

## FACT SHEET | PUKA MEKA

# Income tax – Unacceptable tax position shortfall penalty

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IS 26/05 FS 1

This fact sheet accompanies interpretation statement [IS 26/05: Shortfall penalty for taking an unacceptable tax position](#), which explains the meaning of “unacceptable tax position” in relation to the shortfall penalty for taking an unacceptable tax position in s 141B of the Tax Administration Act 1994.

All legislative references are to the Tax Administration Act 1994.

## Key terms | Kīanga tau tāpua

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| <b>Tax position</b>                    | A position or approach regarding tax under a tax law.  |
| <b>Tax shortfall</b>                   | The difference between the tax effect of the taxpayer’s tax position for the return period and the correct tax position for that period.   |
| <b>Taxpayer’s total tax figure</b>     | The amount shown in the taxpayer’s tax return as tax paid or payable (before any group offset election or subvention payment), a net loss (treated as having a positive value multiplied by the basic rate of income tax for companies) or a refund. |
| <b>Commissioner’s official opinion</b> | An opinion about the taxpayer’s own tax affairs, given by the Commissioner after the taxpayer has provided all relevant and  |

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|  | correct information, or a finalised official statement issued by the Commissioner that specifically applies to that taxpayer's situation.<br><br>It does not include a private binding ruling. |
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## Unacceptable tax position shortfall penalty

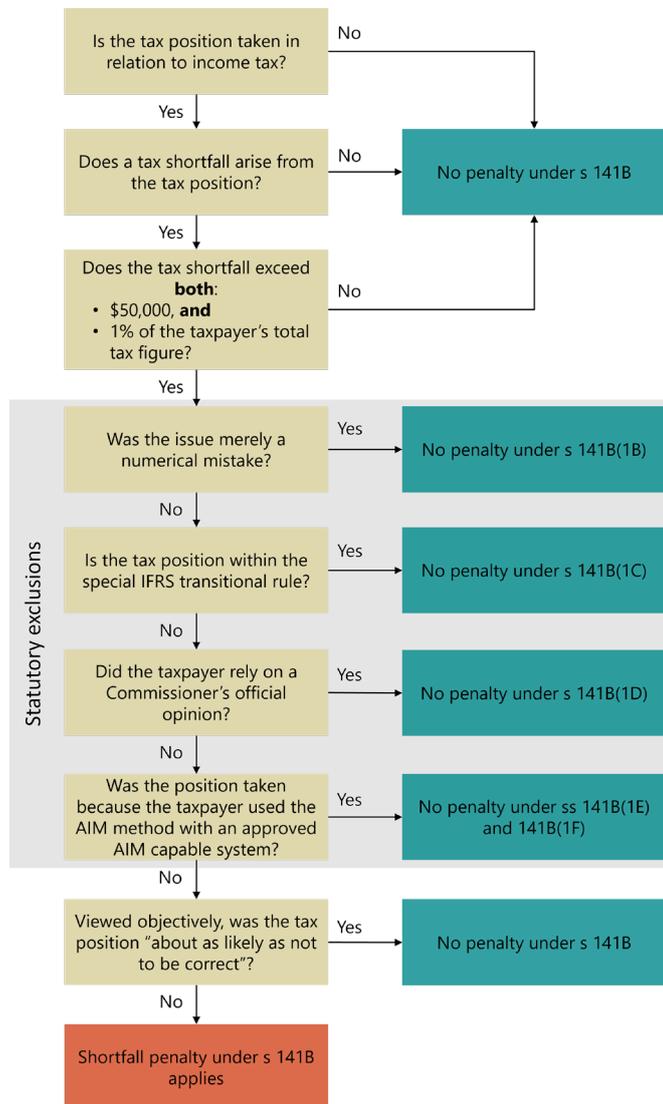
### Overview

1. An **unacceptable tax position shortfall penalty** applies only if:
  - A taxpayer has taken a tax position; and
  - **The tax position relates to income tax** (excluding withholding-type taxes such as PAYE, FBT, and RWT) or, beginning 1 January 2027, multinational top-up tax. **The penalty does not apply to tax positions relating to GST**; and
  - There is a tax shortfall; and
  - **The shortfall is > \$50,000 AND > 1% of the taxpayer's total tax figure**; and
  - The tax position is not "about as likely as not to be correct"; and
  - No statutory exclusions apply (numerical mistakes, IFRS transition cases, reliance on Commissioner advice, AIM provisions).
2. The penalty is 20% of the tax shortfall. The amount of the penalty may be capped at \$50,000 if certain requirements are met and may be reduced in certain situations. The \$50,000 cap applies after the amount of the penalty is determined under s 141B and the other reduction provisions are applied.
3. [IS 26/03: Shortfall penalties – requirement for a "tax position" and a "tax shortfall"](#) explains the requirements for a "tax position" and a "tax shortfall".
4. [IS 26/09: Shortfall penalties – reductions and other matters](#) explains reductions and other matters relevant to the penalty, including the \$50,000 cap on the amount of the penalty, 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.
5. [IS 26/05: Shortfall penalty for taking an unacceptable tax position](#) explains the meaning of "unacceptable tax position" in s 141B.

