Background to Interpretation Statement IS 10/07

This Interpretation Statement is the successor of two exposure drafts:

- *INS0072: "Interpretation of Sections 6 and 6A of the Tax Administration Act 1994, Care and Management of Taxes" (December 2005).*

- *INS0072: "Care and management of the taxes covered by the Inland Revenue Acts" - Section 6A(2) and (3) of the Tax Administration Act 1994 (August 2008).*

Both exposure drafts were released for consultation. After taking account of the submissions and further consideration, the second exposure draft has been revised and is published as this Statement.

The principles and conclusions contained in this Statement are essentially the same as those contained in the second exposure draft. The following are the significant differences between the Statement and the second exposure draft:

- The Statement more extensively discusses the relationship between section 6A and the other provisions of the Inland Revenue Acts and, in particular, what the Commissioner can and cannot do under section 6A.

- The Statement contains new paragraphs discussing the three factors in section 6A(3), and clarifies the weight each factor is to be given.

- The Statement's discussion on settlements and agreements states the Commissioner's position on settlements in multi-party tax disputes, and notes the effect of the Protocol between the Commissioner and the Solicitor General.

- The answers given to several examples in the Statement have been extensively revised and, in some cases, a different conclusion reached. This was done so as to identify more clearly the weight that the Commissioner would give particular factors on the facts, and to specifically address matters raised in the submissions. The examples have also been reordered and given new headings. As was proposed in the second exposure draft, two examples have been deleted. A new example 6 has been inserted to deal with the relationship between section 6A and the Commissioner's binding rulings function.

Interpretation Statement IS 10/07

"CARE AND MANAGEMENT OF THE TAXES COVERED BY THE INLAND REVENUE ACTS" – Section 6A(2) and (3) of the Tax Administration Act 1994

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

Introduction

1. A reality of modern tax administration is that the Commissioner must operate the tax system with limited resources. This means that the Commissioner cannot always collect every last dollar of tax owing in every case. As a result, the Commissioner must decide how to best use his resources to maximise the taxes collected and to foster the integrity and effective functioning of the tax system. The Commissioner's resource allocation and management decisions can affect the integrity of the tax system, including taxpayer perceptions of that integrity. In particular, what may be seen by one taxpayer as flexibility that achieves a practical and sensible outcome could be seen as inconsistency or favouritism by other taxpayers.

2. Before section 6A(2) and (3) were enacted, the Inland Revenue Acts arguably obligated the Commissioner to collect all taxes owing, regardless of the costs and resources involved. According to this view, the Commissioner could decide not to collect taxes owing only if a specific statutory discretion or power authorised him to do so. The possibility that the Commissioner was required to collect all taxes owing (subject only to the specific relief and remission provisions) was problematic, because it:

   - was an unrealistic obligation given the Commissioner's limited resources; and
   - sat uncomfortably with the appropriation and financial accountability requirements under the Public Finance Act 1989 and State Sector Act 1988.

3. As a result, section 6A(2) and (3) were enacted to make clear that the Commissioner is not required to collect all taxes owing. Section 6A(2) provides that the Commissioner is "charged with the care and management of the taxes covered by the Inland Revenue Acts". Section 6A(3) provides that the Commissioner has the duty to "collect over time the highest net revenue that is practicable within the law". Section 6A(2) and (3) legislatively recognise that the Commissioner exercises managerial discretion as to the allocation and management of his resources.

4. Section 6 was enacted at the same time as section 6A(2) and (3). Section 6 requires the Commissioner, at all times, to use best endeavours to protect the integrity of the tax system. Section 6A(2) and (3), along with section 6, provide guidance on the exercise of the managerial discretion and ensure the integrity of the tax system is protected.

5. This Interpretation Statement sets out the Commissioner's view on his "care and management" responsibility in section 6A(2) and his duty in section 6A(3). In the course of doing so, it clarifies the relationship between section 6A (2) and (3) and the other provisions of the Inland Revenue Acts, including section 6. Factual

examples illustrate the principles set out in this Statement: see paragraphs 172–237 below.

Summary

6. The following paragraphs summarise the principles set out in this Statement on:

- the "care and management" responsibility under section 6A(2);
- the specific duty under section 6A(3); and
- the relationship between section 6A(2) and (3) and section 6.

Section 6A(2)

7. Section 6A(2) provides that the Commissioner is "charged with the care and management of the taxes covered by the Inland Revenue Acts". In doing so, section 6A(2) imposes two interrelated responsibilities on the Commissioner.

8. First, the Commissioner is charged with the "care" of the taxes. This means the Commissioner is responsible for promoting the integrity and effective functioning of the tax system. To discharge this responsibility, the Commissioner must seek to foster the tax system's capacity to function effectively in light of economic, commercial, technological and other changes.

9. Second, the Commissioner is charged with the "management" of the taxes. This means he is responsible for making managerial decisions in the interests of bringing about the efficient and effective administration of the tax system. The "management" responsibility recognises that the Commissioner makes decisions about the allocation and management of his limited resources. This involves the Commissioner exercising judgement as to the resources he allocates, over time, across the various parts of Inland Revenue and to dealing with particular taxpayers. The "management" responsibility also recognises that the Commissioner often exercises judgement as to how he carries out his functions.

10. Section 6A(2) and (3) were enacted together (along with section 6) to provide the framework within which the Commissioner administers the tax system. Section 6A(3) applies "[i]n collecting the taxes committed to the Commissioner's charge". The collecting of taxes is an aspect of the Commissioner's "management" responsibility. Section 6A(3) clarifies the Commissioner's overall objective in carrying out his functions in administering the tax system.

11. Section 6A(2) and (3) make clear that the Commissioner is not required to collect all taxes owing regardless of the costs and resources involved. Instead the Commissioner has the duty to maximise the net revenue collected over time. Accordingly, section 6A(2) and (3) may authorise the Commissioner to act inconsistently with the rest of the Inland Revenue Acts only to the extent that they otherwise require him to collect the full amount of tax. Section 6A(2) and (3) do not allow the Commissioner to act inconsistently with any other legislative and constitutional constraints and obligations. Some important implications of this are that the Commissioner cannot:

- disregard the requirements for the lawful exercise of powers and discretions conferred by other provisions;
- alter taxpayers' obligations and entitlements;

- issue extra-statutory concessions;
- administratively remedy legislative errors and other deficiencies;
- interpret provisions other than in accordance with statutory interpretation principles contained in the Interpretation Act 1999 and court decisions; or
- act inconsistently with his obligation under section 6 to use best endeavours to protect the integrity of the tax system.

12. As with the Commissioner's other powers and discretions, it is for the Commissioner to prescribe which officers have the delegated authority to make decisions pursuant to section 6A(2) and (3). In addition, the Commissioner may, from time-to-time, issue guidelines that set out how Inland Revenue officers are to act under section 6A(2) and (3).

Section 6A(3)

13. Section 6A(3) imposes on the Commissioner the duty to "collect over time the highest net revenue that is practicable within the law".

14. The Commissioner must discharge the section 6A(3) duty when "collecting the taxes committed to the Commissioner's charge". The word "collecting" could be interpreted narrowly to mean that section 6A(3) only applies after the taxes have been assessed and when the Commissioner seeks to recover those taxes. However, the Commissioner interprets the word "collecting" more broadly. The word refers to the actions the Commissioner takes, before and after the taxes have been assessed, to carry out his functions in administering the tax system.

15. Section 6A(3) requires the Commissioner to maximise the net revenue he collects "over time". The words "over time" require the Commissioner to balance the short and long term implications of the available means of administering the tax system or dealing with particular taxpayers. These words mean that the Commissioner may adopt courses of action that have the effect of forgoing the collection of the highest net revenue:

    - in the short term, if he considers that this will enable the collection of more net revenue in the longer term; and
    - from particular taxpayers, if he considers that this will enable more net revenue to be collected from all taxpayers.

16. In addition, section 6A(3) requires the Commissioner to have regard to three factors when deciding on which course of action to take. These factors are:

    - the resources available to the Commissioner;
    - the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and
    - the compliance costs incurred by the taxpayers.

    Section 6A(3) does not prescribe the weight to be given to each factor. The weight to be given each factor depends on the circumstances of the particular case.

17. The words "within the law" and "notwithstanding anything in the Inland Revenue Acts" affect what courses of action the Commissioner can undertake to "collect over time the highest net revenue that is practicable". The words "notwithstanding anything in the Inland Revenue Acts" mean that the Commissioner can carry out the course of action that he considers will "collect over time the highest net revenue that is practicable" even if it results in less tax being collected than is imposed, or required to be collected, by another provision. The words "within the law" mean that the Commissioner must act consistently with the other provisions of the Inland Revenue Acts.

18. Section 6A(3) is not overridden by a later enacted provision unless Parliament specifically intended the later provision to do so.

Section 6

19. Section 6(1) requires the Commissioner, at all times, to use best endeavours to protect the "integrity of the tax system". Section 6 applies to all of the Commissioner's functions in administering the tax system. The term "integrity of the tax system" is defined non-exhaustively in section 6(2).

20. Section 6 is not inconsistent with section 6A(2) and (3), because it does not require the Commissioner to collect all taxes regardless of the costs and resources involved. Therefore the Commissioner must comply with section 6 when acting under section 6A(2) and (3). This means that when deciding how he will act under section 6A(2) and (3), the Commissioner must consider, and take into account, the extent to which the available courses of action might undermine, or support, the integrity of the tax system.

Legislation

21. Sections 6 and 6A provide:

> 6 Responsibility on Ministers and officials to protect integrity of tax system
>
> (1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.
>
> (2) Without limiting its meaning, the integrity of the tax system includes—
>
> (a) Taxpayer perceptions of that integrity; and
>
> (b) The rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
>
> (c) The rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
>
> (d) The responsibilities of taxpayers to comply with the law; and
>
> (e) The responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and
>
> (f) The responsibilities of those administering the law to do so fairly, impartially, and according to law.
>
> 6A Commissioner of Inland Revenue
>
> (1) The person appointed as chief executive of the Department under the State Sector Act 1988 is designated the Commissioner of Inland Revenue.

(2) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

(3) In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—

(a) The resources available to the Commissioner; and

(b) The importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and

(c) The compliance costs incurred by taxpayers.

Legislative History

22. By way of background, the legislative history of section 6A and section 6 will be outlined. This includes discussing two reports that lead to the enactment of section 6A and section 6:

- *First Report of the Working Party on the Re-organisation of the Income Tax Act 1976*, July 1993, Wellington ("the Valabh report"); and
- *Organisational Review of the Inland Revenue Department*, Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance), April 1994, Wellington ("the ORC report").

The courts have treated these reports as relevant legislative history when considering section 6A and section 6: *Westpac Banking Corp v CIR* [2008] NZSC 24 (SC); *Auckland Gas Co Ltd v CIR* (1999) 19 NZTC 15,027 (CA); *Fairbrother v CIR* (2000) 19 NZTC 15,548 (HC); *Accent Management Ltd (No 2) v CIR* (2007) 23 NZTC 21,366 (CA). Paragraphs 35–41 below also note the origins of section 6A in the United Kingdom legislation and case law.

