

# Shortfall penalties – reductions and other matters

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IS 26/09

This interpretation statement is relevant where the Commissioner imposes a shortfall penalty for not taking reasonable care (s 141A), an unacceptable tax position (s 141B), gross carelessness (s 141C), an abusive tax position (s 141D), or evasion or similar act (s 141E). It 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.

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

## REPLACES | WHAKAKAPIA

- [IS0053](#): Shortfall penalty for not taking reasonable care (October 2005) *Tax Information Bulletin* Vol 17, No 9 (November 2005)
  - [IS0055](#): Shortfall penalty – Unacceptable interpretation and unacceptable tax position (April 2005) *Tax Information Bulletin* Vol 17, No 9 (November 2005)
  - [IS0060](#): Shortfall penalty for gross carelessness ((August 2004) *Tax Information Bulletin* 168-104 Vol 16, No 8 (September 2004): 10
  - [IS0061](#): Shortfall penalty for abusive tax position (December 2005) *Tax Information Bulletin* Vol 18, No 1 (February 2006)
  - [IS0062](#): Shortfall penalty – evasion (November 2006) *Tax Information Bulletin* Vol 18, No 11 (December 2006)
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## Introduction | Whakataki

1. This interpretation statement provides guidance on matters that arise when the Commissioner imposes one of the following shortfall penalties:
  - not taking reasonable care – 20% penalty (s 141A);
  - an unacceptable tax position – 20% penalty (s 141B);
  - gross carelessness – 40% penalty (s 141C);
  - an abusive tax position – 100% penalty (s 141D); and
  - evasion or similar act – 150% penalty (s 141E).
2. It discusses when a shortfall penalty is reduced (or increased), what happens when a taxpayer could be liable for more than one penalty, the assessment, payment and disputing of shortfall penalties.
3. It does not address when a shortfall penalty will be imposed, which is considered in:
  - [IS 26/03](#): **Shortfall penalties – requirements for a “tax position” and a “tax shortfall”**;
  - [IS 26/04](#): **Shortfall penalty for not taking reasonable care**;
  - [IS 26/05](#): **Shortfall penalty for taking an unacceptable tax position**;
  - [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 a similar act**.

## Summary | Whakarāpopoto

4. In summary, this interpretation statement explains the following matters:
  - In several situations the shortfall penalty payable by a taxpayer is reduced.
  - The level of reduction ranges from 40% to 100%.
  - The level of reduction available depends on the type of shortfall penalty imposed and the behaviour and actions of the taxpayer.
  - A shortfall penalty can be subject to a 25% increase if the taxpayer obstructs the Commissioner in determining the correct tax position.<sup>1</sup>

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<sup>1</sup> Section 141K.

- A taxpayer is liable to only one shortfall penalty for each tax shortfall. If a taxpayer could be liable for more than one shortfall penalty, the highest shortfall penalty will be imposed.<sup>2</sup>
- The Commissioner may make and amend an assessment of a shortfall penalty in the same way as they would make or amend an assessment of the tax to which the penalty relates, but does so separately from the tax.<sup>3</sup>
- Generally, a shortfall penalty is due and payable on the date the Commissioner notifies the taxpayer the penalty is due and payable.<sup>4</sup>
- A taxpayer may use a tax loss to pay a shortfall penalty imposed on an income tax liability.<sup>5</sup> A taxpayer may not use tax pooling to pay a shortfall penalty.<sup>6</sup>
- A taxpayer may dispute an assessment of a shortfall penalty in the same way as they dispute other tax assessments.

## Analysis | Tātari

5. This flowchart sets out the high level steps in determining the amount of shortfall penalty a taxpayer will pay. It also identifies the paragraphs where each step is discussed in more detail in this statement.

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<sup>2</sup> Section 149(2) and (3).

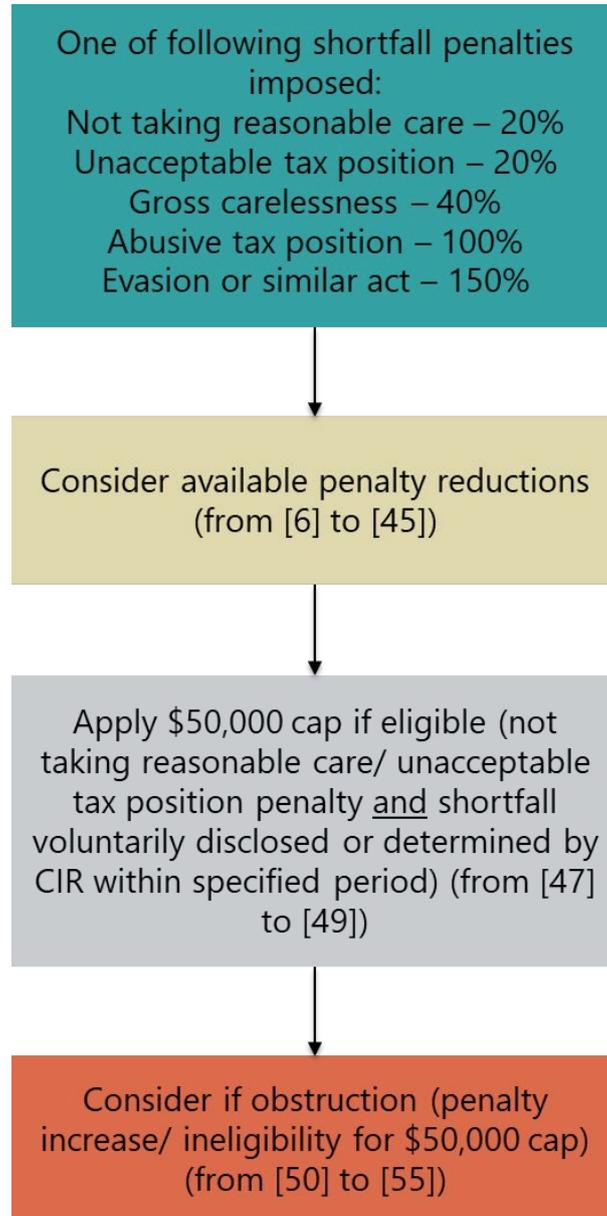
<sup>3</sup> Section 94A.

