduction was something known by the taxpayer to have occurred.³⁷

46. If an officer of the taxpayer³⁸ applies a deduction or withholding of tax other than in payment to the Commissioner, s 141F provides that the Commissioner may apportion the shortfall penalty between the taxpayer and officers of the taxpayer. In determining whether and how to apportion, the Commissioner must have regard to the acts or omissions of the taxpayer and the officers, and whether those acts or omissions were reasonable.
47. Section 4A outlines how certain provisions are to be construed. Under ss 4A(2)(b) and 4A(2)(bb) respectively, an amount of tax is deemed to be withheld or a KiwiSaver contribution is deemed to be deducted when a PAYE income payment is made net of the amount of the withholding or deduction.³⁹
48. Under s 4A(2)(c), the taxpayer will be treated as having applied a KiwiSaver contribution deduction or withholding of tax for a purpose other than payment of the amount to the Commissioner if the amount is not paid to the Commissioner by the relevant due date.
49. In addition, under s 4A(3), references to tax liabilities under the PAYE rules, to the extent necessary, also include references to liabilities under other statutory provisions that arise or are performed at the same time as the tax liabilities. These other liabilities are:
 - Accident Compensation Corporation (ACC) premiums and levies;
 - Child Support payments;
 - KiwiSaver contributions; and
 - Student loan repayments.
50. In *Meulen's Hair Stylists v CIR*, Barrowclough CJ considered the requirements for s 33(1)(b) of the Income Tax Assessment Act 1957, which imposed criminal liability in similar circumstances to those now covered by s 141E(1)(b). Barrowclough CJ relevantly asserted that if a company, by a responsible officer, "had knowledge that a payment was due on the preceding 20th and that it had not then been paid that would clearly be sufficient to establish that the appellant knowingly failed to make the payment".⁴⁰ As stated from [30], subjective recklessness as to whether an amount

³⁷ *Case W3* at [53].

³⁸ For example, where the taxpayer is a company.

³⁹ "PAYE income payment" is defined in s RD 3 of the Income Tax Act 2007 and means a payment of salary and wages, an extra pay, or a schedular payment.

⁴⁰ *Meulen's Hair Stylists* at 800.

deducted or withheld has been paid is sufficient to amount to a known failure to pay the amount withheld or deducted.

51. In other words, for the requirements of s 141E(1)(b) to be satisfied, it is sufficient to establish that the person knew that a deducted or withheld amount was due and knew that it was not paid by that due date. However, there is an exception to this in s 141E(2).

Exception – s 141E(2) – Cause beyond the person’s control

52. Under s 141E(2), a taxpayer is not liable for a shortfall penalty under s 141E(1)(b) if they satisfy the Commissioner that the:

- amount of the deduction or withholding has been accounted for, and
- failure to account for it within the prescribed time was due to illness, accident, or some other cause beyond the taxpayer’s control.

53. For the exception to apply, there must be a direct causal connection between the illness, accident, or other cause put forward and the taxpayer’s failure to pay. This was the view of Gallen J in *CIR v Joy Wright Ltd*.⁴¹ In that case, the trial judge concluded that the principal officer of the company had a depressive illness and that this resulted in the failure to account to the Commissioner for the PAYE. In the High Court, Gallen J dismissed the Commissioner’s appeal and held that the exception applied.

54. Generally, a lack of funds or liquidity problems do not constitute a cause beyond the taxpayer’s control. An example of this is *Case W3*, where the taxpayer stated he had not paid PAYE deductions because the Commissioner had not released a GST refund.⁴² In addition, it is not a defence to the application of s 141E(1)(b) that the amount owed would be offset against an expected tax credit.⁴³

55. In summary, for the exception in s 141E(2) to apply, the following factors are relevant:

- The deduction or withholding amount must have been paid to the Commissioner.
- The failure to account must have been due to illness, accident, or some other cause beyond the taxpayer’s control.

⁴¹ *CIR v Joy Wright Ltd* (1984) 6 NZTC 61,788 (HC).

⁴² *Case W3* at [61], citing *Driscoll v CIR* (1984) 6 NZTC 61,861 (HC); *Hammond v Walesby and Paramount Graphics Limited* (1986) 8 NZTC 5,185 (HC); and *CIR v JF McCormick Ltd* [1964] NZLR 56 (SC).

⁴³ *Case W3* at [61], citing *CIR v Orme* (1984) 6 NZTC 61,831 (HC).

- There must be a direct causal connection between the reasons given and the failure to pay on time.
- Liquidity problems are generally insufficient for the exception to apply.