Valabh report (1993)

23. In June 1993 the Valabh Committee was asked to (Valabh report, page 1):

> Report to the Minister of Revenue on the appropriate statutory independence of the position of the Commissioner of Inland Revenue and its relationship with the role of the Minister in specifying priorities in, and the nature of, tax administration and enforcement given the Commissioner's accountabilities and responsibilities under the Public Finance Act and the State Sector Act.

24. In its report, the Valabh Committee noted that the Income Tax Act imposed the obligation to pay income tax, and that the Commissioner's statutory functions were directed to the quantification of that liability. It considered that in its "extreme form" the law obliged the Commissioner to "assess and recover all taxes which are due" (Valabh report, page 6). The Committee considered this was an unrealistic obligation that did not match the practice of the Department. Moreover, any such obligation sat uncomfortably with the appropriation and financial accountability requirements of the State Sector Act 1988 and the Public Finance Act 1989. These required departments to focus on the "efficient, effective and economic production of their outputs, the funding for which is appropriated by Parliament" (Valabh report, page 14). The Commissioner was required to act consistently with both enactments.

25. Consequently the Valabh Committee recommended that there should be "legislative recognition of managerial discretion to determine priorities and enter

into sensible settlements". It considered that the United Kingdom care and management provision provided "a useful model". This recommendation was accompanied by a note of caution (Valabh report, page 8):

> Such a change in the legislation would have to be presented and implemented with due care. It would be important to emphasise for instance that the taxes *are* committed to the Commissioner's *charge*. Taxpayers may try to take advantage of an apparently increased discretion, and there could be some prospect of greater variability in decisions. Taxpayers are above all entitled to decisions which are correct and consistent. As well, there is always scope for abuse in the administration of the tax system. ... It is important that the professionalism and impartiality of those charged with administering the tax system is not called into question. This could happen if the discretion were extended beyond the limited scope suggested by the Working Party and if the administrative arrangements do not involve adequate guidelines and other safeguards.

26. After the publication of the Valabh report, members of the Court of Appeal in *Brierley Investments Ltd v CIR* (1993) 15 NZTC 10,212 (CA) differed as to whether the Commissioner had "care and management" responsibilities similar to those imposed by the United Kingdom legislation.

27. In *Brierley Investments*, Richardson J considered that under the tax legislation at that time the Commissioner was obliged to assess and collect all taxes. His Honour held that the income tax legislation proceeded on the "premise" that it was in the interests of the community that the Commissioner ensured that the income of every taxpayer is assessed and the tax paid. The Commissioner could not contract out of those obligations (at page 10,217):

> Certainly there is nothing in the New Zealand legislation to justify the conclusion that the Commissioner may elect not to assess taxpayers or may elect to charge them with less tax than throughout the assessment and re-assessment period the Commissioner considers due.

28. Richardson J held that this "premise" of the New Zealand legislation meant that, unlike under the United Kingdom legislation, there was "no scope for weighing and balancing management functions against collection responsibilities in respect of particular taxpayers" (at page 10,219). His Honour recognised that in reality limited resources would affect "the nature and the extent of the investigation undertaken to quantify the statutorily imposed liability for tax and the efforts made to pursue recovery" (at page 10,215).

29. Casey J took the opposite view to Richardson J. Casey J considered that the United Kingdom "care and management" jurisprudence was relevant to New Zealand. This was because his Honour could (at page 10,225):

> ... see no essential distinction between [the Commissioner's] obligations and those of the United Kingdom Commissioners who are charged with the "care management and collection" of tax. Administering revenue acts must require similar duties and administrative discretions in each country in the assessment and collection of tax, calling for the exercise of similar standards of fairness.

Casey J accepted that the Commissioner did not have any "dispensing power", and that it could not be an abuse of power for the Commissioner to collect taxes due. His Honour considered, however, that the duty to collect taxes could not be isolated from the Commissioner's functions of administering and managing the tax system.

Organisational Review Committee report (1994)

30. In light of the recommendations of the Valabh Committee, the Organisational Review Committee (chaired by Sir Ivor Richardson) was set up to investigate the optimal organisational arrangements for the tax system. In its 1994 report, the

Organisational Review Committee reviewed and made recommendations about the tax administration structure.

31. Relevant to this Statement is the Organisational Review Committee's observations on the Commissioner's obligation to collect taxes. The Committee stated (ORC report, sections 7.2.2 and 8.2):

> **IRD's legislative objective is not achievable (refer Section 8, Objective of tax administration)**
>
> An interpretation of the legislation is that IRD is required by the Inland Revenue Department Act to 'administer' the Act and, amongst other things, to collect 'all' the tax. For many practical reasons, this objective is impossible to achieve. But there is a clear general expectation that IRD will collect the most revenue that it can within certain limitations. Other factors affecting the ability to meet requirements under [the] legislation are also relevant such as the exercise of good management, and the need for trade-offs between factors such as compliance costs and information requirements.
>
> ...
>
> ... The Review Committee agrees with the view of the Valabh Committee that this is not a realistic objective. Clearly, the Commissioner, like other chief executives, is subject to resource constraints imposed by Parliament. So the Commissioner cannot be expected to collect *all* taxes. The objective of the tax administration function of IRD therefore should be changed to match these current needs and situation.

32. The Committee agreed with the Valabh Committee's recommendation that there should be legislative recognition of the Commissioner's managerial discretion (ORC report, section 9.4.2):

> It is not possible for the Chief Executive of IRD, operating within limited resources, to ensure that every cent of due taxes is collected. Explicit recognition of the management of limited resources in the efficient and effective collection of taxes is required.

33. The Committee considered that the Commissioner's responsibility for the "management of limited resources in the efficient and effective collection of taxes" was encapsulated by the term "care and management". It defined this term as (ORC report, Glossary and Commonly Used Abbreviations, page 81):

> Managerial discretion as to the use of independent statutory powers in a cost effective manner.

The Committee recognised that the Inland Revenue Department Act 1974 (now repealed) would need to be amended to recognise any "care and management" responsibility. It considered that it was uncertain whether section 4 of the 1974 Act, which provided that the Commissioner was charged with the "administration" of the Inland Revenue Acts, "implies that care and management of limited resources overrides the more specific tasks and duties of the Commissioner defined in the Inland Revenue Acts" (ORC report, Appendix D, pages 24-25).

34. Consequently, the Committee recommended its draft section 4 of the Inland Revenue Act 1976 be enacted. It considered that draft section 4 recognised the Commissioner's managerial discretion and, at the same time, subjected this discretion to safeguards and guidance. The relevant parts of the draft section 4 were:

> (1) Every Minister and Officer of any Department having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts will at all times use their best endeavours to protect the integrity of the tax system.
>
> (2) Without limiting the meaning of "the integrity of the tax system" it reflects:

(i) taxpayer perceptions of that integrity;

(ii) the rights of taxpayers to have their liability determined fairly, impartially and according to law;

(iii) the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers;

(iv) the responsibilities of taxpayers to comply with the law;

(v) the responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and

(vi) the responsibilities of those administering the law to do so fairly, impartially and according to law.

… .

(4) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

(5) In collecting the taxes committed to the Commissioner's charge and notwithstanding anything in the Inland Revenue Acts the Commissioner will collect over time the highest net revenue that is practicable within the law having regard to:

(i) the resources available to the Commissioner;

(ii) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and

(iii) the compliance costs incurred by taxpayers.

… .

(9) For the purposes of this section "tax" includes any revenue or entitlements covered by the Inland Revenue Acts and "taxpayers" and "taxes" shall be construed accordingly.

These parts of the draft section 4 are almost identical to section 6 and section 6A(2) and (3).

United Kingdom legislation and case law

35. Both the Valabh Committee and Organisational Review Committee referred to the United Kingdom "care and management" provision. At that time this provision was contained in section 1 of the Taxes Management Act 1970:

> 1(1) Income tax, corporation tax and capital gains tax shall be under the care and management of the Commissioners of Inland Revenue (in this Act referred to as "the Board"), and the definition of "inland revenue" in section 39 of the Inland Revenue Regulation Act 1890 shall have effect accordingly.

36. Section 1 of the Taxes Management Act 1970 was repealed and replaced with section 5 of the Commissioners for Revenue and Customs Act 2005. Section 5(1) uses the term "collection and management of revenue", which section 51(3) provides has the same meaning as "care and management".

37. The House of Lords considered section 1 of the Taxes Management Act 1970 in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 ("*Fleet Street Casuals* case"). In this decision, casual workers in the printing industry had "engaged in a process of depriving the Inland Revenue of tax due on their casual earnings". The casual workers had falsified their identities and addresses when collecting their pay, so that the Inland Revenue could not assess and collect tax due from them.

38. To end this revenue loss, the United Kingdom Revenue entered an arrangement with the casual workers, the Union and the employers. By the terms of this arrangement:

- the casual workers would register with the Revenue in respect of their employment in order for future tax to be deducted at source or otherwise assessed, and to co-operate with the Revenue in settling their taxes for the previous two year period; and

- the Revenue agreed not to investigate tax liability of these casual workers in years before the past two years.

39. The respondent sought a writ of mandamus to compel the United Kingdom Revenue to act contrary to this arrangement by discharging their statutory duty to assess and collect all taxes owed by the casual workers. In considering the application, the House of Lords held in *Fleet Street Casuals* that the Revenue had a “wide managerial discretion” under section 1(1) of the Taxes Management Act 1970. Lord Diplock stated that this discretion was inherent in the phrase “care and management” (at page 101):

> … the Board are charged by statute with the care, management and collection on behalf of the Crown of income tax, corporation tax and capital gains tax. In the exercise of these functions the board have a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection.

It is worth observing that section 6A(3) is very similar to the duty Lord Diplock stated was imposed by section 1 of the Taxes Management Act 1970.

40. Their Lordships held that the arrangement was within the managerial discretion conferred by section 1 of the Taxes Management Act 1970. Without the arrangement, attempting to collect the taxes from the casual workers would have been unlikely to produce any substantial sums of money (at pages 99-100 per Lord Wilberforce; at page 101 per Lord Diplock). Moreover, the arrangement was likely to lead to a greater collection of revenue, because it brought the casual workers into the taxation system and so enabled their future income to be taxed. As Lord Roskill stated (at page 121):

> To my mind it is clear beyond argument … that what was done was a matter of taxes management, and I can see no shadow of dereliction of duty by the [Revenue], or any suggestion of improper or unlawful conduct on their part. On the contrary, what they did seems to me to have been a matter of administrative common sense. Instead of wasting public time and money in seeking to collect taxes from persons whose names were unknown and whose ability to pay was therefore equally unknown, they made an arrangement which enabled taxes not hitherto able to be collected or in fact collected, collectable in the future at a cost to the general body of taxpayers of foregoing the collection of that which in reality could never have been collected.

41. Having considered the background to section 6 and section 6A, the rest of this Statement analyses the “care and management” responsibility, and its relationship with section 6A(3) and the rest of the Inland Revenue Acts, including section 6.

