Inland Revenue
Te Tari Taake

INTERPRETATION STATEMENT | PUTANGA WHAKAMĀORI

Shortfall penalty for taking an unacceptable tax position

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IS 26/05

This interpretation statement 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.

REPLACES | WHAKAKAPIA

- IS0055: Shortfall penalty – Unacceptable interpretation and unacceptable tax position (April 2005) *Tax Information Bulletin* Vol 17, No 9 (November 2005)

Contents | Ihirangi

Key terms | Kīanga tau tāpua

Tax position	A position or approach regarding tax under a tax law.
Tax shortfall	The difference between the tax effect of the taxpayer's tax position for the return period and the correct tax position for that period.
Taxpayer's total tax figure	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.
Commissioner's official opinion	An opinion about the taxpayer's own tax affairs, given by the Commissioner after the taxpayer has provided all relevant and correct information, or a finalised official statement issued by the Commissioner that specifically applies to that taxpayer's situation. It does not include a private binding ruling.

Introduction | Whakataki

1. Section 141B imposes a shortfall penalty for taking an unacceptable tax position where:

- the taxpayer has taken a tax position;[1]
- **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;[2]
- a tax shortfall arises from the tax position and **the tax shortfall is more than both**:[3]
  - **$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".

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.[4]

3. Notably, **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.

4. **In addition, for the 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**.[5] 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.[6] 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.[7] 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

[1] See IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

[2] Section 141B(2) and s 154 of the Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Act 2024. See also IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

[3] Section 141B(2). See also IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall" for how to calculate 1% of the taxpayer's total tax figure for relevant return period.

[4] Section 141JAA. See IS 26/09: Shortfall penalties – reductions and other matters.

[5] Section 141B(2).

[6] Section 141B(3).

[7] Section 141B(3)(a).

multiplied by the basic rate of income tax for companies.[8] For the purpose of determining whether a tax shortfall exceeds the threshold amounts:[9]

- 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]

5. Where there is more than one tax shortfall in a return period, the threshold amounts in s 141B(2) are applied to each tax shortfall. This is except for tax shortfalls arising from similar or identical tax positions that are aggregated and deemed to be 1 tax shortfall.[11]

6. Example 4 shows how to calculate 1% of the taxpayer's total tax figure for the relevant period.

7. IS 26/03: **Shortfall penalties – requirements for a "tax position" and a "tax shortfall"** explains the requirements for a "tax position" and a "tax shortfall".

8. This interpretation statement explains the meaning of "unacceptable tax position" in s 141B.

9. IS 26/09: **Shortfall penalties – reductions and other matters** explains other matters relevant to the penalty, including the cap of $50,000 on the amount of the penalty if certain requirements are met, 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.

10. The flowchart at Figure 1 | Hoahoa 1 shows how s 141B applies.

Summary | Whakarāpopoto

11. In summary, this interpretation statement explains the following matters:

[8] Section 141B(3)(b). On and after 1 January 2027, s 141B(3)(b) will not apply to multinational top-up tax (Taxation (Annual Rates for 2023-2024, Multinational Tax, and Remedial Matters) Act 2024). This is because, when multinational top-up tax applies, there will always be tax to pay.

[9] Section 141B(8).

[10] Section 141B(8). This is except in the case of a multinational top-up tax (Taxation (Annual Rates for 2023–24, Multinational Tax, and Remedial Matters) Act 2024).

[11] Section 141(10).

- An "unacceptable tax position" is a tax position that is **not** "about as likely as not to be correct".
- 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.
- Generally, 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.

Legislation

12. Section 141B provides:

141B Unacceptable tax position

(1) A taxpayer takes an unacceptable tax position if, viewed objectively, the tax position fails to meet the standard of being about as likely as not to be correct.

(1B) A taxpayer does not take an unacceptable tax position merely by making a mistake in the calculation or recording of numbers used in, or for use in preparing, a return.

(1C) A taxpayer does not take an unacceptable tax position if—

(a) the taxpayer adopts IFRSs for the purposes of financial reporting before the 2007–08 income year; and

(b) the taxpayer's tax position relates to a period—

(i) starting on and including the first day of the first income year for which a person adopts IFRSs for the purposes of financial reporting; and

(ii) finishing on and including the last day of the 2006–07 income year; and

(c) a tax shortfall for a return period in the period described in paragraph (b) arises from actual or potential accounting under IFRSs; and

(d) the tax shortfall is due to an application of IFRSs which, if viewed objectively, passes the standard of being about as likely as not to represent acceptable accounting practice under IFRSs; and

(e) the taxpayer has fully disclosed the IFRS-related tax position.

(1D) A taxpayer does not take an unacceptable tax position to the extent to which they have taken their position because they have relied on a Commissioner's official opinion.

(1E) A taxpayer does not take an unacceptable tax position merely by using the AIM method and an approved AIM provider's AIM-capable accounting system.

(1F) Subsection (1E) does not apply for a taxpayer that—

(a) is approved under section 124ZE:

(b) uses a large business AIM-capable system.

(2) A taxpayer is liable to pay a shortfall penalty if the taxpayer takes an unacceptable tax position in relation to income tax as defined in section YA 1 of the Income Tax Act 2007, but ignoring the effect of section RA 2 of that Act, and the tax shortfall arising from the taxpayer's tax position is more than both—

(a) $50,000:

(b) 1% of the taxpayer's total tax figure for the relevant return period.

(3) For the purposes of this section, a taxpayer's total tax figure is—

(a) the amount of tax paid or payable by the taxpayer in respect of the return period for which the taxpayer takes the taxpayer's tax position before, in the case of income tax, any group offset election or subvention payment; or

(b) where the taxpayer has no tax to pay in respect of the return period, an amount equal to the product of—

(i) the net loss of the taxpayer in respect of the return period, ascertained in accordance with the provisions of the Income Tax Act 2007 and treated as having a positive value; and

(ii) the basic rate of income tax for companies in the relevant return period,—

that is shown as tax paid or payable, or as net losses of the taxpayer, or as a refund to which the taxpayer is entitled, in a tax return provided by the taxpayer for the return period.

(4) Where subsection (2) applies, the shortfall penalty payable is 20% of the resulting tax shortfall.

(5) For the purposes of this section, the question whether any tax position is acceptable or unacceptable shall be determined as at the time at which the taxpayer takes the taxpayer's tax position.

(6) The time at which a taxpayer takes a tax position for a return period is—

(a) the time at which the taxpayer provides the return containing the taxpayer's tax position, if the taxpayer provides a tax return for the return period:

(b) the due date for providing the tax return for the return period, if the taxpayer does not provide a tax return for the return period.