Exception – s 141E(2B) – Penalty under s 141ED applies

56. Under s 141E(2B), a taxpayer is not liable for a shortfall penalty under s 141E(1)(b) if they are liable for an employers' withholding payment penalty under s 141ED.
57. A penalty under s 141ED may apply if an employer provides employment income information under subpart 3C but does not pay the required amount by the due date, and the Commissioner has given notice of details of the penalty and actions the taxpayer can take to avoid the imposition of further penalties.
58. This essentially means that where PAYE is withheld and included in employment income information provided to the Commissioner, the relevant penalty is the shortfall penalty under s 141ED, not an evasion shortfall penalty under s 141E(1)(b).⁴⁴ Section 141E(1)(b) is still relevant for other types of deduction or withholding not included in employment income information, or where PAYE is deducted but not included in employment income information.
59. The shortfall penalty in s 141ED is a graduated penalty that can be applied repeatedly if payment is not made, up to a maximum of 150% of the tax shortfall. This is the only shortfall penalty that can be applied more than once in relation to a single tax shortfall.
60. Example | Tauira 3 illustrates a scenario where a person knowingly permits the application of a deduction or withholding of tax for purposes other than in payment to the Commissioner. The example also addresses the application of exceptions in ss 141E(2) and 141E(2B).

Example | Tauira 3 – Failure to pay PAYE to Commissioner; apportionment between director and company

Sebastian was one of three shareholders and directors of a company which had operated a garden centre from 2003. Sebastian had always been the person who prepared and filed the company's employment income information (previously employer monthly schedule). From April this year until October (when it ceased trading) PAYE was deducted as usual from salary and wages paid to employees, but

⁴⁴ Commentary to the Taxation (Annual Rates, Business Taxation, KiwiSaver, and Remedial Matters) Bill which introduced s 141ED is clear that this penalty is intended to replace 141E(1)(b) in relation to unpaid PAYE. At 82 the commentary relevantly states, "Shortfall penalties for evasion will not be imposed if the employer files the employer monthly schedule but does not pay the PAYE".

the company did not file employment income information for these periods and did not pay the PAYE to the Commissioner.

Sebastian states that he was not trying to evade assessment or payment. He has been suffering from a rare disease he contracted overseas which makes him confused at times and generally has put him under significant stress. Sebastian asserts that due to this, he forgot to handle the company's PAYE obligations for the relevant periods.

Should an evasion shortfall penalty be imposed?

Section 141E(1)(b) imposes a shortfall penalty on a taxpayer who knowingly applies or permits the application of the amount of a deduction or withholding of tax made or deemed to be made under a tax law for any purpose other than in payment to the Commissioner. A person is deemed under s 4A(2)(c) to have applied a deducted or withheld amount for a purpose other than in payment to the Commissioner if the amount is not paid to the Commissioner by the due date.

Sebastian did not pay the PAYE to the Commissioner by the due date. Therefore, the relevant element is whether this was done "knowingly". This requires knowledge of the doing of the act or omission. It does not require any specific intent, or knowledge that the act or omission is explicitly unlawful.

The question here then, is whether Sebastian (and, therefore, the company for which he is a responsible officer) knew he had failed to pay the PAYE due to the Commissioner. As Sebastian normally returns the employment income information for the company, it can be inferred that he (and therefore the company) knew that payments were due each month.

In this respect, the fact Sebastian did continue to file other returns, manage other payroll responsibilities, and conduct other business suggests that the disease and stress did not affect his ability to function to the extent that it could be said he did not act "knowingly". While a lapse in concentration occasioned by the stress or the confusion brought on by the disease could be a plausible explanation for a single lapse, this was repetitive and, therefore it can be inferred as knowing behaviour. It can be concluded that Sebastian knowingly failed to make the payments.

Does an exception apply?

The next issue is whether any exception to s 141E(1)(b) applies.

141E(2B)

Under s 141E(2B), nobody is chargeable with an evasion shortfall penalty if they are chargeable with a shortfall penalty under s 141ED. Liability to pay a shortfall penalty

under s 141ED arises if a taxpayer provides employment income information to the Commissioner but fails to pay the PAYE by the due date.

As the PAYE was deducted, but employment income information was not filed, s 141ED does not apply, so the exclusion in s 141E(2B) does not prevent the imposition of a shortfall penalty under s 141E(1)(b). Therefore, the exclusion in s 141E(2B) does not apply.

If Sebastian had filed employment income information for the relevant periods but failed to pay, a penalty could be imposed under s 141ED after the Commissioner provides the necessary notice to the taxpayer detailing the penalty and actions to be taken to prevent the imposition of further penalties. If Sebastian does not pay the outstanding amount, or enters into an instalment arrangement with the Commissioner but does not comply with it, further penalties may be imposed at monthly intervals.