"Care and management"

Two interrelated responsibilities

42. Section 6A(2) provides:

> The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

43. Section 6A(2) provides that the Commissioner has two core responsibilities: the "care and management of the taxes covered by the Inland Revenue Acts" and "such other functions as may be conferred". This Statement is concerned only with the "care and management" responsibility.

44. The phrase "care and management" is not defined in the Tax Administration Act 1994, and the courts have not given it detailed consideration. The Commissioner considers that the phrase "care and management" means that he has two interrelated responsibilities.

45. The Commissioner is charged with the "care" of the taxes. This means that the Commissioner is responsible for promoting the integrity and effective functioning of the tax system. To discharge this responsibility, the Commissioner must seek to foster the tax system's capacity to function effectively in light of economic, commercial, technological and other changes. In the context of the current tax system, the promotion of the voluntary compliance system by the Commissioner is consistent with his "care" responsibility.

46. The Commissioner is also charged with the "management" of the taxes. This means he is responsible for making managerial decisions in the interests of bringing about the efficient and effective administration of the tax system. The "management" responsibility also recognises that the Commissioner often exercises judgement about how he carries out his functions and deals with particular taxpayers. The need to exercise judgement arises, for instance, where the Inland Revenue Acts provide the Commissioner with alternative courses of action. For example:

- It is left to the Commissioner to design the audit strategy whereby the taxpayers that will be audited are selected.

- The Inland Revenue Acts provide the Commissioner with information gathering powers and specify the requirements for the lawful exercise of these powers. The Commissioner exercises judgement as to when he will exercise these powers.

- The Inland Revenue Acts may permit the Commissioner to enter into an instalment arrangement, or to institute enforcement proceedings, in order to recover outstanding tax from a particular taxpayer.

The Commissioner exercises judgement as to which of the alternative courses of action he will adopt.

47. The "management" responsibility also recognises that the Commissioner makes decisions about the allocation and management of his resources. The Commissioner has limited resources within which to carry out his functions, and this means there will be competing demands on those resources. The Commissioner must reconcile those competing demands. This involves him exercising judgement about the relative resources he allocates, over a period of

time, across the various parts of Inland Revenue, and with respect to dealing with particular taxpayers.

48. This analysis of the "care and management" responsibility is consistent with the House of Lords' decision in *Fleet Street Casuals* and the legislative history of section 6A(2).

49. In the *Fleet Street Casuals* case, the House of Lords held that the United Kingdom "care and management" provision conferred on the Inland Revenue Commissioners managerial discretion as to the "best means" of collecting the taxes. Lord Diplock stated (at page 101):

> ... the Board are charged by statute with the care, management and collection on behalf of the Crown of income tax, corporation tax and capital gains tax. In the exercise of these functions the board have a wide managerial discretion as to the best means of obtaining for the Exchequer from the taxes committed to their charge the highest net return that is practical having regard to the staff available to them and the cost of collection.

50. Similarly, Lord Roskill stated (at page 121) that the Commissioners were entitled to exhibit "administrative common sense" and to make "sensible arrangement[s] in the overall performance of their statutory duties in connection with taxes management". Finally, Lord Scarman stated that the legislation placed income tax under the Commissioners' care and management and, for that purpose, conferred on them "very considerable discretion in the exercise of their powers", and that (at page 111):

> In the daily discharge of their duties inspectors are constantly required to balance the duty to collect "every part" of tax due against the duty of good management. This conflict of duties can be resolved only by good managerial decisions, some of which would inevitably mean that not all the tax known to be due will be collected.

51. In light of the *Fleet Street Casuals* case, the Organisational Review Committee defined the phrase "care and management" for the purposes of its report as (ORC report, Glossary and Commonly Used Abbreviations, page 81):

> Managerial discretion as to the use of independent statutory powers in a cost effective manner.

52. The reference in this definition to the use of independent statutory powers in a "cost effective manner" reflects the main objective intended to be achieved by enacting section 6A(2). The Organisational Review Committee considered that enacting a "care and management" provision would remove (ORC report, Appendix D, Roles of the Commissioner and Chief Executive of IRD, paragraph 36):

> ... some doubt ... as to the extent to which the present wording of section 4 of the Inland Revenue Department Act, charging the Commissioner with 'administration' of the Inland Revenue Department Act implies that care and management of limited resources overrides the more specific tasks and duties of the Commissioner defined in the Inland Revenue Acts.

53. In contrast, the Committee considered that the phrase "care and management" explicitly recognised the Commissioner's "management of limited resources in the efficient and effective collection of taxes" and his "administrative discretion in the application of finite resources to the collection of taxes" (ORC report, sections 9.4.2 and 9.5.1, and Appendix D, paragraphs 35 and 37). As the ORC report suggests, the Committee considered that a "care and management" provision would legislatively recognise the Commissioner's need to make decisions concerning the discharge of his functions and how he would deal with particular taxpayers. This is made clear elsewhere in the ORC report (ORC report, Appendix D, paragraph 36):

> Consistent with good management practice, care and management of limited resources should be applied by the [Commissioner] across the full range of functions of tax administration, including functions which are subject to the convention of managerial independence and the statutory independence of the Commissioner in administering the Revenue Acts.

Relationship between section 6A(2) and (3)

54. Until now, the focus has been on the meaning of the words "care and management" in section 6A(2). The next issue is the relationship between section 6A(2) and (3).

55. Section 6A(3) provides:

> In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—
>
> (a) The resources available to the Commissioner; and
>
> (b) The importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and
>
> (c) The compliance costs incurred by taxpayers.

56. Section 6A(2) and (3) are considered together because section 6A(3) provides legislative guidance for the exercise of the "management" responsibility. Section 6A(3) applies "[i]n collecting the taxes committed to the Commissioner's charge". The collecting of taxes is part of the "management" responsibility in section 6A(2). As will be discussed, section 6A(3) clarifies the Commissioner's overall objective in carrying out his functions in administering the tax system: see paragraphs 95–103 below. This position is supported by the legislative history to section 6A(2) and (3). These provisions were enacted together (along with section 6) as a "legislative package" to provide the framework within which the Commissioner administers the tax system.

57. Further, as already noted, section 6A(3) is almost identical to the duty that Lord Diplock in *Fleet Street Casuals* identified as imposed by the United Kingdom "care and management" provision. In *Fairbrother v CIR*, Young J noted (at paragraphs 21 and 26) that this similarity was "not a coincidence". His Honour held that "[section] 6A must be regarded as statutory ratification of the approach adopted by the House of Lords in *Fleet Street Casuals".*

58. Section 6A(3) is more extensively analysed later in paragraphs 90-135.

Relationship with the other provisions of the Inland Revenue Acts

59. An issue arises about the extent to which section 6A(2) and (3) authorise the Commissioner to act inconsistently with the rest of the Inland Revenue Acts (including section 6).

60. One possible interpretation of the words "notwithstanding anything in the Inland Revenue Acts" in section 6A(3) is that section 6A(2) and (3) override all other provisions. Under this interpretation, the Commissioner could act inconsistently with any provision if he considers this would maximise the net revenue collected. It is acknowledged that passages in several High Court decisions appear to support this interpretation: see *Fairbrother v CIR,* at paragraph 26; *Raynel v CIR* (2004) 21 NZTC 18,583, at paragraph 49; *Accent Management Ltd v CIR* (2006) 22 NZTC 19,758 (HC), at paragraph 71. However, the Commissioner considers

that this interpretation is incorrect, because Parliament did not intend section 6A(2) and (3) to override all other provisions.

61. In the Commissioner's view, the better interpretation is that section 6A(2) and (3) allow him to act inconsistently with the rest of the Inland Revenue Acts only to the extent that they can be seen to obligate him to "collect all taxes that are due regardless of the resources and costs involved" (*Fairbrother v CIR* (2000), at paragraph 27). This reflects Parliament's purpose in enacting section 6A(2) and (3). Before these provisions were enacted, the tax legislation at the time arguably required the Commissioner to seek to collect all taxes owing (subject only to the specific relief and remission provisions). Section 6A(2) and (3) were enacted to make clear that the Commissioner was under no such obligation, and that instead he has the duty of maximising the net revenue collected over time.

62. It might be noted that interpreting section 6A(2) and (3) as overriding all other provisions would seem to effectively alter the constitutional framework within which the tax system operates. Instead of administering the legislation as enacted by Parliament, the Commissioner would have an overarching discretion whether to give effect to it. Such an interpretation would seem to permit the Commissioner to maximise the net revenue collected by (for instance):

- disregarding legislative requirements or limitations imposed on him by Parliament (eg, by amending assessments to increase the assessed tax liability despite the four-year time limit having been exceeded); or

- altering the statutory assessment basis by advising taxpayers to assess themselves other than in accordance with the legislation.

63. The Commissioner considers that Parliament did not intend section 6A(2) and (3) to alter the constitutional framework within which the tax system operates. This is supported by section 6A(3) requiring the Commissioner to "collect over time the highest net revenue that is practicable **within the law**" (emphasis added). The words "within the law" indicate that Parliament intended to legally constrain the Commissioner's ability to maximise the net revenue collected: they require him to act consistently with the specific constraints and obligations imposed on him by other provisions.

64. This interpretation is supported by *Kemp v CIR* (1999) 19 NZTC 15,110. In that decision, the High Court held that the Commissioner could not disregard section 414A(5) of the Income Tax Act 1976. Section 414A(5) required the Commissioner to obtain ministerial approval before remitting more than $50,000 tax. Robertson J held that section 6A(2) and (3) did not confer a "general dispensing power" on the Commissioner (at page 15,117):

> I accept the argument of the Commissioner that even if a general power to enter into settlements with taxpayers exists, it would not override the specific requirements laid down by Parliament for the exercise of powers of remission in Part XVI of the IT Act. If this were the case, it would be possible for the Commissioner to avoid the limitations on his discretionary power merely by omitting to take one of the steps specified in sections such as s 414A and then claiming recourse to a general power. To allow such an unbridled discretion can not have been the intention of Parliament. I agree with the Commissioner that this would allow through a "back door" that which does not meet the explicit statutory requirements.

Therefore the Commissioner was required to comply with section 414A(5) and, in this case, had acted unlawfully in failing to do so.

Implications of conclusions on the relationship between section 6A(2) and (3) and the other provisions of the Inland Revenue Acts

65. Paragraphs 66-86 below discuss some of the important implications of the Commissioner's conclusions on the extent to which section 6A(2) and (3) authorise him to act inconsistently with the other provisions of the Inland Revenue Acts. This discussion is intended to assist in clarifying what the Commissioner can and cannot do under section 6A(2) and (3). The important implications discussed are that section 6A(2) and (3) do not authorise the Commissioner to:

- disregard the requirements for the lawful exercise of powers and discretions conferred by other provisions;
- alter taxpayers' obligations and entitlements;
- issue extra-statutory concessions;
- administratively remedy legislative errors and other deficiencies; or
- interpret provisions other than in accordance with statutory interpretation principles contained in the Interpretation Act 1999 and court decisions.

The relationship between section 6A(2) and (3) and section 6 is another important issue, and this is discussed later in paragraphs 136-150.