(7) The matters that must be considered in determining whether the taxpayer has taken an unacceptable tax position include—

(a) the actual or potential application to the tax position of all the tax laws that are relevant (including specific or general anti-avoidance provisions); and

(b) decisions of a court or a Taxation Review Authority on the interpretation of tax laws that are relevant (unless the decision was issued up to 1 month before the taxpayer takes the taxpayer's tax position).

(8) For the purpose of determining whether the resulting tax shortfall is in excess of the amounts specified in subsection (2),—

(a) a tax return provided by—

(i) a partnership; or

(ib) a look-through company; or

(ii) any other group of persons that derive or incur amounts jointly or that are assessed together,—

is to be treated as if it were a tax return of every taxpayer who is a partner in the partnership, effective look-through interest holder for the look-through company, or person in such group; and

(b) the tax rate in a return period applying to a partnership or a look-through company is deemed to be the same as the basic rate of income tax for companies for the relevant period.

(9) The amounts or the percentage specified in subsection (2) may be varied from time to time by the Governor-General by Order in Council.

(10) An order under subsection (9) is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

Analysis | Tātari

What an unacceptable tax position is

13. An "unacceptable tax position" is a tax position which is **not** "about as likely as not to be correct".[12] Meaning of "about as likely as not to be correct"

14. To satisfy the standard of "about as likely as not to be correct", the likelihood of an interpretation being correct needs to be about equal to the likelihood of it being incorrect. In *Case U47*, Judge Barber stated the use of the word "about" allowed for the standard to be met if the interpretation was close to or around 50% likely to be correct. Judge Barber stated:[13]

> [37] … No statutory guidance is given as to how the phrase "about as likely as not to be correct" is to be interpreted but, the words "as likely as not" indicate an even balance of 50/50. **There would need to be an about equal chance of an interpretation being likely to be correct as it is to be incorrect.** It follows that where one of two interpretations does not have about a 50% chance of being correct in the view of a Court, the taxpayer will have failed to meet the required standard under limb (b). … I agree with counsel that the word "about", which precedes the above phrase must be taken into account as it makes the test less stringent and provides some latitude in applying the test. I accept that **the use of the word "about"** in the phrase "about as likely as not to be correct" **allows for the standard to be met if the interpretation is close to or around 50% likely to be correct.** It follows that where a Court subsequently holds an interpretation to be incorrect, the test in s 141B may potentially be satisfied if it is close to being 50% correct. Perhaps that may be the case where a Court finds two possible interpretations attractive, but prefers one to the other. [Emphasis added]

[12] Section 141B(1). As noted, for an unacceptable tax position shortfall penalty to apply, the tax position must relate to income tax (excluding withholding-type taxes such as PAYE, FBT, and RWT) and, beginning 1 January 2027, multinational top-up tax (see [1] and [2]).

[13] *Case U47* (2000) 19 NZTC 9,410.

15. In *Ben Nevis Forestry Ventures Ltd & Ors v CIR*, the majority of the Supreme Court referred with apparent approval to what Hill J stated in the Australian case *Walstern Pty Ltd v C of T* about a similar standard of "about as likely as not correct".[14] Hill J stated there must be room to argue for which position is correct so, on balance, the taxpayer's argument, while wrong, can be argued on rational grounds to be right. For the standard to apply, there must be room for a real and rational difference of opinion. The case must be one where reasonable minds could differ. Hill J stated:

> [108] …
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> > 5. … The word "about" indicates the need for balancing the two arguments, with the consequence that there must be room for it to be argued which of the two positions is correct so that **on balance the taxpayer's argument can be said to be one that while wrong could be argued on rational grounds to be right**.
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> > …
> >
> > 7. … That is to say the two arguments, namely, that which is advanced by the taxpayer and that which reflects the correct view will be finely balanced. **The case must thus be one where reasonable minds could differ** as to which view, that of the taxpayer or that ultimately adopted by the Commissioner was correct. **There must, in other words, be room for a real and rational difference of opinion** between the two views such that while the taxpayer's view is ultimately seen to be wrong it is nevertheless "about" as likely to be correct as the correct view. A question of judgment is involved. [Emphasis added]

16. The majority of the Supreme Court in *Ben Nevis* considered that the standard did not require the taxpayer's tax position to have a 50% chance of success but that the merits of the taxpayer's arguments must be substantial. In *Frucor*, the majority of the Supreme Court agreed that a mathematical assessment was not required.[15] However, they did not regard a test of substantiality as particularly helpful. The majority of the Court stated:

> [100] In *Ben Nevis*, a majority in the Supreme Court commented on the s 141B test:
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> > [184] On its terms this standard does not require that the appellants' tax position had a 50 per cent prospect of success but, subject to that qualification, the merits of the arguments supporting the taxpayer's interpretation must be substantial. The stipulation of an objective test means that the taxpayer's belief that the position taken was correct, or not unacceptable, is irrelevant.

[14] *Ben Nevis Forestry Ventures Ltd & Ors v CIR; Accent Management Ltd & Ors v CIR* [2008] NZSC 115, (2009) 24 NZTC 23,188 at [185]; *Walstern Pty Ltd v C of T* (2003) 138 FCR 1 (FCA). See also *Case X25* (2006) 22 NZTC 12,203, where Judge Willy approved of what Hill J stated in *Walstern*.

[15] *Frucor Suntory New Zealand Ltd v CIR* [2022] NZSC 113, (2022) 30 NZTC 25-024.

> This passage has sometimes been construed as substituting for the statutory language a test of substantiality.
>
> [101] We agree that a mathematical assessment is not appropriate but do not regard substituting "substantiality" for the statutory language as particularly helpful. "[A]bout as likely as not" is an ordinary, perhaps slightly colloquial, English expression with its own nuances of meaning—nuances not necessarily fully captured by the language of substantiality. Indeed, we doubt whether such a substitution was intended in the passage just cited. As we will indicate, when applying s 141B in *Ben Nevis*, this Court reverted to the statutory language. [Footnotes omitted]

17. Even if sophisticated and credibly advanced, to meet the standard, arguments relied on in support of a tax position must be "about as likely as not" to be accepted by a New Zealand court. In *Frucor*, the majority said:[16]

> [142] The second point by way of response is more general. We accept that the approaches to facts and law proposed by Glazebrook J are based on arguments that are sophisticated and are (and were) capable of being credibly advanced. This, however, is not controlling. This is because the result we arrive at in relation to penalties reflects our assessment that as at 2006 and 2007 when the returns were filed, such arguments nonetheless were not "about as likely as not" to be accepted by New Zealand courts.