<sup>4</sup> Section 142B.

<sup>5</sup> Section IW 1 of the Income Tax Act 2007.

<sup>6</sup> Section RP 17B of the Income Tax Act 2007.

Figure | Hoahoa 1 – Determining the shortfall penalty amount payable



## Reduction of shortfall penalties for previous behaviour

6. Under s 141FB a shortfall penalty is reduced by 50% where a taxpayer has good past compliance. To qualify for the reduction, a taxpayer must not have been:
  - convicted of a “disqualifying offence”; or
  - liable for a “disqualifying penalty”.
7. A disqualifying offence is either of the following:

- An offence under any of the following provisions if the conviction was on or after 26 March 2003 and before the taxpayer takes the tax position to which the current penalty relates:
    - s 143A (knowledge offences);
    - s 143B (evasion or similar offence);
    - s 143F (offence in relation to inquiries);
    - s 143G (offence in relation to court orders);
    - s 143H (obstruction); and
    - s 145 (penalties for offences for which no specific penalty imposed); and
  - An absolute or strict liability offence under s 143 relating to the same tax type as the current penalty if the conviction was:
    - within the past 2 years, where the current penalty relates to the taxpayer's application of the PAYE rules, FBT, GST or RWT; or
    - within the past 4 years, where the current penalty relates to other tax types; and
    - before the taxpayer took the tax position to which the current penalty relates.
8. What constitutes a disqualifying penalty depends on the type of shortfall penalty the taxpayer is currently liable for. Broadly, a disqualifying penalty is an earlier shortfall penalty of a similar nature, and for the same type of tax, as the current penalty. A disqualifying penalty can prevent a taxpayer from receiving a reduction for previous behaviour and usually applies if the earlier penalty was not reduced for voluntary disclosure and happened within a recent timeframe.
9. Where the current shortfall penalty is for **not taking reasonable care** or **taking an unacceptable tax position**, a disqualifying penalty is a shortfall penalty of any sort that:
- relates to the same tax type as the current penalty;
  - is not reduced for voluntary disclosure; and
  - relates to a tax position taken within the past:
    - 2 years, where the current penalty relates to the taxpayer's application of the PAYE rules, FBT, GST, or RWT; or

- 4 years, where the current penalty relates to other tax types.<sup>7</sup>
10. Where the current shortfall penalty is for **gross carelessness** or **taking an abusive tax position**, a “disqualifying penalty” is a shortfall penalty for evasion or a similar act, gross carelessness or taking an abusive tax position that:
- relates to the same tax type as the current penalty;
  - is not reduced for voluntary disclosure; and
  - relates to a tax position taken within the past:
    - 2 years, where the current penalty relates to the taxpayer’s application of the PAYE rules, FBT, GST, or RWT, or
    - 4 years, where the current penalty relates to other tax types.<sup>8</sup>
11. Where the current shortfall penalty is for **evasion**, a disqualifying penalty is a shortfall penalty for evasion or a similar act that:
- relates to the same tax type as the current penalty;
  - is not reduced for voluntary disclosure; and
  - relates to a tax position taken on or after 26 March 2003 and before the date the taxpayer takes the tax position to which the current penalty relates.<sup>9</sup>
12. Accordingly, a previous shortfall penalty reduced for voluntary disclosure will not prevent a current shortfall penalty being reduced under s 141FB.
13. The reduction for previous behaviour applies separately for each tax type, such as FBT, income tax and GST. A penalty relating to one tax type does not preclude a reduction if the current penalty relates to a different tax type. Example | Taura 1 and Example | Taura 2 illustrate how a reduction for previous behaviour applies where a taxpayer has had a previous shortfall penalty of the same or different tax type. Example | Taura 3 illustrates a situation where a taxpayer’s previous shortfall penalty is not a disqualifying penalty.
14. A shortfall penalty relating to a tax shortfall identified at the same time as the tax shortfall to which the current penalty relates is not disqualifying if the:
- Commissioner becomes aware of both tax shortfalls in a single investigation or voluntary disclosure; and

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<sup>7</sup> See the definition of disqualifying penalty in s 141FB(3)(b)(i), (ii)(B), (iii) and (iv). Where the current shortfall penalty is for taking an unacceptable tax position the penalty will relate to income tax only (and excluding withholding-type taxes such as PAYE, FBT, and RWT).