Commissioner cannot disregard the requirements for the lawful exercise of the powers and discretions conferred by other provisions.

66. It follows from the Commissioner's conclusions that section 6A(2) and (3) do not affect the requirements for the lawful exercise of the powers and discretions conferred on him by other provisions. If the requirements for the lawful exercise of a particular power or discretion are not satisfied, section 6A(2) and (3) do not authorise the Commissioner to exercise that power or discretion nevertheless. Similarly section 6A(2) and (3) do not allow the Commissioner to disregard explicit legislative directions or prohibitions on how he must or must not act. Accordingly, section 6A(2) and (3) do not allow the Commissioner to (for example):

- exercise search and seizure powers, or to retain seized property, other than in accordance with the provisions governing the exercise of these powers (*Singh v CIR* (1999) NZTC 15,050);
- recover outstanding tax inconsistently with section 176(2)(b), which prohibits the recovery of outstanding tax to the extent it would place the taxpayer, being a natural person, in "serious hardship" (*W v CIR* (2005) 22 NZTC 19,602, at paragraph 24); or
- write-off outstanding tax inconsistently with section 177C(3), which prohibits the writing-off of outstanding tax in certain circumstances (*Raynel v CIR*, at paragraph 61; *Clarke & Money v CIR* (2005) 22 NZTC 19,165, at paragraph 25; *Rogerson v CIR* (2005) 22 NZTC 19,260, at paragraph 51).

67. In the same way, section 6A(2) and (3) do not allow the Commissioner to carry out courses of action that are unlawful under another enactment or rule of law. For instance, section 6A(2) and (3) do not authorise the Commissioner to decide

not to respond to information requests within the period required by the Official Information Act 1982.

68. Further, section 6A(2) and (3) do not authorise the Commissioner to carry out actions that he does not have the power to do. For instance, if the Commissioner were prevented from writing off tax under section 177C (which provides the Commissioner with discretion to write off outstanding tax) or any other provision, the Commissioner could not write off that tax under section 6A(2) and (3). However, the Commissioner could decide not to allocate the resources required to collect outstanding tax from a particular taxpayer. This would involve the exercise of the managerial discretion as to the allocation and management of resources. If the Commissioner were to make such a decision, he would not be writing-off the outstanding tax but rather only deciding not to take the steps required to collect the tax. The taxpayer's liability to pay that tax would remain despite the Commissioner's resource decision.

Commissioner cannot alter taxpayers' obligations and entitlements

69. Another implication of the Commissioner's conclusions is that section 6A(2) and (3) do not allow him to alter taxpayers' legislative obligations and entitlements. The Commissioner can alter taxpayers' obligations and entitlements only if authorised by another provision. For example, section 6A(2) and (3) do not authorise the Commissioner to:

- collect more tax than imposed by the legislation;
- amend taxpayers' assessments other than in accordance with the statutory assessment basis (*Vestey v IRC* [1979] 3 All ER 976);
- contract with taxpayers as to their tax liability in future years (*Ali Fayed v IR Commrs* [2006] BTC 70); and
- grant legislative entitlements to taxpayers who are not eligible under the legislation (*R (on the application of Wilkinson) v IRC* [2005] UKHL 30).

70. Similarly, the Commissioner cannot advise taxpayers that they are not required to comply with their tax obligations. The Commissioner could not, for instance, direct taxpayers to assess themselves other than in accordance with the statutory assessment basis. Taxpayers' obligations are imposed on taxpayers by the legislation itself, and the tax liability is payable independently of its assessment: *CIR v Lemmington Holdings* (1982) 5 NZTC 61,268 (CA); *Reckitt and Colman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032; *Westpac Banking Corp v CIR* (2009) 24 NZTC 23,340. This is made clear by section 15B of the Tax Administration Act 1994:

> **15B Taxpayer's tax obligations**
>
> A taxpayer must do the following:
>
> (aa) If required under a tax law, make an assessment:
>
> (a) Unless the taxpayer is a non-filing taxpayer, correctly determine the amount of tax payable by the taxpayer under the tax laws:
>
> (b) Deduct or withhold the correct amounts of tax from payments or receipts of the taxpayer when required to do so by the tax laws:
>
> (c) Pay tax on time:

(d) Keep all necessary information (including books and records) and maintain all necessary accounts or balances required under the tax laws:

(e) Disclose to the Commissioner in a timely and useful way all information (including books and records) that the tax laws require the taxpayer to disclose:

(f) To the extent required by the Inland Revenue Acts, co-operate with the Commissioner in a way that assists the exercise of the Commissioner's powers under the tax laws:

(g) Comply with all the other obligations imposed on the taxpayer by the tax laws.

(h) If a natural person to whom section 80C applies, inform the Commissioner that the person has not received an income statement for a tax year, if the income statement is not received by the date prescribed by section 80C(2) or (3):

(i) If the taxpayer is a natural person, correctly respond to any income statement issued to the taxpayer.

71. It follows that if the Commissioner were to inform taxpayers that they are not required to comply with their tax obligations, he would be purporting to suspend the operation of the Inland Revenue Acts. This would be inconsistent with Article 1 of the Bill of Rights 1688 (Imp), which declares illegal the "suspending of laws … by Regall Authority without consent of Parlyment". Given the Commissioner is an officer of the Crown and collects the tax as the statutory agent of the Crown (*Cates v CIR* (1982) 5 NZTC 61,237 (CA)), such a statement would arguably imply that "what was being done was lawful and had legal effect" (*Fitzgerald v Muldoon* [1976] 2 NZLR 615).

72. While the Commissioner cannot purport to alter taxpayers' obligations and entitlements, section 6A(2) and (3) do authorise him to decide not to allocate the resources required to collect the full amount of taxes imposed by another provision. If the Commissioner were to make such a decision, with the result that not all taxes are collected, he is not dispensing with the provisions imposing the tax liability. The Commissioner's resource allocation and management decisions are administrative acts that do not affect the underlying tax liability. Taxpayers are obliged to pay the full amount of tax imposed regardless of whether the Commissioner decides to allocate resources to collect it.

Extra-statutory concessions

73. It has been occasionally suggested that section 6A(2) and (3) authorise the Commissioner to issue what are sometimes called extra-statutory concessions. In the United Kingdom, HM Revenue & Customs has issued extra-statutory concessions since at least 1947. It defines "extra-statutory concession" as ("Extra-Statutory Concessions – ex-Inland Revenue" (Concessions as at 31 August 2005), at page 2 available at: HM Revenue & Customs website http://www.hmrc.gov.uk):

> … a relaxation which gives taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law. Most concessions are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter.

This definition indicates that extra-statutory concessions reduce the tax liability otherwise imposed by the legislation, and in this sense they purport to alter taxpayers' legal obligations and entitlements.

74. As was discussed earlier in paragraphs 69-72, section 6A(2) and (3) do not allow the Commissioner to alter taxpayers' obligations and entitlements. Therefore it follows that section 6A(2) and (3) do not authorise the issuing of extra-statutory

concessions. This position is supported by the fact that, despite the well-established practice in the United Kingdom, neither the Valabh report nor the ORC report suggests that it was intended that any New Zealand "care and management" provision would authorise the issuing of extra-statutory concessions.

75. As an aside, it is noted that HM Revenue & Customs considers that the House of Lords' decision in *R (on the application of Wilkinson) v IRC* (discussed in paragraphs 83–84 below) indicates that its ability to issue extra-statutory concessions is more limited than previously considered: Finance Bill 2008, Clause 154, Explanatory Note, paragraphs 12–13. As a consequence, section 160 of the Finance Act 2008 (UK) was enacted to enable extra-statutory concessions issued before 2008 to be given statutory effect. Section 160(1) provides that "[t]he Treasury may by order make provision for and in connection with giving effect to any existing HMRC concession."

Commissioner cannot administratively remedy legislative errors and other deficiencies

76. The Commissioner's conclusions also mean that section 6A(2) and (3) do not authorise him to administratively remedy legislative errors and other deficiencies. Similarly these provisions do not authorise the Commissioner to avoid or reduce the undesirable effects of legislative obligations imposed on taxpayers or the Commissioner. Legislative errors and deficiencies can be remedied only by Parliament.

77. The House of Lords has taken a similar position with respect to the United Kingdom "care and management" provision.

78. In *Vestey v IRC* the House of Lords considered section 142 of the Income Tax Act 1952 (UK). As interpreted by earlier courts, section 142 made each beneficiary fully liable for the tax on the total income of the trust. This meant that section 142 imposed double taxation where multiple beneficiaries derived income from a discretionary trust, because it did not provide any means of apportioning the total tax liability amongst the beneficiaries. It was unlikely that the United Kingdom Parliament intended this result. To remedy this apparent legislative deficiency, the United Kingdom Commissioners adopted a policy whereby the total tax liability was apportioned between the beneficiaries.

79. The House of Lords held that the Commissioners had no authority to adopt this policy. The policy "involved … not one of construction, even one of strained construction, [of the legislation] but … one of rewriting the enactment" (per Lord Wilberforce, at page 983). Although the House of Lords acknowledged that the policy was intended to "mitigate the gross injustice" of the provision, the Commissioners had no authority to act contrary to the provision because it was mandatory (per Viscount Dilhorne, at page 994). No other provision in the tax legislation provided any "statutory support" for the policy adopted by the Commissioners (per Lord Edmund-Davies, at page 1002).

80. Lord Wilberforce identified "fundamental objections" to this policy. The discretion claimed by the Commissioners was inconsistent with Parliamentary sovereignty and with the constitutional maxim that Parliament alone imposes taxes. His Lordship stated (at pages 984-985):

> Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.

> A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle. It may be that the Revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it: but, unless, it has done so, the courts, acting on constitutional principles, not only should not, but cannot validate it.

81. His Lordship rejected the Commissioners' submission that their "general administrative discretion in the execution of" the tax legislation provided the legal basis for the policy (at page 985):

> When Parliament imposes a tax, it is the duty of the commissioners to assess and levy it upon and from those who are liable by law. Of course they may, indeed, should act with administrative commonsense. To expend a large amount of taxpayer's money in collecting, or attempting to collect, small sums would be an exercise in futility; and no one is going to complain if they bring humanity to bear in hard cases. I accept also that they cannot, in the absence of clear power, tax any given income more than once. But all this falls far short of saying that so long as they do not exceed a maximum they can decide that beneficiary A is to bear so much tax and no more, or that beneficiary B is to bear no tax.
>
> This would be taxation by self-asserted administrative discretion and not by law. … "one should be taxed by law, and not be untaxed by concession."

82. Lord Wilberforce acknowledged that the Commissioners had "done their best to devise a system which is workable and reasonably fair". Nevertheless the Commissioners had no legal authority to remedy the legislative deficiency (at page 986):

> But whatever system they might devise lacks any legal basis. I must regard this case therefore as one in which Parliament has attempted to impose a tax, but in which it has failed, in the case of discretionary beneficiaries, to lay down any basis on which it can be assessed or levied. In the absence of any such basis the tax must fail.