18. The meaning of "about as likely as not to be correct" may be summarised as follows:

- Even though wrong, the taxpayer's tax position must be able to be argued on rational grounds to be right.[17]
- The taxpayer's tax position must be one on which "reasonable minds could differ". There must be room for a real and rational difference of opinion.[18]
- The taxpayer's tax position must have about an equal chance of being correct.

How to determine whether a tax position is "about as likely as not to be correct"

19. 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.[19]

[16] See also [31] and [32].

[17] *Walstern*; *Case X25*; *Ben Nevis*; *Frucor*.

[18] *Walstern*; *Case X25*.

[19] *Erris Promotions Ltd & Ors v CIR* (2003) 21 NZTC 18,330 (HC); *Ben Nevis*; *Alesco New Zealand Ltd v CIR* [2013] NZCA 40, (2013) 26 NZTC 21-003.

20. A taxpayer's tax position must be "about as likely as not to be correct" at the time the taxpayer takes it, based on the law at that time.[20] In establishing whether a tax position meets this standard, it is necessary to consider tax laws, including anti-avoidance provisions, and court and Taxation and Charities Review Authority decisions issued up to 1 month before the taxpayer took the tax position.[21] A taxpayer's ignorance of the law is no excuse.[22]

21. In the absence of relevant case law, considered and published views such as commentary on the law, Inland Revenue rulings, expert opinions and legal articles may assist. Inland Revenue documents not intended for publication are irrelevant.[23]

22. Establishing whether a taxpayer's tax position meets the "about as likely as not to be correct" standard involves a judgment of the weight of the arguments supporting the taxpayer's tax position in applying the law to the relevant facts. In *Ben Nevis*, the majority of the Supreme Court stated:

> [185] … Whether a taxpayer's interpretation meets the standard in any case accordingly comes down to a judgment of the weight of the arguments that support the taxpayer's position in the application of the law to the relevant facts. The Act requires that the application of all tax laws, including the general anti-avoidance provision, be taken into account in making this judgment. As well, discussions of the courts and Taxation Review Authority on the interpretation of relevant tax laws must be considered. [Footnotes omitted]

23. 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 *Frucor*, the majority of the Supreme Court stated:

> [111] As we will explain later, we see the application of the "about as likely as not to be correct" standard in this case at least as requiring a focus on the legal soundness (or otherwise) of the tax positions adopted. **The starting point for our assessment must therefore be the facts as we have found them to be**. **If, on those facts, the tax positions adopted by DHNZ satisfy the standard of being "about as likely as not to be correct", there can be no liability to shortfall penalties. If they did not, then shortfall penalties will be applied**. [Emphasis added]

[20] *Alesco* at [148]; see [31].

[21] Section 141B(5) and (7). The Taxation Review Authority became the Taxation and Charities Review Authority on 5 July 2024 (see s 4 of the Charities Amendment Act 2023).

[22] *Case U47*.

[23] *Case U47*; *Walstern*; *Accent Management & Ors v CIR* (2005) 22 NZTC 19,027 (HC); *ASB Bank Ltd v CIR* [2014] NZHC 2184, (2014) 26 NZTC 21-098.

24. Examples of factual issues that may turn on questions of evaluation include the categorisation of a receipt as capital or revenue or assessments of economic substance and effect.[24] In *Frucor*, the majority of the Supreme Court said:

> [128] As we have foreshadowed, we propose in this case to apply the "about as likely as not to be correct" standard on the basis of the facts as we have found them to be. **We accept that in some cases, for instance, where the factual issues turn on questions of evaluation or assessment, there may be scope for taking into account a taxpayer argument along the lines that the view of the facts on which the tax position was premised was "about as likely as not to be correct". Conceivably this may sometimes be so in relation to assessments of economic substance and effect. A possible example of this is *Commissioner of Inland Revenue v John Curtis Developments Ltd* which turned on the categorisation of certain receipts as capital or revenue**. … [Emphasis added and footnotes omitted]

25. In *CIR v John Curtis*, the evaluation question was whether a receipt was revenue or capital in nature. Kós J disagreed with the taxpayer that a receipt was capital in nature and held it was taxable.[25] However, Kós J stated the taxpayer's argument was "plainly a stance which a reasonable mind might adopt" and decided not to impose a shortfall penalty for an unacceptable tax position.[26]

26. *Easy Park Ltd v CIR* is another case where a factual issue turned on a question of evaluation.[27] As in *John Curtis*, in *Easy Park* the evaluation question concerned whether a receipt was revenue or capital in nature. The High Court disagreed with the taxpayer's argument that the receipt was capital in nature, instead deciding it was revenue. Even so, Ellis J decided the taxpayer was not liable for a shortfall penalty for taking an unacceptable tax position.[28]

27. In deciding to impose no penalty, Ellis J said the fact she had ruled against the taxpayer on the evaluation question was not determinative. The factors Ellis J considered in reaching this decision included:

- there was no authority "squarely against" the taxpayer's argument;
- the evaluation question was "notoriously oblique" and, were it not for a recent clarifying amendment, it was conceivable circumstances could arise where such a receipt may have been regarded as capital; and
- the taxpayer's argument was not irrational and was persuasively advanced.

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[24] *Frucor*.

[25] *CIR v John Curtis Developments Ltd* (2014) 26 NZTC 21,113 (HC) at [107].

[26] *John Curtis* at [107].

[27] *Easy Park Ltd v CIR* (2017) 28 NZTC 23,024.

[28] The Commissioner did not question Ellis J's decision on the penalty on appeal: *Easy Park Ltd v CIR* (2018) 28 NZTC 23,066 (CA).