<sup>8</sup> See the definition of disqualifying penalty in s 141FB(3)(b)(i), (ii)(A), (iii) and (iv).

<sup>9</sup> See the definition of disqualifying penalty in s 141FB(3)(a)(i)-(iv).

- the taxpayer:
  - takes the tax positions on the same date; and/or
  - has not been liable for a shortfall penalty in the past 2 years (where the current penalty relates to the taxpayer's application of the PAYE rules, FBT, GST, or RWT) or 4 years for other tax types.<sup>10</sup>

15. Example | Taura 4 illustrates a situation where tax shortfalls are identified at the same time.

### Example | Taura 1 – Previous shortfall penalty of different tax type

#### Facts

During an audit, a GST shortfall is found that warrants the imposition of a shortfall penalty for not taking reasonable care. Two years ago, the taxpayer was liable for an unacceptable tax position shortfall penalty relating to an income tax shortfall.

#### Outcome

Penalty reduced by 50% for previous behaviour.

The previous unacceptable tax position shortfall penalty relates to an income tax shortfall; that is, a different tax type from the current penalty, which relates to a GST shortfall. Accordingly, the previous shortfall penalty does not prevent the current shortfall penalty for not taking reasonable care being reduced by 50% for previous behaviour.

### Example | Taura 2 – Previous shortfall penalty of same tax type

#### Facts

During an audit, an income tax shortfall is found that warrants the imposition of a shortfall penalty for not taking reasonable care. Two years ago, the taxpayer was liable for an unacceptable tax position shortfall penalty relating to an income tax shortfall that was not reduced for voluntary disclosure.

#### Outcome

Penalty not reduced for previous behaviour.

As there was another shortfall penalty for the same tax type imposed within the past 4 years (that is, income tax) and the current shortfall penalty is for not taking reasonable

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<sup>10</sup> Section 141FB(5).

care, the current shortfall penalty for not taking reasonable care is not reduced by 50% for previous behaviour.

### Example | Taura 3 – Previous shortfall penalty not a type that is a disqualifying penalty

#### Facts

During an audit, an FBT shortfall is found that warrants the imposition of a shortfall penalty for gross carelessness. One year ago, the taxpayer was liable for a shortfall penalty for not taking reasonable care in relation to an FBT shortfall.

#### Outcome

Penalty reduced by 50% for previous behaviour.

Even though both shortfall penalties relate to the same tax type (that is, FBT), because the previous shortfall penalty was for not taking reasonable care, the previous shortfall penalty does not prevent the current shortfall penalty for gross carelessness being reduced by 50% for previous behaviour.

### Example | Taura 4 – Tax shortfalls identified at the same time

#### Facts

An investigation finds a taxpayer incorrectly claimed income tax deductions for capital improvements and excessive motor vehicle expenses. The Commissioner forms the view the taxpayer is liable for a shortfall penalty for not taking reasonable care for each tax shortfall.

The taxpayer has not previously been liable for a shortfall penalty or convicted of an offence under the Act.

#### Outcome

Each shortfall penalty is determined as if the taxpayer is not liable for the others. Each shortfall penalty is reduced by 50% for previous behaviour.

16. The Commissioner applies any previous behaviour reduction a taxpayer is entitled to after any reduction under s 141G for voluntary disclosure (discussed from [18]), s 141I for a temporary shortfall (discussed from [32]) or s 141H for disclosure of a tax position (discussed from [27]).

17. For more on the reduction for previous behaviour in s 141FB, see [SPS 06/03: Reduction of shortfall penalties for previous behaviour](#).<sup>11</sup>

## Reduction in penalty for voluntary disclosure of the tax shortfall

18. Under s 141G, a shortfall penalty may be reduced if, in the Commissioner's opinion, the taxpayer makes a full voluntary disclosure to the Commissioner of all the details of the tax shortfall. The factors the Commissioner considers in determining whether a taxpayer has made a full voluntary disclosure are summarised at [25].
19. When voluntarily disclosing a tax shortfall under s 141G, a taxpayer is informing the Commissioner they consider the tax position taken is incorrect and requesting their tax be reassessed based on the correct position.
20. Disclosure must be made:
- before the taxpayer is first notified of a pending audit or investigation (pre-notification disclosure);<sup>12</sup> or
  - after the taxpayer has been notified of a pending audit or investigation but before the audit or investigation has started (post-notification disclosure).<sup>13</sup>
21. A taxpayer is deemed to have been notified of a pending tax audit or investigation if any of the following people have been notified:
- the taxpayer;
  - an officer of the taxpayer;
  - a shareholder of the taxpayer, if the taxpayer is a close company;
  - a tax adviser acting for the taxpayer;
  - a partner in partnership with the taxpayer; or
  - a person acting for or on behalf of or as a fiduciary of the taxpayer.
22. An audit or investigation starts at the earlier of the:
- end of the first interview an Inland Revenue officer has with the taxpayer or the taxpayer's representative, after the taxpayer receives the notice of the audit or investigation; or

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<sup>11</sup> SPS 06/03: Reduction of shortfall penalties for previous behaviour (standard practice statement, Inland Revenue, June 2006).