83. More recently in *R (on the application of Wilkinson) v IRC*, the House of Lords considered whether the United Kingdom "care and management" provision authorised HM Revenue & Customs to extend to widowers an allowance that the legislation provided only to widows. Wilkinson submitted that the "care and management" provision authorised HM Revenue & Customs to extend the allowance to widowers, and that this should be done to comply with the United Kingdom's international obligations to eliminate gender discrimination.

84. The House of Lords rejected this submission. It held that the "care and management" provision could not authorise the Commissioners to grant the allowance to widowers. Lord Hoffmann acknowledged that the "care and management" provision conferred on the Commissioners wide managerial discretion as to the best means of collecting the taxes, but this did not (at paragraphs 21–22):

> [21] … enable the commissioners to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant, and on the grounds not of pragmatism in the collection of tax but of general equity between men and women.
>
> [22] It follows that in my opinion the legislation gave the commissioners no power to act otherwise than to disallow claims for allowances by widowers … .

85. In *Vestey* and *Wilkinson* the House of Lords held that the United Kingdom "care and management" provision does not enable legislative errors and deficiencies to be administratively remedied. This is entirely consistent with the Commissioner's view of the relationship between section 6A(2) and (3) and the other provisions of the Inland Revenue Acts.

Role of the "care and management" responsibility and section 6A(3) in statutory interpretation

86. Another important implication of the Commissioner's conclusions is that section 6A(2) and (3) do not justify him interpreting other provisions in the Inland Revenue Acts other than in accordance with statutory interpretation principles. For instance, the Commissioner cannot prefer one interpretation, over another competing interpretation, on the basis that it will result in the highest net revenue being collected over time. The other provisions in the Inland Revenue Acts must be interpreted only according to the principles of statutory interpretation contained in the Interpretation Act 1999 and in court decisions.

Delegation and guidelines

87. As already stated, the "management" responsibility recognises that the Commissioner often exercises judgement as to how he carries out his functions and deals with particular taxpayers. This means that the "management" responsibility is not only relevant with respect to "high-level" managerial decision-making. It is also relevant with respect to the making of day-to-day managerial decisions concerning particular taxpayers.

88. As with his other powers and discretions, it is for the Commissioner to prescribe which officers have the delegated authority to make decisions under section 6A(2) and (3). In addition the Commissioner may from time-to-time issue guidelines so as to ensure that across Inland Revenue there is consistent decision-making under section 6A(2) and (3). These guidelines will assist in protecting the integrity of the tax system as required by section 6, by ensuring "recognition of the relevant criteria and a proper degree of consistency in the exercise of discretions": *CIR v Wilson* (1996) 17 NZTC 12,512 (CA).

89. The Organisational Review Committee considered that guidelines would help to ensure that "perceptions of the integrity of the tax system are not diminished". It noted that particular taxpayers may be concerned about the application of the Commissioner's authority to enter settlements, and that some taxpayers "may also attempt to take advantage of the apparently increased discretion". The Committee therefore recommended (ORC report, Appendix D, at paragraphs 48-49):

> To ensure the proper and consistent use of managerial responsibility in these areas, the tax administration will be required to refine or develop internal guidelines for the exercise of care and management in the administration of the Inland Revenue Acts. The guidelines should be consistent with the objective of maximising net revenue over time according to the law and give guidance to staff on the proper procedures and considerations to take into account as they apply tax law.

Section 6A(3): Duty to collect over time the highest net revenue that is practicable within the law

Overview of section 6A(3)

90. Section 6A(3) provides:

> In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—
>
> (a) The resources available to the Commissioner; and
>
> (b) The importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and

(c) The compliance costs incurred by taxpayers.

91. Section 6A(3) requires the Commissioner to identify the available courses of action for administering the tax system or for dealing with particular taxpayers. These courses of action must be “within the law”. Section 6A(3) then requires the Commissioner to evaluate these courses of action by considering their likely effect on the amount of net revenue collected over time, and by having regard to the three factors in section 6A(3)(a), (b) and (c).

92. Once the Commissioner has identified the course of action that is consistent with the duty to “collect over time the highest net revenue that is practicable within the law”, the words “notwithstanding anything in the Inland Revenue Acts” authorise the Commissioner to undertake that course of action even if it will result in less tax being collected than is imposed, or required to be collected, by the other provisions of the Inland Revenue Acts.

93. In deciding which course of action is consistent with section 6A(3), the Commissioner will generally consider the circumstances of the particular taxpayers or groups of taxpayers concerned. However, the Commissioner may also from time to time issue general statements of policy that set out the course of action he will take in particular types of situations.

94. The text of section 6A(3) is analysed in the following paragraphs.

Scope of section 6A(3): “In collecting the taxes committed to the Commissioner’s charge”

95. Section 6A(3) applies when the Commissioner is “collecting the taxes committed” to his charge. Neither the courts nor the Organisational Review Committee has commented on the meaning of the word “collecting”.

96. The word “collecting” could be construed as meaning the actual receiving or taking possession of taxes. Under this narrower interpretation, section 6A(3) would apply only when the Commissioner seeks to recover the taxes assessed as owing, for instance when deciding whether to exercise enforcement powers or instead enter an instalment arrangement. This means that section 6A(3) would apply with respect to the Commissioner’s actions after the tax liability has been assessed, but would not cover his actions **before** the tax liability has been assessed or that relate to ensuring the correct assessment of tax.

97. It is considered that the better view is that the word “collecting” has a broader meaning: it refers to the Commissioner’s functions that relate to, or enable, the receiving or taking possession of taxes. Under this, more holistic, interpretation section 6A(3) applies to the Commissioner’s functions both before and after the tax liability has been assessed. It would also include a wide range of administrative and support functions undertaken by the Commissioner, and also the Commissioner’s actions that relate to ensuring the correctness of taxpayers’ assessments (eg, the exercise of audit and investigative powers and reassessment powers).

98. The narrower interpretation gives the word “collecting” a meaning it can have in isolation. However, the Commissioner considers that the broader interpretation is to be preferred, because it is consistent with the statutory context and gives better effect to the purpose of section 6A(3). The Organisational Review Committee envisaged that the section 6A(3) duty would be the “overall objective” of the “total tax system” (see ORC report, section 8.2). Section 6A(3) would

have this function under the broader interpretation of the word "collecting", because it would apply to every aspect of the Commissioner's administration of the tax system.

99. It is relevant to note that the Organisational Review Committee adopted the words "in collecting the taxes committed to the Commissioner's charge" as a result of the Valabh Committee's recommendation that (Valabh report, page 8):

> Such a change in the legislation [ie, the adoption of a provision similar to the United Kingdom "care and management" provision] would have to be presented and implemented with due care. It would be important to emphasise for instance that the taxes *are* committed to the Commissioner's *charge*. Taxpayers may try to take advantage of an apparently increased discretion … .

100. This indicates that the words "in collecting the taxes committed to the Commissioner's charge" were not intended to confine section 6A(3) to the actual receiving or taking possession of taxes. Instead the addition of these words was considered necessary to guard against taxpayers improperly taking advantage of "an apparently increased discretion" brought about by enacting a "care and management" provision (Valabh report, at page 7).

101. This in turn highlights a nuance inherent in the words "in collecting the taxes committed to the Commissioner's charge". The words "committed to the Commissioner's charge" emphasise that decisions concerning the collection of the taxes are those of the Commissioner alone. These words accordingly make it clear that section 6A(3) does not provide taxpayers with any basis for expecting that they will not be required to comply with their tax obligations.

102. In summary, the words "in collecting the taxes committed to the Commissioner's charge" cover all the Commissioner's functions that relate to, or enable, the receiving or taking possession of taxes. As a result, section 6A(3) applies whenever the Commissioner exercises the managerial discretion conferred by the "care and management" responsibility.

103. It is important to note that this conclusion concerns only the ambit of section 6A(3). It does not directly affect what the Commissioner can or cannot do to "collect over time the highest net revenue that is practicable within the law". The conclusions on the meaning of the words "within the law" and "notwithstanding anything in the Inland Revenue Acts" in section 6A(3) govern what courses of action the Commissioner can undertake to discharge the section 6A(3) duty: see paragraphs 127-130 below.

Duty to collect over time the highest net revenue that is practicable

104. Section 6A(3) requires the Commissioner to "collect over time the highest net revenue that is practicable".

105. The phrase "highest net revenue" is not defined in the Tax Administration Act 1994. The Organisational Review Committee defined these words as "actual revenue less administration (collection) costs" (ORC report, section 8.2, footnote 2). It defined "administrative costs" as the "costs incurred by the tax administration in assessing and collecting taxes" (ORC report, Appendix, "Glossary and Commonly Used Abbreviations", page 81).

106. The significance of the duty imposed by section 6A(3) was discussed in *Fairbrother v CIR.* In this decision, Young J noted the similarity between section 6A(3) and the obligation imposed by the United Kingdom "care and management"

provision (recognised by Lord Diplock in *Fleet Street Casuals*). His Honour considered (at paragraphs 26-27) that section 6A(2) and (3) amounted to "statutory ratification" of the House of Lords' approach in *Fleet Street Casuals.* Consequently, there was no scope for an argument that the Commissioner was under "an absolute obligation to collect the right amount of tax" in the absence of explicit contrary statutory direction.

107. At the same time, section 6A(3) does not authorise the Commissioner to decide to collect only "some" taxes owing. The duty to collect the "highest net revenue" means the Commissioner is obliged to **maximise** the net revenue having regard to the relevant considerations in section 6A(3). Section 6A(3) requires the Commissioner to compare the available courses of action in terms of their effect on the amount of net revenue that he collects over time, both from the particular taxpayers concerned and from all taxpayers.

108. In making this comparison, the Commissioner must consider the short and long term implications of the available courses of action. This is required by the words "over time" in section 6A(3). The Organisational Review Committee discussed the meaning of the words "over time" (ORC report, section 8.2, footnote 1):

> The requirement to balance short term and long term considerations, and to have regard to the importance of promoting voluntary compliance, will be important moderating influences in circumstances where the objective may otherwise prompt an unnecessarily vigorous and short-term approach to revenue collection.
>
> 1. *Over time* indicates the obvious need for the tax administration to balance short and longer term implications of possible strategies before deciding on any particular course of action. *Over time* is intended to capture the concept of net present value (a valuation technique common to business as well as governments) and appears to be the best short and non-technical means of capturing the concept.

109. These comments highlight that the practical effect of the words "over time" is that the Commissioner may adopt courses of action that have the effect of forgoing the collection of the highest net revenue:

- in the short term, if he considers that this will enable the collection of more net revenue in the longer term; and
- from particular taxpayers, if he considers that this will enable more net revenue to be collected from all taxpayers.

Factors the Commissioner must have regard to: section 6A(3)(a), (b) and (c)

110. In determining which course of action is consistent with the duty to collect over time the highest net revenue that is practicable within the law, section 6A(3) requires the Commissioner to have regard to three factors. These factors are:

> (a) The resources available to the Commissioner; and
>
> (b) The importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and
>
> (c) The compliance costs incurred by taxpayers.