28. Ellis J said:

> [94] … As the wording of s 141B makes clear, the lens through which an unacceptable tax position is assessed is objective rather than subjective. **The taxpayer's actual belief in its correctness is irrelevant. But so too is the fact that I have ruled against the Easy Park. That is not determinative of the question. If the taxpayer's argument "can objectively be said to be one that, while wrong, could be argued on rational grounds to be right", shortfall penalties will not be appropriate. But it must be a matter on which reasonable minds could differ.** As the Court of Appeal has noted, there is "some element of fuzziness in the underlying concept".
>
> [95] I find the present case a difficult one. As I have said, **there was no authority which tells squarely against the position taken by Easy Park**. Public Rulings are not binding on taxpayers and the very existence of a ruling arguably suggests that its subject matter may be difficult or controversial. Moreover BR PUB 09/06 expressly acknowledged that arguments similar to those advanced before me (based on dicta in *McKenzies*) had previously been raised. **The capital revenue divide is notoriously oblique and, as my discussion above indicates, were it not for the clarity wrought by the recent amendment to the ITA [Income Tax Act 2007], it is conceivable that circumstances could yet arise where a lease surrender payment might properly be regarded as an affair of capital in the hands of the lessor. Mr Harley's submissions were not irrational; they were persuasively advanced**. [Emphasis added and footnotes omitted]

29. In *Frucor*, the question was whether the taxpayer had suffered the economic burden of "interest incurred", a question critical to the application of the general anti-avoidance provision relevant in that case.[29] The majority stated an argument the taxpayer had suffered the economic burden would not be "about as likely as not to be correct". The majority stated it was plain the taxpayer did not suffer the economic burden of the "interest incurred" and was aware of that. The majority stated:

> [128] … In the present case, we consider that an argument that the economic burden contemplated by deductibility for "interest incurred" was met would not meet the "about as likely as not to be correct" standard. We say this because all those relevantly involved were well aware of the economic substance of the funding arrangement. Indeed, they went as far as to record that substance in the management accounts of DHNZ and DAP and in other contemporaneous documentation.

30. The majority concluded the taxpayer's tax position was unacceptable. This conclusion did not automatically follow from the majority's finding of tax avoidance. Rather, the taxpayer's tax position was unacceptable because, on the law as it applied when the tax position was taken, the tax position was not "about as likely as not to be correct". In summary, the majority of the Court stated:

[29] *Frucor* at [132]. Section BG 1 of the Income Tax Act 2004 was relevant in that case.

- the principles relating to the construction of the general anti-avoidance provision had been settled;[30]
- there was a need to consider the economic substance of the transaction;[31]
- the taxpayer did not suffer the economic consequences Parliament contemplated;[32] and
- arguments supporting the taxpayer's tax position, while sophisticated and capable of being credibly advanced, were not "about as likely as not to be correct".[33]

31. Although that view was not shared by the High Court, the Court of Appeal, or the dissenting judge in the Supreme Court in *Frucor*, the majority explained the "about as likely as not to be correct" standard was, nevertheless, not met because:

- When assessing the standard, the focus was on the legal soundness of the taxpayer's tax position based on the facts as the majority found them to be.
- The High Court applied the standard to factual findings that were wrong.
- The Court of Appeal did not apply the standard to the facts as it found them to be. Instead, it allowed its conclusion to be controlled by the result arrived at by the High Court based on factual findings the Court of Appeal did not accept.
- The Supreme Court judge's dissent was based on views of the facts and the law different from those of the majority. Although the approaches to the facts and law proposed by the dissenting Supreme Court judge were founded on sophisticated and credibly advanced arguments, the arguments were not "as likely as not to be correct".

32. The majority said:

> [111] As we will explain later, we see the application of the "about as likely as not to be correct" standard in this case at least as requiring a focus on the legal soundness (or otherwise) of the tax positions adopted. The starting point for our assessment must therefore be the facts as we have found them to be. If, on those facts, the tax positions adopted by DHNZ satisfy the standard of being "about as likely as not to be correct", there can be no liability to shortfall penalties. If they did not, then shortfall penalties will be applied.
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> [112] We consider that the approaches of the High Court Judge and the Court of Appeal to shortfall penalties were erroneous. Muir J approached this aspect of the case on the basis of the factual findings that underpinned his conclusions as to the non-applicability

[30] *Frucor* at [130].

[31] *Frucor* at [141].

[32] *Frucor* at [130]. See also *Frucor* at [128], set out at [29].

[33] *Frucor* at [142].

> of s BG 1(1)—factual findings that we consider to be wrong. And, the Court of Appeal did not seek to apply the "as likely as not to be correct standard" to the facts as it found them to be. Instead, it allowed its conclusion to be controlled by the result arrived at by Muir J as to s BG 1(1) despite it being based on factual findings which the Court of Appeal did not accept.
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> …
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> [139] The dissent of Glazebrook J is based on views of the facts and law sufficiently different from those expressed in these reasons as to make detailed response not particularly practicable. There are, however, two points that we wish to make.
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> …
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> [142] The second point by way of response is more general. We accept that the approaches to facts and law proposed by Glazebrook J are based on arguments that are sophisticated and are (and were) capable of being credibly advanced. This, however, is not controlling. This is because the result we arrive at in relation to penalties reflects our assessment that as at 2006 and 2007 when the returns were filed, such arguments nonetheless were not "about as likely as not" to be accepted by New Zealand courts.

33. Accordingly, a lower court decision or dissenting judgment supporting a taxpayer's tax position does not necessarily mean the tax position is about as likely as not to be correct. Based on *Frucor*, a lower court decision or dissenting judgment that relies on facts rejected by the appeal court or majority of the court, will not be conclusive.

34. *Ben Nevis* confirmed that, from a finding of tax avoidance, it remains a separate decision whether the taxpayer's tax position was not "about as likely as not to be correct" when the taxpayer took it. The inquiry into whether there is tax avoidance differs from the inquiry into whether the taxpayer's tax position is unacceptable. The tax avoidance inquiry concerns whether there is a tax avoidance arrangement applying s BG 1 of the Income Tax Act 2007. The unacceptable tax position inquiry involves considering whether, applying the law at the time the taxpayer took the tax position, arguments supporting the taxpayer's tax position were "about as likely as not to be correct". As the majority of the Supreme Court stated in *Ben Nevis*:[34]

> [185] … Whether a taxpayer's interpretation meets the ["about as likely as not to be correct"] standard in any case accordingly comes down to a judgment of the weight of the arguments that support the taxpayer's position in the application of the law to the relevant facts. …

35. In *Alesco*, referring to the above paragraph from *Ben Nevis*, the Court of Appeal stated:

[34] See [22].