In those alternative circumstances, the Commissioner could not impose an evasion shortfall penalty under s 141E(1)(b) for the unpaid PAYE.

141E(2)

Under s 141E(2), a person is not chargeable with a shortfall penalty under s 141E(1)(b) if they satisfy the Commissioner that the amount of the deduction or withholding has been accounted for, and that the failure to account was due to illness, accident, or some other cause beyond the person's control.

For s 141E(2) to apply, the deductions must since have been paid to the Commissioner, which they have not been. However, assuming they had been, it must be shown that the illness caused the failure to pay the PAYE deductions. Here, when the illness is weighed with the other evidence, it has not been shown that it was the illness which was responsible for the failures.

Despite the illness, Sebastian managed his other responsibilities to the company, and the lapse was repetitive over an extended period, rather than a single moment of confusion or forgetfulness. The defence is not an ongoing one, and if Sebastian felt unable to prepare and file such returns there was ample time for him to arrange for someone else, such as an accountant, to do it instead.

Accordingly, the defence under s 141E(2) is not available to the company.

How should the penalty be apportioned between the company and Sebastian?

The starting point under s 141E(1)(b) is that the penalty is imposed on the company. However, s 141F(2) allows the Commissioner to apportion certain penalties imposed on a taxpayer between the taxpayer and an officer of the taxpayer. Section 141F(2) can

apply where the taxpayer is required to make or account for a deduction or withholding of tax and an officer of the taxpayer fails to do so.

In this example, s 141F(2) would allow the Commissioner to apportion the shortfall penalty that the company is liable for under s 141E(1)(b) between the company and Sebastian. To determine apportionment, it is necessary to consider the relative actions or omissions of the company and Sebastian and whether they were reasonable.

The history and experience of both will be relevant. Here, this was ongoing and deliberate behaviour by Sebastian not to file or pay PAYE deductions to the Commissioner for a period of 7 months. It was not a one-off misunderstanding. The company too, however, may be considered blameworthy in not having any systems in place to check such behaviour. That is, the company lacked safeguards to ensure returns are filed and payment is made on time, and the other two shareholders and directors did not realise what was going on over a prolonged period.

Considering the deliberateness of Sebastian's actions and the company's lack of systems to check such behaviour, it could be considered that both were equally to blame for the shortfall. In this situation, the Commissioner could therefore consider it reasonable to apportion the penalty 50:50.

Section 141E(1)(c) – Failure to deduct or withhold

61. A person is liable for an evasion shortfall penalty under s 141E(1)(c) if they knowingly do not make a deduction, withholding of tax, or transfer of payroll donation required to be made by a tax law.
62. As stated in relation to s 141E(1)(b), an amount is deemed to be withheld or deducted when a PAYE income payment is made net of the amount of the withholding or deduction. It follows that a taxpayer knowingly does not make a deduction, withholding of tax, or transfer of payroll deduction if they knowingly make a PAYE income payment that is not net of the amount of the relevant withholding or deduction. Under s 4A(3), this includes amounts required to be withheld or deducted under other legislative provisions at the same time.
63. In the same manner discussed at [46] for s 141E(1)(b), if an officer of the taxpayer fails to make a deduction or withholding of tax, s 141F provides that the Commissioner may apportion the shortfall penalty between the taxpayer and officers of the taxpayer.

Section 141E(1)(d)-141E(1)(f) – Obtaining or attempting to obtain refund or payment of tax

64. Sections 141E(1)(d) to 141E(1)(f) all concern obtaining or attempting to obtain a refund or payment of tax, or enabling another person to do so.

Obtains

65. A taxpayer is liable for an evasion shortfall penalty under s 141E(1)(d) if they obtain a refund or payment of tax, knowing they are not lawfully entitled to the refund or payment. Section 141E(1)(da) applies if the taxpayer attempts to obtain such a refund or payment in the same circumstances.
66. "Obtain", "refund" and "payment" are not defined in the TAA for the purposes of s 141E. However, tax legislation does refer to amounts that the Commissioner is required to refund or pay to a taxpayer. For example, s LA 4(5) of the Income Tax Act 2007 states that the Commissioner "refunds a refundable tax credit by applying section LA 6, LA 7, or LA 8". Another example is s 20(5) of the Goods and Services Tax Act 1985, which requires the excess of input tax over output tax to be "refunded" by the Commissioner.
67. The term "refund" connotes paying back an amount paid, such as where an employee's PAYE for the year is higher than their end-of-year tax liability. "Payment" does not have this connotation and might include any amount paid to a taxpayer under a tax law.
68. It follows that a person obtains a refund or payment of tax if they receive an amount of money from the Commissioner that is within the broad definition of tax. If they do so knowing they, or the relevant person, is not lawfully entitled to the refund or payment, they will be liable for an evasion shortfall penalty.