<sup>12</sup> Section 141G(1)(a).

<sup>13</sup> Section 141G(1)(b).

- time when:
      - an Inland Revenue officer inspects the taxpayer’s information (including books or records) after the taxpayer receives the notice of the audit or investigation; and
      - the taxpayer is notified of the inspection.
- 23. The Commissioner’s practice for notifying taxpayers of a pending audit or investigation or advising them of when an audit or investigation has begun is set out in [SPS 16/03: Notification of a pending audit or investigation](#).<sup>14</sup>
- 24. The level of reduction for a voluntary disclosure depends on the type of shortfall penalty imposed and whether it is a pre-notification or post-notification disclosure. Table | Tūtohi 1 sets out the various reduction percentages for voluntary disclosure that can apply.

**Table | Tūtohi 1 – Voluntary disclosure reduction percentages**

Reduction type	Reduction percentage for each penalty type				
	Not taking reasonable care	Unacceptable tax position	Gross carelessness	Abusive tax position	Evasion
Pre-notification voluntary disclosure: s 141G(1)(a)	100%	100%	75%	75%	75%
Post-notification voluntary disclosure: s 141G(1)(b)	40%	40%	40%	40%	40%

- 25. The factors the Commissioner considers to determine whether a taxpayer has made a full voluntary disclosure of all details of a tax shortfall are outlined in [SPS 19/02: Voluntary disclosures](#).<sup>15</sup> In summary, a clear statement by the taxpayer of all the details of the tax shortfall is required. As a minimum, the Commissioner requires the disclosure of:
  - sufficient details for the Commissioner to satisfactorily identify the taxpayer (name, trade name, IRD number) and confirm their contact details (postal address, contact telephone number(s), email address);

<sup>14</sup> SPS 16/03: Notification of a pending audit or investigation (standard practice statement, Inland Revenue, June 2016).

<sup>15</sup> SPS 19/02: Voluntary disclosures (standard practice statement, Inland Revenue, March 2019). See also *Vitasovich v CIR* [2017] NZHC 1,501, (2017) 28 NZTC 23-028, at [36].

- the tax periods and tax type involved;
- an explanation as to why the tax shortfall occurred;
- sufficient detail of the tax shortfall, including its amount, and full details of the facts and circumstances leading to the tax shortfall to enable the Commissioner to make a correct assessment of the tax shortfall; and
- any further information necessary for the Commissioner to make a correct assessment.

26. For more on the reduction of shortfall penalties under s 141G, see SPS 19/02.

## Reduction for disclosure of a tax position

27. Under s 141H a shortfall penalty payable by a taxpayer under s 141B (an unacceptable tax position) or s 141D (an abusive tax position) may be reduced by 75%, if, in the Commissioner's opinion, the taxpayer makes adequate disclosure of the tax position at the time they take it. This reduction applies to only these two shortfall penalties.
28. This disclosure differs from the voluntary disclosure under s 141G (discussed from [18]). Disclosure under **s 141G** is of a tax shortfall made at some point **after the taxpayer has taken a tax position**. Disclosure under **s 141H** is of a tax position made **at the time the tax position is taken**. A taxpayer might disclose a tax position at the time the tax position is taken for various reasons. For example, the taxpayer might be unsure of the correctness of the position, disagree with the Commissioner's view or adopt a conservative position out of caution or due to materiality. By disclosing the tax position they will be entitled to a reduced penalty if the tax position is later found to be not "about as likely as not to be correct" (an acceptable tax position).<sup>16</sup>
29. If a tax return is provided, the taxpayer takes the tax position at the time it provides the return containing its tax position. If no tax return is provided, the taxpayer takes the tax position on the due date for providing the tax return for the return period.<sup>17</sup>
30. Disclosure under s 141H must be "adequate", which appears a lesser standard than "full voluntary disclosure" required under s 141G. However, for the disclosure to be

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<sup>16</sup> See Taxpayer Compliance, Standards and Penalties 2: Detailed proposals and draft legislation (government discussion document, Inland Revenue, April 1995) at [6.8] and [8.20]–[8.23].

<sup>17</sup> See ss 141H(1) and 141B(6).

effective, the taxpayer must provide full and relevant arguments for the tax position they have taken.<sup>18</sup> For adequate disclosure, the Commissioner requires:<sup>19</sup>

- the taxpayer's details (name, trade name, IRD number, address, date of birth, contact telephone and contact times);
- an overview of the position taken;
- interpretation of case law on the subject, contents of any tax opinions, legal articles and related material;
- any relevant Inland Revenue public ruling;
- a calculation, if necessary, to show the position and how it was arrived at; and
- a declaration by and the signature of the taxpayer.