> [148] … ***Ben Nevis*** **also confirms that a finding of tax avoidance does not necessarily lead to a conclusion that the tax position was not more likely than not to be correct when it was taken**. The inquiry is not to be influenced by a later finding that the tax position taken was incorrect. [Emphasis added and footnote omitted]

36. It is possible for a taxpayer to take an unacceptable tax position even though they have followed the advice of a tax advisor. In *Case U47*, Judge Barber stated that it is the taxpayer that takes the tax position and that will include any associated interpretation by an agent:

> 42. … **It must be the taxpayer who takes the tax position and, by inference, that will include any associated interpretation by an agent.** … **It follows that because I find that the disputant has followed the advice of a tax agent** (which advice has led to the making of an unacceptable interpretation), **that does not prevent the disputant from being liable for any shortfall penalty payable under s 141B**. That unacceptable interpretation becomes the disputant's interpretation, for the purposes of s 141B, by virtue of the disputant's agency arrangement with its Accountant. [Emphasis added]

37. In *Erris*, Ronald Young J found the taxpayers who had taken a tax position through the advice and guidance of their tax agent were bound to the knowledge and actions of the agent:

> [372] … In this case either directly or indirectly upon receiving the depreciation loss advice from Actonz the Plaintiffs, subject to penal tax, had filed a tax return claiming the loss. Clearly therefore a tax position has been taken by them through the advice and guidance of their tax agent Actonz/AML. In those circumstances the Plaintiffs are bound to the knowledge and actions of their appointed agents AML/Actonz and Mr Anderson.

38. *Case U47* and *Erris* were concerned with an earlier version of s 141B that referred to the prior "unacceptable interpretation" test. However, *Alesco* confirms the same approach applies in relation to the current s 141B. When considering whether the taxpayer had taken an "unacceptable tax position", Harrison J said the taxpayer's reliance on professional advice did not prevent if being liable for shortfall penalties:

> [142] Second, Mr McKay submits that Alesco NZ entered into the OCNs arrangement after receipt of reputable and expert taxation advice. Other taxpayers had done the same, adopting a similar template. It must be assumed, he says, that the advice received by Alesco NZ was positive in concluding that s BG 1 did not apply.
>
> [143] Again, this argument postulates a subjective inquiry and is irrelevant. Alesco NZ's **acceptance of professional advice does not immunise it from a statutory liability for shortfall penalties**. The fact that it was positive does not mean it was correct. … [Emphasis added and footnote omitted]

39. A taxpayer is primarily responsible for correctly determining their tax liabilities.[35]

40. A taxpayer relying on the advice of a tax advisor may be treated as having taken reasonable care for the purposes of the shortfall penalty for not taking reasonable care.[36] For an explanation, see IS 26/04: **Shortfall penalty for not taking reasonable care**.

41. Example | Tauira 1, Example | Tauira 2, Example | Tauira 3, Example | Tauira 4, and Example | Tauira 5 show the kind of tax positions that may be unacceptable.

[35] Section 15B.

[36] Section 141A.

Example | Tauira 1 – Overlooking to include bonus shares in a tax return

Facts

An individual invests in shares. During the income year, the individual receives cash dividends and shares from a taxable bonus issue.

The individual includes the cash dividends in their income tax return for the year but overlooks the bonus shares and does not include them. The individual's income tax return shows they have $60,000 in tax to pay. If the individual had included the bonus shares, they would have had $500 more in tax to pay.

Outcome

When they filed their return, the individual took a tax position that the bonus shares were not taxable. The individual's tax position was incorrect, leading to a $500 tax shortfall.

Viewed objectively, the individual's tax position is **not** "about as likely as not to be correct". The value of the bonus shares was income. This is not something on which reasonable minds could differ. Although the individual overlooked including the bonus shares in their return, this was not a mistake they made in calculating or recording numbers used in a return. The individual has taken an unacceptable tax position.

However, the $500 tax shortfall is below the thresholds for the penalty applying. The shortfall is less than $50,000 and $600 (ie, 1% of the taxpayer's total tax figure of $60,000).[37] Accordingly, the individual is not liable for the shortfall penalty for an unacceptable tax position.

The individual may, nevertheless, be liable for a shortfall penalty for not taking reasonable care under s 141A.[38]

[37] Sections 141B(2) and (3). See also IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

[38] See IS 26/04: Shortfall penalty for not taking reasonable care.

Example | Tauira 2 – Overlooking to include land sale proceeds in a tax return

Facts

A self-employed surveyor acquired a block of land to subdivide and sell. The subdivision never went ahead and, after a couple of years, the surveyor sold the land undivided.

When the time came to complete their income tax return at the end of the year, the surveyor was preoccupied with finalising a large project. They included the income from their surveying business in their income tax return, but overlooked including the proceeds from the sale of the land. The surveyor filed their return showing they had $80,000 in tax to pay. If they had included the land sale proceeds, they would have had $140,000 in tax to pay.

Outcome

When they filed their return, the surveyor took a tax position that the proceeds from the sale of the land were not income. The surveyor's tax position was incorrect, resulting in a $60,000 tax shortfall.

Viewed objectively, the surveyor's tax position is **not** "about as likely as not to be correct". The surveyor should have returned the land sale proceeds as income. There is no room for a real and rational difference of opinion about this. The surveyor's tax position does not have about an equal chance of being correct. Although the surveyor was preoccupied, this was not a mistake they made in calculating or recording numbers used in a return. They have taken an unacceptable tax position.

The $60,000 tax shortfall is above the thresholds for the penalty applying. It is more than $50,000 and $800 (ie, 1% threshold of the surveyor's total tax figure of $80,000).[39]

Accordingly, the surveyor is liable for a shortfall penalty for an unacceptable tax position.

Depending upon the circumstances, the surveyor may also be liable for a higher shortfall penalty.[40] In that case, the higher penalty would be imposed.[41]

[39] Sections 141B(2) and (3). Also see IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

[40] See IS 26/06: Shortfall penalty for gross carelessness, IS 26/07: Shortfall penalty for taking an abusive tax position, and IS 26/08: Shortfall penalty for evasion or similar act.

[41] See IS 26/09: Shortfall penalties – reductions and other matters.

Example | Tauira 3 – Claiming a deduction for a capital expense

Facts

A company owns several commercial properties from which it derives rental income. When the tenant of one of the properties vacated, the company undertook work on the property before re-leasing it. The work involved repairs to the existing building and the addition of a new office and a toilet block. The company spent $100,000 on the repairs and $200,000 on the additions.

The company's tax advisor instructed the company's accounting staff to code the $200,000 spent on the additions to expenses.

In its income tax return for the year, the company claimed the entire $300,000 expense as a deduction. The company's income tax return shows $30,000 tax to pay after a $40,000 subvention payment to a group company.

Outcome

When it filed its income tax return, the company took a tax position that the $200,000 it spent on the addition of the new office and toilet block was deductible. The company's tax position was incorrect, resulting in a $56,000 tax shortfall.