Attempts to obtain

69. Under ss 141E(1)(da) and 141E(1)(f), a taxpayer can be liable for an evasion shortfall penalty if they attempt to obtain a refund or payment of tax, either for themselves under para (da) or for another person under para (f). These provisions were enacted in 2001 in response to a submission made by officials that ss 141E(1)(d), (e) and 141E(3)

should be corrected to apply where a taxpayer attempts to obtain a refund or payment.⁴⁵ Officials relevantly commented with the following:⁴⁶

All taxpayers who knowingly seek to obtain a refund or payment to which they are not lawfully entitled should be subject to the evasion penalty. Taxpayers should not benefit from the department's actions which result in the refund or payment not being made.

70. This means a taxpayer can be liable for an evasion shortfall penalty even if the relevant person does not actually receive the refund or payment of tax.

Enables another person

71. A taxpayer can also be liable for an evasion shortfall penalty if they enable another person to obtain or attempt to obtain a refund or payment of tax, knowing the other person is not lawfully entitled to the refund or payment, under ss 141E(1)(e) and 141E(1)(f).
72. "Enables" is not defined in the TAA. The meaning was outlined by Rigby LJ in *Guardians of West Derby Union v Metropolitan Life Assurance Society*.⁴⁷
73. Rigby LJ expressed the concept of "enables" as removing a disability when dealing with another person.⁴⁸ It follows that to "enable" someone could be by the positive act of assisting a person to do something, doing it on their behalf, or by removing an impediment to doing something.
74. In these circumstances, the person is liable to pay an amount equal to the shortfall penalty that would have been imposed if the other person's tax position had been the taxpayer's tax position.⁴⁹
75. This means that two shortfall penalties may be imposed where, for example, a director of a company obtains a refund of tax for the company, knowing the company is not lawfully entitled to it. The company would be liable to pay an evasion shortfall penalty of 150% of the resulting tax shortfall and the director would be liable to pay the Commissioner an amount equal to the company's shortfall penalty.

⁴⁵ Taxation (Beneficiary Income of Minors, Services-Related Payments and Remedial Matters) Bill (Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill, 19 February 2001).

⁴⁶ At 86.

⁴⁷ *Guardians of West Derby Union v Metropolitan Life Assurance Society* [1897] 1 Ch. 335.

⁴⁸ *West Derby Union* at 357, 358.

⁴⁹ Section 141E(3).

76. Example | Taura 4 illustrates a scenario where a person obtains or attempts to obtain a refund or payment of tax for another person.

Example | Taura 4 – Obtaining and attempting to obtain a refund; imposition on company and director

Iosia is the sole shareholder and director of a GST registered company that operates a small landscaping business. Recently, the business has been running into cashflow issues due to some customers not paying invoices. Iosia has very recently purchased his dream truck for personal use. Stressed about upcoming bills, Iosia gets the idea to claim a GST input tax deduction for the truck. This would lead to a refund that would help him cover some of the running costs of the business until the outstanding invoices are paid.

In the company's next GST return, Iosia includes the GST portion of the truck, and then decides to claim a bit more to give him a buffer in case he does not get all the money he is owed. Iosia knows that the company cannot claim GST on the truck as he bought it for personal use, but he really needs the money.

The refund is paid out, but the company's financial situation has not improved in the next period, so Iosia includes further fraudulent input tax deductions in the company's following GST return. This second refund is flagged by Inland Revenue and the Commissioner notifies the company of his intention to investigate the circumstances of the return.

Should an evasion shortfall penalty be imposed on the company?

Yes, Iosia, as an officer of the company, obtained, and also attempted to obtain for the second return, a refund. Iosia knew the company was not lawfully entitled to the amounts claimed. Therefore, the company is liable to pay a shortfall penalty under s 141E(1)(d) for the shortfall resulting from the first return and under s 141E(1)(da) for the shortfall resulting from the second return.

Should an evasion shortfall penalty be imposed on Iosia?

Yes. In most circumstances, the Commissioner will only impose one shortfall penalty in relation to each tax shortfall. However, if a taxpayer enables, or attempts to enable, a refund or payment of tax for another person, s 141E(3) provides that the taxpayer is liable to pay an amount equal to the shortfall penalty that would be imposed if the other person's tax position had been the taxpayer's tax position.