31. The information may be provided using the form **Statement in support of a tax position** – [IR 282](#).<sup>20</sup>

## Reduction where shortfall is temporary

32. Under s 141I a shortfall penalty must be reduced if and “to the extent” that the tax shortfall is temporary. The penalty applying to all or that part of the tax shortfall that is temporary is reduced by 75%.<sup>21</sup>
33. The use of the words “to the extent” means the section may apply to situations where part of a tax shortfall is temporary.
34. A tax shortfall will be temporary if the Commissioner is satisfied that, because of the taxpayer's actions or by the operation of law or circumstances, the tax shortfall has or will be permanently reversed or corrected within 4 years. Section 141I(3) provides:

### 141I Reduction where temporary shortfall

...

- (3) A tax shortfall is a temporary tax shortfall for the return period of a tax position if, when the Commissioner considers the assessment of a shortfall penalty, the Commissioner is satisfied that—

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<sup>18</sup> Taxpayer Compliance, Penalties, and Disputes Resolution Bill: Commentary on the Bill (Inland revenue, September 1995) at 11.

<sup>19</sup> Section 141H(3), Background – new compliance and penalties rules *Tax Information Bulletin* Vol 8, No 7 (October 1996): 1 at 25 and Statement in support of a tax position – IR 282 (form, Inland Revenue, 2014).

<sup>20</sup> Statement in support of a tax position – IR 282 (form, Inland Revenue, 2014).

<sup>21</sup> Section 141I(1) and (2).

- (a) the tax shortfall has been or will be, in an earlier or later return period, permanently reversed or corrected—
  - (i) before the end of the 4-year period beginning after the day on which the taxpayer took the tax position; and
  - (ii) with the effect that the taxpayer pays or returns for the relevant return periods the correct total amount of tax, not including penalties and interest, in respect of the tax position; and
  - (iii) as a result of actions taken by the taxpayer or by the operation of law or circumstances; and
- (b) no tax shortfall will arise in a later return period in respect of a similar tax position; and
- (c) no arrangement exists with the purpose or effect of creating for another return period a tax deferral or advantage related to the tax position.

35. Example | Taura 5 and Example | Taura 6 illustrate situations where a tax shortfall is permanently reversed or corrected in a later return period.
36. In the case of a timing shortfall (that is, a tax shortfall arising due to a tax position having been taken in the wrong period), the Commissioner will accept the tax shortfall has been permanently reversed if:<sup>22</sup>
- it appears from the taxpayer's actions that steps taken will remedy the tax shortfall; or
  - through operation of law or circumstances, the matter will reverse itself.
37. A tax return containing the reversal is not required, provided the Commissioner is satisfied the reversal will be made.

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<sup>22</sup> When the Commissioner will accept timing shortfalls have been permanently reversed is explained in INV-231: Temporary shortfall – permanent reversals (standard practice statement, Inland Revenue, September 1999).

## Example | Taura 5 – Temporary tax shortfall – GST

### Facts

A company runs a business that involves purchasing materials from suppliers that are both registered and unregistered for GST purposes.

The company claimed an input tax deduction on secondhand goods purchased from an unregistered person in the taxable period ended 31 March 2025 based on the full purchase price totalling \$36,000, when during that period only \$5,000 of the total amount was due and paid. The balance of the purchase price (\$31,000) was due and paid on 10 April 2025. This is incorrect (in relation to the input tax deduction on \$31,000 of the \$36,000 purchase price) as an input tax deduction for secondhand goods is only allowed to the extent that payment has been made.

There is a tax shortfall in the taxable period ended 31 March 2025. Assuming a shortfall penalty is applicable on the facts the following outcome arises.

### Outcome

Penalty reduced by 75% for a temporary shortfall.

The company was entitled to claim an input tax deduction in relation to the \$31,000 in the GST return for the period ended 30 April 2025. The taxpayer, having claimed an input tax deduction for the \$31,000 in the previous GST return, did not claim an input tax deduction on that amount in its April return.

The company is allowed a temporary shortfall reduction because Inland Revenue is satisfied that the tax shortfall was permanently reversed in the April return period, and that a similar error will not occur in a later return period.

## Example | Taura 6 – Temporary tax shortfall – deduction

### Facts

A company prepays \$60,000 for its advertising for the 2025 income year (\$5,000 per month). At balance date the unexpired portion of the expenditure is \$20,000. A deduction for the full expense of \$60,000 is included in the company's 2025 income tax return. The company's tax position regarding the timing of the deduction is incorrect as \$20,000 of the expense is deductible in the 2026 income year.

There is a tax shortfall of \$20,000 in 2025. Assuming a shortfall penalty is applicable on the facts the following outcome arises.

## Outcome

Penalty reduced by 75% for a temporary shortfall.

The company is allowed a temporary shortfall reduction even though the 2026 income tax return has not been filed because Inland Revenue is satisfied that the tax shortfall will be permanently reversed (the \$20,000 of advertising expenditure is deductible in the 2026 income year), and that a similar error will not occur in a later return period.