Viewed objectively, the company's tax position is **not** "about as likely as not to be correct". Based on case law that applied at the time the company took its tax position, the $200,000 the company spent on the additions was a non-deductible capital expense. This is not something on which reasonable minds could differ. It cannot be argued on rational grounds that the $200,000 the company spent on the additions was deductible. The company's tax position does not have about an equal chance of being correct. The company has taken an unacceptable tax position.

The $56,000 tax shortfall is above the thresholds for the penalty applying. It is more than $50,000 and $700 (ie, 1% of the company's total tax figure of $70,000, being the amount of tax payable by the taxpayer for the income year before the subvention payment).[42]

Accordingly, the company is liable for a shortfall penalty for taking an unacceptable tax position.

[42] Sections 141B(2) and (3). See also IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

Example | Tauira 4 – Claiming a deduction in the wrong income year

Facts

A company carries on a business buying and selling land. It acquires land for $1.2 million and claims a deduction for the cost of the land in same income year. However, the land is "revenue account property", the cost of which is not deductible until the income year in which the company disposes of the land.[43]

The company's income tax return for the year shows a $100,000 loss and no tax to pay.

Outcome

The company took a tax position when it filed its tax return claiming a deduction for the cost of the land. The company's tax position is incorrect and there is a tax shortfall of $336,000. The tax shortfall is more than $50,000. It is also more than 1% of the "taxpayer's total tax figure" for the income year of $280, calculated as follows:[44]

> 1% x (the taxpayer's net loss, treated as having a positive value x the company tax rate)
>
> 1% x ($100,000 x 28%)
>
> 1% x $28,000 = $280

Viewed objectively, the tax position is **not** "about as likely as not to be correct". The cost of the land was not deductible in the income year the land was acquired. This is not something on which reasonable minds could differ. The company's tax position does not have about an equal chance of being correct. Consequently, the company is liable for a shortfall penalty for taking an unacceptable tax position.

Example | Tauira 5 – Failing to recognise the cost of goods in transit

Facts

A company is a wholesaler of imported goods. In the 2025 income year, the company purchased a shipment of stock from an overseas supplier. The company paid and received ownership of the stock while it was still in transit. However, the company overlooked including the cost of the stock in transit in the closing stock figures it

[43] Section EA 2(2) of the Income Tax Act 2007.

[44] Section 141B(2) and (3). See also IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

provided to its tax agent. Consequently, the 2025 income tax return the tax agent filed for the company understated the company's income.

Outcome

The company took a tax position when its tax agent filed its 2025 income tax return without having recognised the cost of the stock in transit. The taxpayer's tax position was incorrect and resulted in a tax shortfall exceeding the threshold amounts.[45]

Viewed objectively, the taxpayer's tax position was **not** "about as likely as not to be correct". The cost of the goods was required to be included in the taxpayer's closing stock for the 2025 income year. This is not something on which reasonable minds could differ. Consequently, the company's tax position was an unacceptable tax position and it is liable for a shortfall penalty for taking an unacceptable tax position.

Mistakes in calculating or recording numbers

42. 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, an income tax return.[46]

43. This exception is limited in its application to inadvertent mistakes involving the transposition of numbers or a mistake in applying mathematical formula to numbers. In *Case Z14*, Judge Barber stated:

> [25] The disputant's challenge appears to be that the mistake of not including the two rural property sales in the 30 November 2004 GST return is a mistake which falls under the ambit of s 141B(1B). However, I agree with the defendant that s 141B(1B) is limited to where numbers have been recorded in a GST return, but incorrectly recorded eg such as a transposition of number or a mistake in applying mathematical formula to those numbers so recorded. The failure to record taxable supplies in a GST return, even by way of an honest mistake, is not a mistake within the ambit of s 141B(1B).

44. Other mistakes and oversights, such as overlooking income to include in a return, may attract a shortfall penalty for taking an unacceptable tax position.[47] Overlooking income to include in a return, even by way of an honest mistake, is different and more

[45] See [4].

[46] Section 141B(1B) and the definition of "return" in s YA 1 of the Income Tax Act 2007.

[47] *Case Z14* (2009) 24 NZTC 14,165. *Case Z14* was decided when the unacceptable tax position penalty applied to GST (see [2]).

serious than "merely making a mistake in the calculation or recording numbers in, or for use in preparing, a return".[48] In *Case Z14*, Judge Barber stated:

> [33] The defendant also submits that the omitting of numbers from a GST tax return is a different and more serious mistake than "making a mistake in the calculation or recording of numbers in a return", and is not subject to the exclusion in s 141B(1B) . Again, I agree. There is no suggestion in this matter that there were any incorrect calculations in a return. Sales were overlooked and, therefore, omitted entirely from the relevant GST return.

45. The exception only excludes liability for a shortfall penalty for taking an unacceptable tax position. A taxpayer who makes a mistake in calculating or recording numbers used in, or in preparing, a return may be liable for a shortfall penalty for not taking reasonable care.[49]

46. Example | Tauira 6, Example | Tauira 7, and Example | Tauira 8 show the kind of mistakes that a taxpayer may make without taking an unacceptable tax position. Example | Tauira 9 shows a kind of error that is not mistake in calculating or recording numbers used in, or for use in preparing, a return.

Example | Tauira 6 – Coding mistake

Facts

A company uses codes to record items of income and expenditure for financial reporting purposes. It determines the correct code for a revenue receipt but inadvertently assigns an incorrect code for a capital receipt. The coding error is carried through into the company's tax return and its income is understated. The company's tax return shows $135,000 in tax to pay, instead of $200,000. That makes a $65,000 tax shortfall.

Outcome

The company took a tax position when it filed its tax return that the revenue receipt was not income. The company's tax position was incorrect. The resulting $65,000 tax shortfall is more than the thresholds for the shortfall penalty for the unacceptable tax position of more than $50,000 in total and $1,350 (ie, 1% of the taxpayer's total tax figure of $135,000).[50]

[48] Mistakes other than in calculating or recording numbers used in, or for use in preparing, an income tax return, will only attract an unacceptable tax position penalty if the resulting tax shortfall exceeds the threshold amounts in s 141B(2) (see [4]).

[49] Section 141A.

[50] Sections 141B(2) and (3). See also IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

However, the company has not taken an unacceptable tax position. This is because the miscoding of the receipt was a genuine mistake that the company made in recording a number it used in, or for use in preparing, its tax return.