By acting on the company's behalf to claim the refunds, Iosia enabled the taxpayer to obtain, and to attempt to obtain, refunds to which he knew it was not lawfully entitled. It follows that Iosia could potentially be liable for an amount equal to the evasion

shortfall penalty to which the company is liable. This means, in effect, two evasion shortfall penalties could be imposed for the same tax shortfall.

Relationship with criminal prosecution

77. Evasion may also be the subject of criminal liability, unlike other acts for which a taxpayer may be liable for a shortfall penalty. Section 143B(2) provides that it is a criminal offence for a person to evade or attempt to evade the assessment or payment of tax by themselves or another. Section 143B(1) covers acts (such as not making tax deductions or providing false returns) which are done either with the intent of evading the assessment or payment of tax, or in order to obtain a refund or payment of tax for themselves or any other person with the knowledge that there is no entitlement to such a refund or payment. The penalty for an offence under s 143B is imprisonment for a term not exceeding 5 years or a fine not exceeding \$50,000, or both.
78. There are also offences for manufacturing or supplying,⁵⁰ and acquiring or possessing,⁵¹ electronic sales suppression tools used to evade the assessment to payment of tax.⁵²
79. Criminal liability for misapplying or not making tax deductions is imposed by s 143A. These offences cover the same acts set out in s 141E(1)(b) and (c).⁵³ The penalty for an offence against s 143A is \$25,000 for a first offence and \$50,000 for subsequent offences. The offence for misapplying deductions can lead, in most circumstances, to imprisonment for a term not exceeding 5 years or a fine not exceeding \$50,000, or both.⁵⁴ For these criminal prosecutions, the onus of proof is also on the Commissioner,⁵⁵ but the standard of proof is beyond reasonable doubt.⁵⁶
80. The Commissioner may not prosecute a taxpayer for taking an incorrect tax position if a shortfall penalty has already been imposed for taking that incorrect tax position.⁵⁷ However, the Commissioner can impose civil penalties (which includes the evasion

⁵⁰ Section 143BB.

⁵¹ Section 143BC.

⁵² As with the penalty under s 141EE, the requirements for an offence under s 143BC are satisfied if the person has a purpose in relation to the tool of evading the assessment or payment of tax.

⁵³ Section 143A(1)(d) and 143A(1)(e).

⁵⁴ Section 143A(8).

⁵⁵ Section 149A(4).

⁵⁶ Section 149A(3).

⁵⁷ Section 149(5).

shortfall penalty) after a taxpayer has been prosecuted for an offence under the Act, regardless of whether the prosecution was successful or not.⁵⁸

81. It is considered that the reference to whether or not the prosecution was successful is an acknowledgement of the different standards of proof on the Commissioner in this area. As noted above, in criminal prosecutions the Commissioner has the onus of proof to the standard of "beyond reasonable doubt".⁵⁹
82. For the shortfall penalty of evasion, the Commissioner has the onus of proof to the standard of the "balance of probabilities".⁶⁰ Because of this difference, the Commissioner may fail to satisfy the evidential standard in a criminal prosecution, yet have sufficient evidence to satisfy the lower threshold of the balance of probabilities for the evasion shortfall penalty.
83. The Commissioner may impose an evasion shortfall penalty as an alternative to prosecution in the following circumstances:
 - There is a high likelihood that the shortfall penalty will be paid by the taxpayer; or
 - The Commissioner is in a position to enforce payment; or
 - Placing the taxpayer into insolvency would be an appropriate compliance outcome in the circumstances.
84. The Commissioner is unlikely to impose an evasion shortfall penalty, and will seek to prosecute, in the following circumstances:
 - An evasion shortfall penalty has been an ineffective compliance tool used against that taxpayer in the past; or
 - There is a low likelihood that shortfall penalty will be paid by the taxpayer and placing a taxpayer into insolvency would not be an appropriate compliance outcome in the circumstances; or
 - Inland Revenue's compliance focus or the wider compliance context makes prosecution a more appropriate compliance outcome.
85. For more information about prosecution, see Inland Revenue's Prosecution Guidelines [expected to be published in early 2026].

⁵⁸ Section 149(4).

⁵⁹ Sections 149(3) and 149A(4).

⁶⁰ Sections 149A(1) and 149A(2).

Draft items produced by the Tax Counsel Office represent the preliminary, though considered, views of the Commissioner of Inland Revenue.

In draft form these items may not be relied on by taxation officers, taxpayers, or practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.

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IS XX/XX: Shortfall penalties – requirement for a “tax position” and a “tax shortfall”

IS XX/XX: Shortfall penalties – reductions and other matters

IS **XX/XX**: Shortfall penalty for gross carelessness

Taxation (Beneficiary Income of Minors, Services-Related Payments and Remedial Matters)
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