111. Section 6A(3) requires the Commissioner to consider and balance all three factors listed in section 6A(3). In *Raynel v CIR*, Randerson J outlined the exercise required by section 6A(3) (at paragraphs 50 and 52):

> [50] These qualifications to the Commissioner's duty mean that the Commissioner is not obliged to take steps to collect revenue regardless of issues of practicality, available

> resources, and costs incurred. Rather, the [Commissioner's] duty is to be approached on a pragmatic basis with proper regard to the likely benefits and the costs of achieving them.
>
> … .
>
> [52] … But the considerations relevant to the exercise of the Commissioner's duty are not limited to issues of practicality, resources and costs. Importantly, the Commissioner is also required by section 6A(3)(b) to have regard to the importance of promoting compliance (especially voluntary compliance) by all taxpayers with the Inland Revenue Acts.

112. The factors in section 6A(3) provide the framework within which the Commissioner evaluates the short and long term implications of the available courses of action for dealing with particular situations. The word "and" after the first two factors indicates that the Commissioner must have regard to all of the factors when evaluating the available courses of action.

113. Section 6A(3) does not stipulate the weight to be given to each of the factors. It is considered that the weight to be given each factor will depend on the circumstances of the particular case. Thus, in *Raynel v CIR* Randerson J stated (at paragraph 56):

> It is difficult and undesirable to give precise guidelines to the Commissioner other than the statutory considerations themselves. It will be a matter for the Commissioner to carry out his duty, having regard to the relevant considerations as they apply in individual cases and circumstances.

114. Randerson J noted (at paragraph 73) that decisions made by the Commissioner pursuant to the "broad managerial responsibilities" given to him "essentially involve the exercise of judgment within the statutory framework". Consequently the Court would be "slow to interfere" with the proper exercise of the Commissioner's duties and discretions in relation to the recovery of outstanding taxes. (For similar comments see also *Rogerson v CIR*, at paragraph 63.)

115. In the following paragraphs, the three factors in section 6A(3) are discussed.

"Resources available to the Commissioner" (section 6A(3)(a))

116. This first factor reflects that the Commissioner has limited resources. It covers the financial, time and human (including technical knowledge and expertise) resources to which the Commissioner has access. This factor includes not only the resources currently "on hand", but also the opportunity costs of using these resources in terms of current and future competing demands for them elsewhere in the tax system.

"Importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts" (section 6A(3)(b))

117. This second factor consists of two interrelated parts: the promotion of compliance generally and the promotion of voluntary compliance in particular. Section 6A(3)(b) refers to the promotion of compliance by "all taxpayers", which emphasises that section 6A(3) is concerned with the highest net revenue collected from the tax system as a whole.

118. The relationship between this factor and the amount of net revenue collected is obvious. Greater compliance results in more tax being collected. Greater **voluntary** compliance increases the net revenue collected by reducing the Commissioner's administration costs. As the Organisational Review Committee observed, the voluntary compliance model, on which the tax system is based, is the most cost-effective form of tax collecting (ORC report, section 8.2 and Appendix D, paragraph 22).

119. As a rule, compliance, especially voluntary compliance, by all taxpayers will be promoted by the Commissioner ensuring that taxpayers perceive that they will be required to comply fully with their tax obligations. In *Raynel v CIR* Randerson J held (at paragraph 54):

> Sections 6 and 6A(3)(b) emphasise that there is a broader public interest in the integrity of the tax system and in ensuring that taxpayers meet their obligations. Taxpayers who comply with the requirements of the Inland Revenue Acts are entitled to expect that appropriate and (where necessary) firm action is taken against taxpayers who shirk their obligations. If not, complying taxpayers will justifiably perceive there is a lack of integrity in the system and an unfair burden is cast on those who conscientiously comply with their obligations. As well, as Master Lang pointed out, the voluntary compliance scheme which is central to the proper functioning of the Inland Revenue Acts will be placed in jeopardy unless all taxpayers know that the Commissioner will act firmly and resolutely with those who do not meet their obligations and have no reasonable excuse for doing so.

120. In some situations, the Commissioner might consider that this factor supports "firm action" (e.g. bringing enforcement and bankruptcy proceedings) being taken against non-complying taxpayers – for instance, where there has been a flagrant and on-going failure to comply and where recovery is dubious or is likely to result only in a relatively minor proportion of the overall debt being recovered: *Raynel v CIR*, at paragraph 55.

121. In other cases, the Commissioner might consider that such "firm action" does not need to be taken against non-complying taxpayers to collect over time the highest net revenue that is practicable. The Organisational Review Committee recognised this possibility (ORC report, section 8.2):

> The requirement to balance short term and long term considerations, and to have regard to the importance of promoting voluntary compliance, will be important moderating influences in circumstances where the objective [i.e., to collect over time the highest net revenue that is practicable within the law] may otherwise prompt an unnecessarily vigorous and short-term approach to revenue collection.

122. It is not possible to identify the cases where the Commissioner would take this approach. It can be said that, at the very least, the Commissioner would need to be satisfied that the circumstances of the non-compliance mean that any failure to take "firm action" would not potentially undermine voluntary compliance by all taxpayers and taxpayer perceptions of the integrity of the tax system.

"Compliance costs incurred by taxpayers" (section 6A(3)(c))

123. The third factor in section 6A(3) covers the costs to taxpayers in assisting the administration of the tax system. This factor does not include the cost of the tax liability. The Organisational Review Committee defined "compliance costs" as (ORC report, Glossary and Commonly Used Abbreviations, page 81):

> The costs to taxpayers of meeting their obligations under tax law and in meeting the requirements and practices of the tax administration.

124. Excessively high compliance costs can decrease the amount of net revenue collected by discouraging economic activity and endangering voluntary compliance (see ORC report, sections 1.8 and 11.1, and Appendix F, paragraph 51). However, the Organisational Review Committee recognised that taxpayers should expect to incur some compliance costs. This was because voluntary compliance systems (on which the New Zealand's tax system is based) necessarily require taxpayers to incur some costs in meeting their obligations (ORC report, Appendix F, paragraphs 5 -7).

125. In the Commissioner's view, section 6A(3)(c) requires him to have regard to whether the available courses of action would result in taxpayers incurring increased compliance costs. However, section 6A(3)(c) does not mean that taxpayers should not incur any compliance costs, or that the Commissioner cannot take courses of action that increase taxpayers' compliance costs. Parliament contemplated that taxpayers would incur compliance costs as a result of them complying with their tax obligations, and due to the Commissioner exercising the powers conferred on him to ensure taxpayer compliance.

126. Section 6A(3)(c) will be primarily relevant in the development of systems and processes for administering the tax system. Consistent with this, the Organisational Review Committee stated (ORC report, section 11.3):

> The second place to tackle compliance costs is through the operational policies and procedures of the tax administration which have an immediate and direct effect on costs to taxpayers. Any steps that are taken ought to have regard to these considerations in the new proposed objective for IRD [ie, section 6A(3)]… .

Section 6A(3)(c) will also be relevant with respect to dealing with specific taxpayers. For instance, the Commissioner might consider (having taken account of all other relevant factors) that two or more courses of action are equally open to him. In such a case, if one of those courses of action would result in the taxpayers incurring significantly more compliance costs, but all other things were equal, the Commissioner could take the view that he should not adopt this course of action because it would increase compliance costs unnecessarily.

What the Commissioner may do to discharge the section 6A(3) duty: "within the law" and "notwithstanding anything in the Inland Revenue Acts"

127. The words "within the law" and "notwithstanding anything in the Inland Revenue Acts" affect the courses of action the Commissioner can undertake to "collect over time the highest net revenue that is practicable".

128. These words were referred to earlier in this Statement when considering the relationship between section 6A(2) and (3) and the other provisions of the Inland Revenue Acts: see paragraphs 59–64 above. It was concluded in this discussion that section 6A(2) and (3) make clear that the Commissioner is not obligated to collect all taxes owing if doing so would not maximise the net revenue collected over time. Section 6A(2) and (3) allow the Commissioner to act inconsistently with other provisions only to the extent that they may otherwise be seen to require him to collect all taxes regardless of considerations such as costs and available resources. They do not authorise the Commissioner to act inconsistently with the rest of the Inland Revenue Acts to any greater extent.

129. In light of these conclusions, the Commissioner considers that the words "notwithstanding anything in the Inland Revenue Acts" mean that the Commissioner may carry out the course of action that he considers will "collect over time the highest net revenue that is practicable" even if it results in less tax being collecting than is imposed, or required to be collected, by another provision. The words "within the law" mean that the Commissioner must act consistently with the rest of the Inland Revenue Acts in seeking to "collect over time the highest net revenue that is practicable".

130. It is worth noting that section 6A(3) is not overridden by a later enacted provision unless Parliament specifically intended the later provision to do so. In *Raynel v CIR*, the High Court held (at paragraphs 63–67) that section 176(1) and (2)(a) were not to be interpreted as overriding section 6A(3). Although section 176(1)

and (2)(a) were enacted later than section 6A(3), there was no evidence that Parliament specifically intended the later provisions to override section 6A(3). Further, interpreting section 176(1) and (2)(a) as overriding section 6A(3) was inconsistent with the words "notwithstanding anything in the Inland Revenue Acts" in section 6A(3). Accordingly, the Commissioner was required to act consistently with both section 176(1) and 2(a) and section 6A(3): see also *Clarke & Money v CIR*; *Rogerson v CIR*.

Summary of conclusions on section 6A(3)

131. Section 6A(3) requires the Commissioner to identify the various options for dealing with administering the tax system or for dealing with particular taxpayers.

132. Section 6A(3) then requires the Commissioner to determine which option would result in the collecting "over time" of the "highest net revenue that is practicable" from all taxpayers. In making this determination, the Commissioner is required to ascertain the short and long term implications of the available options and to have regard to all three factors listed in section 6A(3). These factors are:

- the resources available to the Commissioner (section 6A(3)(a));
- the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts (section 6A(3)(b)); and
- the compliance costs incurred by taxpayers (section 6A(3)(c)).

133. The practical effect of the words "over time" is that the Commissioner may adopt courses of action that have the effect of forgoing the collection of the highest net revenue:

- in the short term if he considers that this will enable the collection of more net revenue in the longer term; and
- from particular taxpayers if he considers that this will enable more net revenue to be collected from all taxpayers.

134. The words "notwithstanding anything in the Inland Revenue Acts" in section 6A(3) mean the Commissioner may carry out the course of action that he considers will "collect over time the highest net revenue that is practicable" even if it results in less tax being collecting tax than is imposed, or required to be collected, by another provision. The words "within the law" mean the Commissioner must act consistently with the rest of the Inland Revenue Acts in seeking to "collect over time the highest net revenue that is practicable".

135. Section 6A(3) is not overridden by a later enacted provision unless Parliament specifically intended the later provision to do so.

Section 6: Protection of the integrity of the tax system

136. Another important issue is the relationship between section 6A(2) and (3) and section 6. In paragraphs 143-150 below this relationship is discussed, beginning with an overview of section 6.