The company may, however, be liable for a shortfall penalty for not taking reasonable care.[51]

Example | Tauira 7 – Use of incorrect depreciation rate

Facts

Due to an undetected systems error, a company's new accounting software picks up an incorrect depreciation rate for a category of large depreciable assets owned by the company. The incorrect rate goes unnoticed and is carried through into the company's income tax return. Consequently, the deduction for depreciation loss claimed by the company for the income year is overstated and its income for the year is understated. The company's tax return shows $155,000 in tax to pay, instead of $211,000. That makes a $56,000 tax shortfall. When reviewing the company's income tax return, Inland Revenue discovers the depreciation rate error and corrects it by way of an agreed adjustment. This was the first time such an error had occurred. As soon as it became aware of the error, the company arranged for its software provider to fix the company's accounting software to prevent the error happening again.

Outcome

The company took a tax position when it filed its tax return that it was entitled to a deduction for the amount of depreciation loss claimed. The company's tax position was incorrect. The resulting $56,000 tax shortfall is more than the thresholds for the shortfall penalty for an unacceptable tax position. It is more than $50,000 and $1,550 (that is, 1% of the taxpayer's total tax figure of $155,000).[52]

However, the company has not taken an unacceptable tax position. This is because the company's use of the incorrect depreciation rate was a genuine mistake in the calculation or recording of numbers used in, or for use in preparing, the company's income tax return. The company did not make a conscious decision to use an incorrect depreciation rate. Nor did the company make a conscious decision to use the incorrect depreciation rate because it considered the rate was correct.

[51] See IS 26/04: Shortfall penalty for not taking reasonable care.

[52] Sections 141B(2) and (3). See also IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

The company may, however, be liable for a shortfall penalty for not taking reasonable care.[53]

Variation

After becoming aware of the systems error in its accounting software, the company takes no action to have the error fixed. The following income year, the software picks up the same incorrect depreciation rate for the same category of large depreciable assets. The incorrect rate is carried through into the company's income tax return. The company fails to check the income tax return before it is filed. Consequently, the company's deduction for depreciation loss for the income year is overstated and its income is understated. The company's tax position for the year is not correct and there is a tax shortfall exceeding the thresholds for the unacceptable tax position penalty. This time, the company has not merely made a mistake in the calculation or recording of numbers used in, or for use in preparing, its return. The company did not make the error inadvertently. The company was aware of the systems error in its accounting software and chose to ignore it. The company's tax position is an unacceptable tax position. It is not about as likely as not to be correct.

Example | Tauira 8 – Mistake in calculation of rental income

Facts

A company owns and leases storage units at eight different locations. When totalling the rental income from each location, the company's bookkeeper inadvertently records the income from location 3 as $147,000 instead of $417,000.

Location	Actual storage rental income ($)	Recorded storage rental income ($)	Difference ($)
1	132,000	132,000	–
2	52,000	52,000	–
3	417,000	147,000	270,000
4	15,000	15,000	–
5	239,000	239,000	–
6	158,000	158,000	–
7	12,300	12,300	–
8	17,600	17,600	–
TOTAL	**1,042,900**	**772,900**	**270,000**

[53] See IS 26/04: Shortfall penalty for not taking reasonable care.

The mistake goes unnoticed and is carried through into the company's tax return. The company's tax return shows $356,000 in tax to pay instead of $431,600, resulting in a $75,600 tax shortfall.

Outcome

When it filed its tax return, the company took a tax position that its rental income from location 3 was $147,000. The company's tax position was incorrect, leading to a $75,600 tax shortfall. The tax shortfall is more than the thresholds for the unacceptable tax position shortfall penalty of more than $50,000 and $3,560 (ie, 1% of the taxpayer's total tax figure of $356,000).[54]

Even so, the company has not taken an unacceptable tax position and is not liable for an unacceptable tax position shortfall penalty. This is because the company merely made an inadvertent mistake when recording numbers used in preparing its tax return. The company may, however, be liable for a shortfall penalty for not taking reasonable care.[55]

Example | Tauira 9 – Overlooking end of year transactions

Facts

A taxpayer calculates their income and prepares a draft of their income tax return on 29 March. This is on the basis they will revise their calculations and return later to include their transactions for 30 and 31 March. However, when the taxpayer finalises their return, they inadvertently overlook including transactions for 30 and 31 March. Consequently, their income tax return does not include the income they derived on 30 and 31 March.

Outcome

The taxpayer took a tax position when it filed its tax return omitting the income it derived on 30 and 31 March. The taxpayer's tax position is incorrect and there is a tax shortfall.

Viewed objectively, the tax position is **not** "about as likely as not to be correct". The income the taxpayer derived on 30 and 31 March should have been included in its income tax return. This is not something on which reasonable minds could differ. The

[54] Sections 141B(2) and (3). See also IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

[55] See IS 26/04: Shortfall penalty for not taking reasonable care.

error the taxpayer made is not an inadvertent mistake in calculating or recording numbers used in, or for use in preparing, a return.[56]

However, the taxpayer would only be liable for a shortfall penalty for taking an unacceptable tax position if the tax shortfall exceeded $50,000 and 1% of the taxpayer's total tax figure for the income year.

Relying on Inland Revenue advice

47. A taxpayer does not take an unacceptable tax position to the extent they have relied on an official opinion that the Commissioner gives. There are two types of "Commissioner's official opinion":

    - **Taxpayer-specific opinions**: The Commissioner publishes these after receiving all relevant and correct information. Only the taxpayer concerned may rely on the opinion.
    - **Official statements**: Inland Revenue publishes these statements, which include standard practice statements, interpretation statements, interpretation guidelines, questions we've been asked and Inland Revenue guides. An official statement must apply to a taxpayer's specific situation before the taxpayer can rely on it.

48. A "Commissioner's official opinion" does not include a private binding ruling. As private binding rulings bind the Commissioner, a taxpayer following the ruling will not be subject to a shortfall penalty for an unacceptable tax position.[57]

49. For more on the Commissioner's official opinions, see Status of the Commissioner's advice *Tax Information Bulletin* Vol 24, No 10 (December 2012): 86.

50. Example | Tauira 10 shows when the s 141B(1D) exception will not apply.

Example | Tauira 10 – Commissioner's official opinion

Facts

Following a review of the taxpayer's tax affairs for the 2025 income year, Inland Revenue discovers the taxpayer has claimed an income tax deduction for the cost of

[56] Section 141B(2). See also IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall".