38. In the case of tax shortfalls where the Commissioner is not satisfied they will be permanently reversed or corrected later, a tax return or other evidence showing the tax shortfall has been permanently reversed or already corrected will be required.
39. In *Brown v CIR*, the taxpayer was unable to show a tax shortfall had been permanently reversed or corrected.<sup>23</sup> The taxpayer was a chartered accountant who claimed income tax deductions for interest he paid to a bank on behalf of a trust. The Taxation Review Authority held the taxpayer was not entitled to the deductions and was liable for a shortfall penalty for not taking reasonable care.<sup>24</sup> The taxpayer argued the penalty should be reduced under s 141I because any tax shortfall was temporary. He said he made the interest payments expecting to be reimbursed and the tax shortfall would be reversed when the trust repaid him.
40. It was decided the taxpayer was not entitled to a temporary shortfall reduction in the penalties under s 141I.<sup>25</sup> The taxpayer had not shown he had a right to be repaid and that the tax shortfalls would be reversed. McKenzie J (in *Brown*) said:

[6] The Judge held that there was no written agreement between the Trust and the appellant recording the arrangement and that there was no agreement, written or oral, that the Trust would repay the taxpayer. In the light of that factual finding by the [Taxation Review Authority], which is not challenged on this appeal, **there is no contractual obligation on the Trust to pay the taxpayer the amount of the interest which he has paid on its behalf.** ...

...

[13] The amount of the penalty under s 141A of the Tax Administration Act 1994 for not taking reasonable care is 20 per cent of the resulting tax shortfall. The Judge held that this was reduced by 50 per cent under s 141FB(2) of that Act. She held that **s 141I of that Act, which applies when a tax shortfall is temporary, did not apply. She rejected a**

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<sup>23</sup> *Brown v CIR* (2014) 26 NZTC 21-089 (HC).

<sup>24</sup> *Case 3/2013* (2013) 26 NZTC 2-002 (TRA).

<sup>25</sup> At the time, s 141I required the tax shortfall be reversed or corrected before the taxpayer was first notified of a pending audit or investigation. Since 1 April 2008, s 141I has required the tax shortfall to be permanently reversed or corrected within 4 years.

**submission that the shortfall is temporary because it will be reversed when the Trust reimburses the appellant. That finding is clearly right. There is no right of reimbursement.** [Emphasis added]

## Limitation on reduction of shortfall penalty

41. Under s 141J a shortfall penalty may qualify for reduction for a voluntary disclosure under s 141G, disclosure of a tax position under s 141H **and** s 141I (for a temporary shortfall). In that case, the shortfall penalty is reduced only once.<sup>26</sup>
42. The shortfall penalty is reduced by 100%, if:
  - the shortfall penalty is for not taking reasonable care<sup>27</sup> or for taking an unacceptable tax position;<sup>28</sup> and
  - the tax shortfall is voluntarily disclosed under s 141G **before** the taxpayer is notified of a pending audit or investigation (a pre-notification disclosure).
43. In all other cases, the penalty is reduced by 75%.<sup>29</sup>
44. This means that if the taxpayer is entitled to a 40% reduction for voluntary disclosure (post-notification) and a 75% temporary shortfall reduction, the temporary shortfall reduction of 75% applies. In this case, because the penalty is not reduced for voluntary disclosure, the penalty may be a “disqualifying penalty” affecting the taxpayer’s entitlement to any future shortfall penalty reduction for previous behaviour under s 141FB.<sup>30</sup>
45. However, if the taxpayer is entitled to a 75% reduction for voluntary disclosure (pre-notification disclosure of a shortfall penalty for gross carelessness, an abusive tax position or evasion) and a 75% temporary shortfall reduction, the voluntary disclosure reduction of 75% applies. In this case, because the penalty is reduced for voluntary disclosure, the penalty will not prevent any future shortfall penalty reduction for previous behaviour under s 141FB.

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<sup>26</sup> Section 141J(2).

<sup>27</sup> Section 141A.

<sup>28</sup> Section 141B.

<sup>29</sup> Section 141J(2). Section 141J(2)(a)(i) refers also to taking a tax position involving an unacceptable interpretation of a tax law. This is a reference to the test in s 141B before its amendment by the Taxation (Maori Organisations, Taxpayer Compliance and Miscellaneous Provisions) Act 2003.

<sup>30</sup> See [8] to [10].

## Summary of reductions

46. Table | Tūtohi 2 summarises the percentage reduction for each reduction type discussed above, for each penalty type.

**Table | Tūtohi 2 - Percentage reduction for each reduction and penalty type**

Reduction type	Reduction percentage for each penalty type				
	Not taking reasonable care	Unacceptable tax position	Gross carelessness	Abusive tax position	Evasion
Previous behaviour: s 141FB	50%	50%	50%	50%	50%
Pre-notification voluntary disclosure: s 141G	100%	100%	75%	75%	75%
Post-notification voluntary disclosure: s 141G	40%	40%	40%	40%	40%
Disclosure of tax position: s 141H	N/A	75%	N/A	75%	N/A
For a temporary shortfall: s 141I	75%	75%	75%	75%	75%

## When the penalty may not be more than \$50,000

47. Under s 141JAA a shortfall penalty for not taking reasonable care<sup>31</sup> or for taking an unacceptable tax position<sup>32</sup> may not be more than \$50,000 if the taxpayer voluntarily discloses the tax shortfall under s 141G (discussed from [18]).<sup>33</sup> The penalty is also capped at \$50,000 if the Commissioner determines the tax shortfall within a period after the due date for the return to which the shortfall relates (for example, if an Inland Revenue office identifies the tax shortfall during an audit). The Commissioner must determine the tax shortfall within the later of:

<sup>31</sup> Section 141A.