Overview of section 6

137. Section 6 provides:

> (1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.
>
> (2) Without limiting its meaning, "the integrity of the tax system" includes –
>
> (a) Taxpayer perceptions of that integrity; and
>
> (b) The rights of taxpayers to have their liability determined fairly, impartially, and according to law; and
>
> (c) The rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
>
> (d) The responsibilities of taxpayers to comply with the law; and
>
> (e) The responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and
>
> (f) The responsibilities of those administering the law to do so fairly, impartially, and according to law.

138. Section 6(1) obligates the Commissioner, along with all other officers of Inland Revenue, to use "best endeavours" to protect the "integrity of the tax system". This obligation must be discharged "at all times" and "in relation to the collection of the taxes and other functions under the Inland Revenue Acts". These words mean that the section 6 obligation must be discharged by the Commissioner in all aspects of his administration of the tax system.

139. Section 6(1) obliges the Commissioner to use "best endeavours" to protect the integrity of the tax system. The phrase "best endeavours" is not defined in the Tax Administration Act 1994. The courts have held that the phrase "best endeavours" in other legislative contexts is to be given its ordinary meaning of "trying one's best in all the circumstances": *Association of University Staff Inc v The Vice-Chancellor of the University of Auckland* [2005] 1 ERNZ 224; *Centaur Investments Co Ltd v Joker's Wild Ltd* (2004) 5 NZCPR 675.

140. Section 6(2) identifies six factors that come within the term "integrity of the tax system". In providing that it applies "[w]ithout limiting its meaning", section 6(2) indicates that the list of factors is not exhaustive. The factors listed in section 6(2) are fundamental principles in tax law: *Westpac Banking Corp v CIR*. These factors show that the term "integrity of the tax system" is a multifaceted concept. Some factors may be more important or relevant than others, and there may be potential for conflict between particular factors: see *Westpac Banking Corp v CIR*.

141. There has been little detailed judicial discussion on section 6. In the Supreme Court judgment in *Westpac Banking Corp v CIR*, McGrath J noted (at paragraph 32):

> The purpose of s 6 is to incorporate protection of the integrity of the tax system in terms that clearly define what is sought to be protected. The [Organisational Review] Committee had earlier observed in its report that tax integrity included the interaction between the total tax community and individual taxpayers.

His Honour described (at paragraph 52) section 6 as imposing an "overarching duty on Ministers and departmental officials". In the High Court decision in *Miller v CIR* (2003) 21 NZTC 18,243, Baragwanath J stated (at 18,253):

> [Section 6] is a statutory expression of long-settled principles of the common law which impose strict standards of conduct upon those exercising public powers conferred for performance of their functions of serving the community.

(See also *Ch'elle Properties (NZ) Ltd v CIR* (2005) 22 NZTC 19,622, at paragraphs 105–106.)

142. Section 6 does not provide taxpayers with a basis for challenging the Commissioner's decisions. It does not render amenable to judicial review any conduct (not involving a decision) that might be said to be inconsistent with the obligation to protect the integrity of the tax system. Consequently, section 6 does not provide a means of challenging an assessment; assessments can be challenged only by way of the statutory objection procedure: *Russell v Taxation Review Authority* (2003) 21 NZTC 18,255 (CA), at paragraphs 34-36; *Tannadyce Investments Ltd v CIR* (2009) 24 NZTC 23,036, at paragraph 63. Further, section 6 does not create rights enforceable by taxpayers such as those found in the New Zealand Bill of Rights Act 1990: *Russell v Taxation Review Authority*, at paragraph 47.

Relationship between section 6 and section 6A(2) and (3)

143. Having provided an overview of section 6, it is now possible to explain more fully the relationship between section 6 and section 6A(2) and (3).

144. Section 6 applies "in relation to the collection of taxes and other functions under the Inland Revenue Acts". These words mean that section 6 will apply when the Commissioner acts under section 6A(2) and (3).

145. As already discussed in paragraphs 59-64 and 127-130 above, section 6A(2) and (3) allow the Commissioner to act inconsistently with other provisions to the extent that they may otherwise be seen to require him to collect all taxes regardless of the costs and resources involved. In the Commissioner's view, section 6A(2) and (3) do not authorise him to act inconsistently with the rest of the Inland Revenue Acts to any greater extent.

146. This raises the issue of whether section 6 is **inconsistent** with section 6A(2) and (3). In the Commissioner's view there is no inconsistency. Section 6 does not require him to collect all taxes regardless of costs and resources involved. Instead section 6 requires the Commissioner to do his best in all the circumstances – to use "best endeavours" – to protect the integrity of the tax system when carrying out his functions and duties. This means that, when considering how he will act under section 6A(2) and (3), the Commissioner must consider, and take into account, the extent to which the available courses of action might undermine, or support, the integrity of the tax system as defined in section 6.

147. This is consistent with the case law. The courts have confirmed that the Commissioner must act consistently with both section 6 and section 6A(3). The Supreme Court and the Court of Appeal have emphasised that section 6 and section 6A together provide the framework within which the Commissioner administers the Inland Revenue Acts: *Auckland Gas Co Ltd v CIR* at paragraphs 32–33*; AG v Steelfort Engineering* (1999) 1 NZCC 61,030, at page 61,036*.* In *Westpac Banking Corp v CIR*, McGrath J held that sections 6 and 6A occupy a "central position in the legislative scheme" (at paragraph 52) and that they were "closely linked" (at paragraph 51):

> The Commissioner's duty to have regard to the importance of voluntary compliance, in collecting the highest net revenue practicable, is closely linked to the importance of public perceptions of the integrity of the system.

148. Similarly, in *Raynel v CIR*, the High Court observed that the Commissioner's obligations in section 6 and section 6A(3) were interrelated in that they reinforced each other (at paragraph 54):

> Sections 6 and 6A(3)(b) emphasise that there is a broader public interest in the integrity of the tax system and in ensuring that taxpayers meet their obligations. Taxpayers who comply with the requirements of the Inland Revenue Acts are entitled to expect that appropriate and (where necessary) firm action is taken against taxpayers who shirk their obligations. If not, complying taxpayers will justifiably perceive there is a lack of integrity in the system and an unfair burden is cast on those who conscientiously comply with their obligations. As well … the voluntary compliance scheme which is central to the proper functioning of the Inland Revenue Acts will be placed in jeopardy unless all taxpayers know that the Commissioner will act firmly and resolutely with those who do not meet their obligations and have no reasonable excuse for doing so.

149. The legislative history also supports the view that the Commissioner must act consistently with both section 6 and section 6A(3). The Organisational Review Committee considered that the section 6 obligation should inform every decision made within the tax system (ORC report, section 9.4.1). The Committee recognised that enacting a "care and management" provision made it "all the more important to ensure that perceptions of the integrity of the tax system are not diminished" (at paragraph 9.5.1). Nevertheless it considered that protecting the integrity of the tax system and maximising the net revenue collected were consistent objectives. Protecting the integrity of the tax system was "crucial" to maintaining voluntary compliance (ORC report, sections 8.2 and 9.3; and Appendix D, paragraph 33). The Committee stated (ORC report, section 15.1.4):

> A key component of obtaining the highest net revenue, by supporting voluntary compliance, rests on taxpayer perceptions of the integrity of the tax system. Perceptions about integrity are tightly linked to the impartial application if the law and the exercise of the administration's coercive powers and decision making powers with respect to the affairs of individual taxpayers.

150. In summary, the Commissioner must comply with section 6 when acting under section 6A(2) and (3). This means that when deciding how to act under section 6A(2) and (3), the Commissioner must consider, and take into account, the extent to which the available courses of action might undermine, or support, the integrity of the tax system as defined in section 6.

Settlements and agreements

151. The courts have held that, under section 6A(2) and (3), the Commissioner can enter into:

- Settlements where taxpayers dispute the interpretation of law or facts on which their liability has been assessed (*Accent Management Ltd v CIR* (2006) 22 NZTC 19,758 (HC); *Accent Management (No 2) v CIR* (CA); *Auckland Gas Co Ltd v CIR;AG v Steelfort Engineering*; and *Fairbrother v CIR).*

- Agreements as to the payment of outstanding tax, penalties and interest *(Raynel v CIR*).

152. The courts have explicitly held that the Commissioner can settle litigation on a basis that does not necessarily correspond to his view of the correct tax position if he considers that doing so is consistent with section 6A(3) and section 6: *Accent Management Ltd (No 2) v CIR* (CA); *Foxley v CIR* (2008) 23 NZTC 21,813. The courts have implicitly suggested that the Commissioner can give effect to settlements by way of an amended assessment, but it is not entirely clear whether this is done under section 6A(2) and (3), or only where authorised by

another provision. However, it is clear that the Commissioner can amend an assessment under section 89C(d) to reflect the terms of a settlement: *Accent Management Ltd (No 2) v CIR* (CA).

153. That the Commissioner can settle litigation might seem inconsistent with the conclusion reached earlier that the Commissioner cannot alter taxpayers' obligations and entitlements: see paragraphs 69–73 above. However, the courts have made clear that the Commissioner is not exercising any power to alter taxpayers' obligations in entering settlements. The courts have held that settlements do not involve the Commissioner "assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament": *Accent Management Ltd v CIR* (HC) at paragraph 74.

154. In taking this position, the courts have emphasised that settlements are made where the taxpayer's obligations and entitlements are legitimately disputed and, therefore, the Commissioner will need to undertake litigation to collect the full amount of tax he considers owing. The courts have recognised that the Commissioner may consider, in light of the litigation risk, that the resources required could be better used elsewhere to maximise the net revenue collected. In *Accent Management Ltd (No 2) v CIR* (CA), William Young P held (at paragraph 15):

> This [the Commissioner's ability to enter settlements] represents an undoubted shift from the approach adopted in [*Brierley Investments*]. The change in policy is justified by recognition that the Commissioner has limited resources and the function of collecting "over time the highest net revenue that is practicable within the law". Major tax litigation is expensive and places a heavy strain on the human resources available to the Commissioner. The Commissioner must be permitted to make rational decisions as to how those resources can be best deployed. Further, "sensible litigation, including settlement, decisions" must necessarily allow for litigation risk.

155. In holding that the Commissioner is authorised to enter settlements, the courts have given effect to a key outcome intended to be achieved by enacting section 6A(2) and (3). The ORC report shows that it was specifically contemplated that section 6A(2) and (3) would authorise the Commissioner to enter settlements (ORC report, section 8.2):

> One significant implication from the objective [that the Commissioner will collect over time the highest net revenue that is practicable within the law] is that IRD will be entitled to enter into compromised settlements with taxpayers, rather than pursue the full amount of assessed tax, in cases where there are legitimate differences of view about the facts in dispute and the costs of litigation are high.

156. The courts have not specifically considered whether the Commissioner can settle tax disputes before litigation or the formal disputes process has started. The Commissioner considers that, in principle, there is no impediment to him doing so. The Commissioner may consider that settling will enable his resources to be better used to maximise the net revenue collected. The Commissioner's position and responsibilities before litigation or the formal disputes process has started are not inherently different to his position and responsibilities during litigation. However, the litigation processes often results in him possessing more information than he did before. Accordingly, the Commissioner will consider settling before litigation or the formal disputes process has started only if satisfied that he has sufficient information on which to make an informed decision. As with his other powers, the Commissioner will prescribe which officers have the delegated authority to decide whether to settle.