## Summary

6. Section 141B imposes a shortfall penalty for taking an unacceptable tax position where:
  - the taxpayer has taken a tax position;
  - the tax position relates to income tax (excluding withholding-type taxes such as PAYE, FBT, and RWT) and, beginning 1 January 2027, multinational top-up tax;
  - a tax shortfall arises from the tax position and the tax shortfall is more than both:
    - \$50,000, and
    - 1% of the taxpayer's total tax figure for the relevant return period; and
  - the tax position is an "unacceptable tax position".
7. The penalty is 20% of the tax shortfall. The amount of the penalty may be capped at \$50,000 if certain requirements are met and may be reduced in certain situations.
8. Accordingly, an unacceptable tax position penalty will only apply where the taxpayer's tax position relates to income tax (excluding withholding-type taxes such as PAYE, FBT, and RWT) and, beginning 1 January 2027, multinational top-up tax. The penalty does not apply to tax positions relating to GST.
9. In addition, for an unacceptable tax penalty to apply, the resulting tax shortfall must exceed both \$50,000 and 1% of the taxpayer's total tax figure for the relevant return period. The taxpayer's total tax figure is the amount shown in the taxpayer's tax return (as filed by the taxpayer) as tax paid or payable, a net loss or a refund. Where a taxpayer has paid tax or has tax to pay, the amount is the tax paid or payable before any group offset election or subvention payment. Where a taxpayer has no tax to pay, the amount is equal to the net loss of the taxpayer, treated as having a positive value multiplied by the basic rate of income tax for companies. For the purpose of determining whether a tax shortfall exceeds the threshold amounts:
  - a tax return provided by a partnership, look-through company or group of persons is treated as if it were a tax return of every partner in the partnership, effective look-through interest holder for the look-through company, or person in such group; and
  - the tax rate applying to a partnership or look-through company is the same as the basic rate for income tax for companies.
10. The following flowchart shows how s 141B applies.

Figure 1 | Hoahoa 1 Flowchart showing how s 141B applies



## Unacceptable tax position

11. [IS 26/05](#): **Shortfall penalty for taking an unacceptable tax position** explains the meaning of “unacceptable tax position” as follows. A taxpayer takes an unacceptable tax position if, viewed objectively, their tax position fails to meet the standard of being “about as likely as not to be correct”. In summary:

- A tax position will be “about as likely as not to be correct” if:
  - even though wrong, it can be argued on rational grounds to be right;

- it is one on which “reasonable minds could differ”. There must be room for a real and rational difference of opinion;
- it has about an equal chance of being correct.
- Whether a tax position is “about as likely as not to be correct” is decided objectively. Whether the taxpayer believes that their tax position was correct is irrelevant to this decision.
- A taxpayer’s tax position must be “about as likely as not to be correct” when the taxpayer takes that position, based on the law at that time.
- The focus is on the legal soundness of the tax position. However, where factual issues turn on questions of evaluation, whether a taxpayer’s view of the facts is “about as likely as not to be correct” may be considered in making the decision.
- It is possible for a taxpayer to take an unacceptable tax position even though they have followed the advice of a tax advisor.
- A taxpayer does not take an unacceptable tax position merely by making a mistake in calculating or recording numbers used in, or for use in preparing, a return.
- A taxpayer does not take an unacceptable tax position to the extent they have relied on an official opinion that the Commissioner gives.
- A taxpayer does not take an unacceptable tax position merely by using the accounting income method (AIM) to calculate their provisional tax and an approved AIM provider’s AIM-capable accounting system. This exception does not apply for larger taxpayers, with an annual gross income of more than \$5 million, using “large business AIM-capable systems”.

## About this document | Mō tēnei tuhinga

Some of the Tax Counsel Office’s longer or more complex items are accompanied by a fact sheet that summarises and explains an item’s main points. While it summarises the Commissioner’s considered views, a fact sheet should be read alongside the full item to completely understand the guidance. Fact sheets are not binding on the Commissioner. See further [Status of Commissioner’s advice](#) (Commissioner’s statement, Inland Revenue, December 2012).