<sup>32</sup> Section 141B.

<sup>33</sup> Section 141JAA(1).

- 3 months after the due date of the return; and
  - the shorter of one return period and six months.
48. The \$50,000 cap does not apply if the penalty is increased for obstruction under s 141K.<sup>34</sup>
49. This cap does not reduce the shortfall penalty but is a maximum limit on the amount of penalty that is payable. The \$50,000 cap applies after the amount of the penalty is determined under s 141A or s 141B and the reduction provisions in ss 141G, 141H (if the shortfall penalty is for taking an unacceptable tax position), 141I and 141J, are applied.

## When the penalty may be increased for obstruction

50. Taxpayers must co-operate with Inland Revenue, to the extent required by tax laws, in providing information and facilitating investigations. In *Tauber v CIR*, the Court of Appeal said:<sup>35</sup>
- [32] ... As a law enforcement authority the Commissioner must act in maintenance of the law and in the interests of justice, which includes being able to complete investigations in a timely way and without obstruction.
51. A shortfall penalty may be increased by 25% of the tax shortfall if the taxpayer obstructs the Commissioner in determining the taxpayer's correct tax position.<sup>36</sup> The penalty will not be increased if the obstruction is by a third party, eg, a tax agent. However, third parties who obstruct the Commissioner may commit an obstruction offence under s 143H.
52. Obstruction occurs when a taxpayer intentionally, and without justification or lawful excuse, impedes or makes it materially more difficult for the Commissioner to carry out lawful duties.<sup>37</sup>
53. Obstruction may include hiding, destroying or refusing access to records, failing to answer questions, and deliberately delaying providing answers or information to frustrate Inland Revenue inquiries.

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<sup>34</sup> See s 141JAA(2).

<sup>35</sup> *Tauber v CIR* (2012) 25 NZTC 20-143 (CA).

<sup>36</sup> Section 141K.

<sup>37</sup> *Urlich v Police* (1989) 4 CRNZ 144 (HC) at 145, *Goldsmith v Police* (1993) 10 CRNZ 106 (HC), *Highfield v CIR* (2000) 19 NZTC 15,609 (HC), and see also the definition of "obstruct" in the *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011).

54. Obstruction does not include exercising legal rights, such as asserting the right to legal privilege, disputing an assessment or maintaining a different view from Inland Revenue.
55. The onus is on the Commissioner to prove a penalty should be increased for obstruction. The standard of proof is the balance of probabilities.<sup>38</sup> To meet this standard, the Commissioner must show the obstruction was more probable than not.

## What happens when the taxpayer could be liable for more than one penalty

56. A taxpayer is liable to only one shortfall penalty for each tax shortfall.<sup>39</sup> If a taxpayer could be liable for more than one shortfall penalty, the highest shortfall penalty is to be imposed.<sup>40</sup>
57. The percentage of the tax shortfall payable as a shortfall penalty for an incorrect tax position increases with the degree of culpability.<sup>41</sup> The percentage is 20% of the tax shortfall for not taking reasonable care and for taking an unacceptable tax position, 40% for gross carelessness, 100% for abusive tax positions, and 150% for evasion or similar act.
58. It may not always be clear which penalty should be imposed. For example, when a taxpayer could be liable for a shortfall penalty for not taking reasonable care and for taking an unacceptable tax position (the amount of the penalty is the same). As the shortfall penalty for not taking reasonable care concerns the exercise of care and the unacceptable tax position shortfall penalty concerns whether the tax position taken is one that is objectively about as likely as not to be correct, the circumstances may show whether the taxpayer's lack of care or their interpretation was the more significant factor in the tax shortfall. After considering all the circumstances, the Commissioner will decide which penalty is more appropriately imposed. If there is a dispute, the Commissioner may propose one penalty and propose another in the alternative.
59. Table | Tūtohi 3 sets out the percentage reduction that applies when a combination of reduction types applies to a shortfall penalty imposed.

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<sup>38</sup> Section 149A(1) and (2)(a).

<sup>39</sup> This is except for employers' withholding payment penalties payable under s 141ED.

<sup>40</sup> Section 149(3).

<sup>41</sup> *Ben Nevis Forestry Ventures Ltd v CIR; Accent Management Ltd v CIR* [2008] NZSC 115, (2009) 24 NZTC 23,188 at [178].