[57] Sections 3 and 141B(1D).

revenue account property acquired during the year and still held at year end. The legislation is clear that the cost of the property is not deductible until the year the property is sold.[58]

The taxpayer took a tax position when it filed its tax return claiming the deduction. The tax position is incorrect and there is a tax shortfall exceeding the threshold amounts for the unacceptable tax position shortfall penalty.[59] Viewed objectively, the tax position is **not** "about as likely as not to be correct". It does not have about an equal chance of being correct.

Inland Revenue considers the taxpayer is liable for an unacceptable tax position shortfall penalty. However, the taxpayer argues it is not liable for the penalty because the exception in s 141B(1D) applies. It refers to an Inland Revenue letter it received in May 2024 advising that, as part of Inland Revenue's compliance programme, a review of the taxpayer's tax obligations and compliance had been completed, and no formal audit would be conducted for the 2022 and 2023 income years. The taxpayer had applied the same incorrect approach to claiming income tax deductions for the cost of revenue account property in those years. However, the incorrect approach was not discovered or considered by Inland Revenue during its review of the taxpayer's tax obligations and compliance in those years.

The taxpayer argues the advice in the May 2024 letter is a "Commissioner's official opinion" that they relied on in support of their continued use of their approach to claiming deductions for the cost of revenue account property in the year the property was acquired. The taxpayer argues that, accordingly, the exception in s 141B(1D) applies and the incorrect tax position they took in the 2025 income year is not an unacceptable tax position.

Outcome

The statement in Inland Revenue's May 2024 letter is not a "Commissioner's official opinion" on which the taxpayer could have relied when taking the incorrect tax position in the 2025 income year.

The statement in the May 2024 letter is that a review of the taxpayer's tax obligations and compliance has been completed, and no formal audit is needed. The statement is not an opinion that the taxpayer's approach to claiming deductions for the cost of revenue account property is correct, made after all information relevant to forming such an opinion was provided. When it made the statement, Inland Revenue was not aware of and had not considered the taxpayer's approach to claiming deductions for

[58] Section EA 2 of the Income Tax Act 2007.

[59] See [4].

the cost of revenue account property. It did not have all information relevant to form an opinion on the correctness of the approach.

Accordingly, the exception in s 141B(1D) would not apply. The taxpayer's tax position is an unacceptable tax position and they are liable for an unacceptable tax position shortfall penalty.

Using the AIM method

51. The AIM regime allows taxpayers considerable judgment in the preparation of their provisional tax payments. If there is a large variation between the provisional tax paid by a taxpayer using AIM and the taxpayer's year end terminal tax liability, Inland Revenue will consider whether the taxpayer has taken reasonable care in using AIM. If they have not, a shortfall penalty for not taking reasonable care may be imposed.[60]

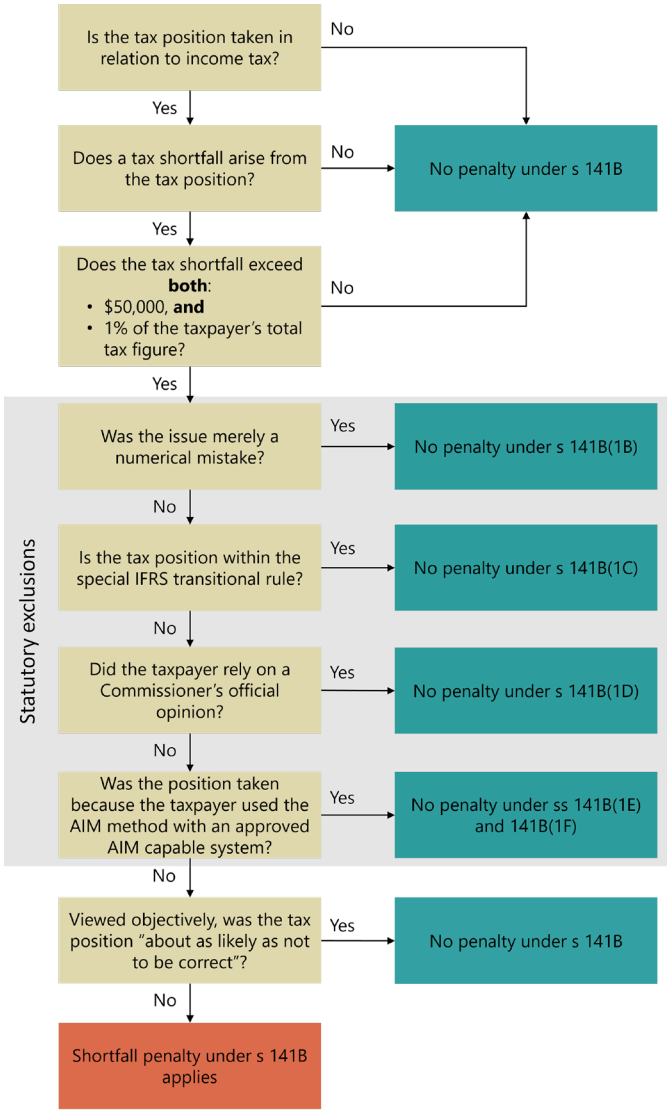
52. However, a taxpayer will **not** be liable for an unacceptable tax position shortfall penalty merely by using the AIM method and an approved AIM provider's AIM-capable accounting system.[61] This exception does not apply for larger taxpayers, with an annual gross income of more than $5 million, using "large business AIM-capable systems".[62]

[60] See IS 26/04: Shortfall penalty for not taking reasonable care and IS 26/03: Shortfall penalties – requirements for a "tax position" and a "tax shortfall". The definition of "tax position" in s 3(1) includes the use of the AIM method for provisional tax and the software product of an approved AIM provider.

[61] Section 141B(1E).

[62] Section 141B(1F) and ss 124Y, 124Z, 124ZD and 124ZE of the Tax Administration Act 1994; and s RC 7B of the Income Tax Act 2007. "Large business AIM-capable systems" are approved by the Commissioner for use under s 124ZD. See also the Commentary on the Taxation (Business Tax, Exchange of Information, and Remedial Matters) Bill 2016 and s 141B(1E).

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



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About this document | Mō tēnei tuhinga

Interpretation statements are issued by the Tax Counsel Office. They set out the Commissioner's views and guidance on how New Zealand's tax laws apply. They may address specific situations we have been asked to provide guidance on, or they may be about how legislative provisions apply more generally. While they set out the Commissioner's considered views, interpretation statements are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further Status of Commissioner's advice (Commissioner's statement, Inland Revenue, December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in an interpretation statement will not necessarily lead to the same tax result. Each case must be considered on its own facts.