**Table | Tūtohi 3 - Percentage reduction for each reduction and penalty type - combination**

Combination	Reduction percentage for each penalty type				
	Not taking reasonable care	Unacceptable tax position	Gross carelessness	Abusive tax position	Evasion
Voluntary disclosure (pre-notification): s 141G <b>and</b> Temporary shortfall: ss 141I and 141J	100%	100%	75%	75%	75%
Voluntary disclosure (post-notification): s 141G <b>and</b> Temporary shortfall: ss 141I and 141J	75%	75%	75%	75%	75%
Voluntary disclosure (pre-notification): s 141G <b>and</b> Previous behaviour: s 141FB	100%	100%	75% then 50%	75% then 50%	75% then 50%
Voluntary disclosure (post-notification): s 141G <b>and</b> Previous behaviour: s 141FB	40% then 50%	40% then 50%	40% then 50%	40% then 50%	40% then 50%
Voluntary disclosure (pre-notification): s 141G <b>and</b> Temporary shortfall: ss 141I and 141J <b>and</b> Previous behaviour: s 141FB	100%	100%	75% then 50%	75% then 50%	75% then 50%

Voluntary disclosure (post-notification): s 141G <b>and</b> Temporary shortfall: ss 141I and 141J <b>and</b> Previous behaviour: s 141FB	75% then 50%				
Temporary shortfall: s 141I <b>and</b> Previous behaviour: s 141FB	75% then 50%				
Disclosure of a tax position: s 141H <b>and</b> Temporary shortfall: s 141I <b>and</b> Previous behaviour: s 141FB	N/A*	75% then 50%	N/A*	75% then 50%	N/A*

\* Section 141H does not apply (but see temporary shortfall and previous behaviour combination)

## Assessment (formal determination) of the penalty

60. The Commissioner may make and amend an assessment of a shortfall penalty in the same way as they may make or amend an assessment of the tax to which the penalty relates but makes it separately from the tax.<sup>42</sup>
61. The Commissioner may assess the penalty at the same time the tax shortfall adjustments are being determined or finalised.<sup>43</sup> There is no statute bar for an assessment of a shortfall penalty. However, if the underlying tax to which the penalty relates has not been assessed by the statute bar for that tax, no shortfall penalty can be assessed. Broadly, statute bar refers to the 4 year limit on the Commissioner's power to amend income and GST assessments.<sup>44</sup>

<sup>42</sup> Section 94A.

<sup>43</sup> Section 94A(3). Do the statutory time bar provisions apply to shortfall penalties? (question we've been asked, Inland Revenue, June 2004) explains that s 94A(3) was enacted to allow the Commissioner to proceed with a shortfall penalty proposal without having to wait for the substantive matter to be finally resolved.

<sup>44</sup> Do the statutory time bar provisions apply to shortfall penalties? (question we've been asked, Inland Revenue, June 2004).

62. The Commissioner can impose a shortfall penalty after a taxpayer has been prosecuted. [IS 26/08: Shortfall penalty for evasion or a similar act](#) discusses this ability.

## Due date for payment of the penalty

63. Generally, a shortfall penalty is due and payable on the date the Commissioner notifies the taxpayer the penalty is due and payable.<sup>45</sup>
64. Where the tax shortfall is an amount of unpaid tax for which no new due date is set, the due date for payment of the shortfall penalty may not be less than 30 days after the date the Commissioner issues the notice of assessment for the penalty.<sup>46</sup>

## Payment of the penalty

65. A taxpayer may use a tax loss to pay a shortfall penalty relating to income tax.<sup>47</sup> How the Commissioner applies s IW 1 of the Income Tax Act 2007, including examples of how to calculate the amount of losses used to pay a shortfall penalty, is set out in [SPS 16/04: Payment of shortfall penalty using losses](#).<sup>48</sup>
66. A taxpayer may not use tax pooling to pay a shortfall penalty.<sup>49</sup>

## Disputing an assessment of the penalty

67. A taxpayer may dispute an assessment of a shortfall penalty in the same way as they may dispute other tax assessments. For more on disputing an assessment (including a shortfall penalty assessment), see [SPS 23/01: Disputes process](#).<sup>50</sup>
68. When disputing liability for a shortfall penalty for not taking reasonable care, taking an unacceptable tax position, gross carelessness or taking an abusive tax position, the onus is on the taxpayer to establish matters of fact. For a shortfall penalty for evasion, the onus shifts to the Commissioner. In either case, the standard of proof is the balance of probabilities.<sup>51</sup> The evidence required to meet the standard will reflect the seriousness of the circumstances of the case.<sup>52</sup>

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<sup>45</sup> Section 142B.

<sup>46</sup> Section 142B(1)(a)(i).

<sup>47</sup> Section IW 1 of the Income Tax Act 2007.

<sup>48</sup> SPS 16/04: Payment of shortfall penalty using losses (standard practice statement, Inland Revenue, August 2016).

<sup>49</sup> Section RP 17B of the Income Tax Act 2007.

<sup>50</sup> SPS 23/01: Disputes process Taxation Information Bulletin Vol 35, No 3 April 2023): 48.

<sup>51</sup> Section 149A,

<sup>52</sup> *Ben Nevis* at [180].

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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.