157. The case law is clear that the Commissioner can enter settlements with taxpayers if he considers doing so is consistent with section 6A(3) and section 6. It is not possible to list all the factors the Commissioner may consider in deciding whether

to settle. Ultimately the decision must be determined by consideration of all factors relevant to the particular case. However, the following, non-exhaustive list identifies some of the factors the Commissioner could consider relevant (depending on the circumstances of the particular case):

- the resources required to undertake litigation;
- the alternative uses of those resources;
- the amount of the tax liability at stake;
- an assessment of the litigation risk (eg, the likelihood of the Commissioner succeeding);
- the implications of the Commissioner succeeding (in whole or part) if litigation is undertaken;
- whether settling or litigating would better promote compliance, especially voluntary compliance, by all taxpayers;
- the amount the taxpayer would pay if the Commissioner were to settle;
- whether the subject matter of the dispute might be determinative of, or have broader application to, other situations;
- whether the Commissioner would be prepared to settle on an equivalent basis with other taxpayers in a similar position;
- the uncertainty in the tax system that might be created should the subject matter not be authoritatively determined by the courts; and
- the likely effects on taxpayer perceptions of the integrity of the tax system of settling or litigating.

158. As already stated, the factors identified above are not exhaustive. Some of these factors may not be relevant and additional factors may be relevant given the circumstances of any particular case. It is for the Commissioner to decide on the appropriate weighting given to the relevant factors in a particular case.

159. Tax disputes sometimes involve several taxpayers. The Commissioner may need to decide whether to settle with each of the taxpayers individually. In such situations, the Commissioner is not required to settle, or to settle on the same terms, with all taxpayers involved in the litigation: *Accent Management Ltd v CIR* (HC), at paragraphs 79–86; and *Accent Management Ltd v CIR (No 2)* (CA), at paragraphs 20–22. However, the Commissioner will be aware that consistency of treatment for taxpayers with the same circumstances is an important consideration under section 6A(3) and section 6. Accordingly, in tax disputes involving several taxpayers, the Commissioner will generally settle on an equivalent basis with those taxpayers he considers share the same circumstances. By contrast, the Commissioner may settle on a different basis with those taxpayers he considers are in different circumstances. Different circumstances might include, for example, the taxpayer’s willingness to settle, the timing of the settlement offers in relation to the progress of the litigation proceedings, the state of the case law at the time, and the Commissioner’s perception of the culpability of the taxpayers involved: *Accent Management Ltd v CIR (No 2)* (CA) at paragraph 21. Because settlements reflect the circumstances of the particular litigation and of the taxpayers, they are not necessarily indicative of how the Commissioner will deal with similar issues in the future.

160. In deciding whether to settle litigation, the Commissioner will act consistently with the Protocol between the Solicitor-General and Commissioner of Inland Revenue, dated 29 July 2009 (available at the Crown Law Office website: http://www.crownlaw.govt.nz). This means that the Commissioner will consult with the Solicitor-General, who is responsible for the conduct of Crown litigation; and that litigation settlements will be jointly approved by Crown Law and Inland Revenue (except where the settlements concern debt matters and summary prosecution in which Inland Revenue solicitors represent the Commissioner). The Commissioner may also consult the Solicitor-General before entering a pre-litigation settlement if the subject-matter is central to a significant dispute in litigation.

161. Finally, where the Commissioner has entered into a settlement or agreement, he will not resile from it except if:

- the Commissioner is acting pursuant to a condition in the settlement or agreement that allows him to resile;
- the taxpayer has failed to adhere to the settlement or agreement; or
- the settlement or agreement was entered into on account of misrepresentations by the taxpayer, or the taxpayer failed to make full disclosure before the settlement or agreement was entered into.

Outline of "care and management" principles

162. Before turning to consider the examples, it is helpful to summarise the principles identified in this Statement's analysis of the "care and management" responsibility. This summary is then used to address the examples.

163. The phrase "care and management" indicates that the Commissioner has two interrelated responsibilities.

164. First, the Commissioner is charged with the "care" of the taxes. This means that the Commissioner is responsible for promoting the integrity and effective functioning of the tax system. To discharge this responsibility, the Commissioner must seek to foster the tax system's capacity to function effectively in light of economic, commercial, technological and other changes.

165. Second, the Commissioner is charged with the "management" of the taxes. This means that he is responsible for making managerial decisions in the interests of bringing about the efficient and effective administration of the tax system. The "management" responsibility recognises that the Commissioner makes decisions as to the allocation of his limited resources. This involves the Commissioner exercising judgement as to relative resources he allocates, over a period of time, across the various parts of Inland Revenue, and with respect to dealing with particular taxpayers. The "management" responsibility also recognises that the Commissioner often exercises judgement as to how he carries out his functions.

166. Section 6A(2) and (3) were enacted together (along with section 6) to provide the framework within which the Commissioner administers the tax system. Section 6A(3) applies "[i]n collecting the taxes committed to the Commissioner's charge". The collecting of taxes is an aspect of the Commissioner's "management" responsibility. Section 6A(3) clarifies the Commissioner's overall objective in carrying out his functions in administering the tax system.

167. In order to discharge his section 6A(3) duty, the Commissioner must compare the available courses of action as to their likely effect on the amount of net revenue he collects over time. To do this the Commissioner must consider the short and long term implications of each course of action, and have regard to all three factors listed in section 6A(3). These factors are:

- the resources available to the Commissioner (section 6A(3)(a));
- the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts (section 6A(3)(b)); and
- the compliance costs incurred by taxpayers (section 6A(3)(c)).

168. The practical effect of the words "over time" is that the Commissioner can adopt courses of action that have the effect of forgoing the collection of the highest net revenue:

- in the short term, if he considers that this will enable the collection of more net revenue in the longer term; and
- from particular taxpayers, if he considers that this will enable more net revenue to be collected from all taxpayers.

169. The words "notwithstanding anything in the Inland Revenue Acts" in section 6A(3) mean that the Commissioner can carry out the course of action that he considers will "collect over time the highest net revenue that is practicable" even if it results in less tax being collected than is imposed, or required to be collected, by another provision. The words "within the law" mean that the Commissioner must act consistently with the rest of the Inland Revenue Acts.

170. Some important implications of these conclusions are that section 6A(2) and (3) do not authorise the Commissioner to:

- disregard the requirements for the lawful exercise of powers and discretions conferred by other provisions;
- alter taxpayers' obligations and entitlements;
- issue extra-statutory concessions;
- administratively remedy legislative errors and other deficiencies;
- interpret provisions other than in accordance with the statutory interpretation principles contained in the Interpretation Act 1999 and court decisions; or
- act inconsistently with his obligation under section 6 to protect the integrity of the tax system.

171. Section 6(1) requires that the Commissioner, at all times, use best endeavours to protect the integrity of the tax system. The term "integrity of the tax system" is non-exhaustively defined in section 6(2). The Commissioner must comply with section 6 when acting pursuant to section 6A(2) and (3). This means that when deciding how to act under section 6A(2) and (3), the Commissioner must consider, and take into account, the extent to which the available courses of action might undermine, or support, the integrity of the tax system.

Examples

172. The following examples illustrate the principles set out in this Statement on the Commissioner's "care and management" responsibility in section 6A(2) and his obligations under section 6A(3) and section 6. The examples are not intended to state definitively what the Commissioner would do in the particular fact scenarios. Instead the examples are intended to assist readers' understanding of the Commissioner's view on:

- what he can and cannot do under section 6A(2) and (3);
- the decision-making process required by section 6A(3), and
- the application of the relevant factors in section 6A(3) and section 6.

Example 1: Decision whether to audit

The Commissioner has decided not to audit plumbers this year, due to their high degree of voluntary compliance and the low likelihood of identifying any undisclosed income. The Commissioner becomes aware of information that shows XYZ Plumbers has not declared $100,000 of income. In the normal course of events, XYZ Plumbers would not be audited because of the Commissioner's decision not to audit plumbers this year. Can the Commissioner decide to treat XYZ Plumbers like all the other plumbers by not auditing it?

173. The Commissioner could decide not to allocate the resources required to audit XYZ Plumbers. This decision would involve the Commissioner exercising the resource allocation discretion recognised by the "care and management" responsibility. However, before the Commissioner would decide not to allocate the resources required to audit, he would consider whether doing so is consistent with section 6A(3) and section 6. On the facts of this example, it would seem unlikely that the Commissioner would be acting consistently with section 6A(3) and section 6 by not auditing a taxpayer he has reason to believe has not declared a substantial amount of income.

Example 2: Decision not to investigate past years' tax liability

The Commissioner is aware that non-compliance is widespread in a particular industry. To address this non-compliance and to avoid further revenue loss, the Commissioner is proposing to inform the industry members that he will not audit their previous years' income if they comply with their tax obligations in current and future years.

Would the Commissioner's proposed course of action be a valid exercise of his "care and management" responsibility?

174. Yes: The proposed course of action would involve the Commissioner exercising his discretion as to the allocation of his resources recognised by the "care and management" responsibility in section 6A(2). In *Fleet Street Casuals* the House of Lords held that the United Kingdom "care and management" provision authorised the Revenue undertake a similar course of action. Before the Commissioner could undertake the proposed course of action, he would need to be satisfied that it is consistent with his obligations under section 6A(3) and section 6.

175. On the facts of this example, the Commissioner would balance the cost of auditing and assessing the industry members against the possible tax yield that might result if they were audited and assessed. He would also consider what resources he has available and the competing uses for those resources (section 6A(3)(a)). The Commissioner would have regard to the fact that auditing and reassessing would increase the industry members' compliance costs (section 6A(3)(c)). However, the Commissioner may give this factor little weight because any additional costs incurred as a result of audit and reassessment would be due to the industry members' non-compliance.

176. The Commissioner would evaluate the extent to which the proposed course of action would promote compliance, especially voluntary compliance (section 6A(3)(c)), and undermine or support the integrity of the tax system (section 6). Accordingly, the Commissioner would determine the benefits that might accrue from not auditing and reassessing the industry members, such as decreased levels of non-compliance in the particular industry. The Commissioner would balance the benefits against the risk that:

- complying taxpayers might consider it unfair if the industry members are not required to pay the full amount of tax; and

- that not reassessing and auditing the industry members might encourage non-compliance in other industries.

177. However, on the facts of this example, section 226B might apply. Section 226B was enacted to grant to the Commissioner a specific power to declare business group amnesties. It provides the Commissioner with discretion to "declare an amnesty … in relation to a group of persons, each of whom carries on a type of activity as the person's main business". Section 226B also provides the requirements for a valid amnesty, including that the Commissioner must consider that declaring the amnesty is (section 226B(1)):

> … consistent with—
>
> (a) protection of the integrity of the tax system; and
>
> (b) collection over time of the highest net revenue that is practicable within the law.

178. Accordingly, section 226B requires the Commissioner to take account of the same sorts of considerations as outlined in paragraphs 175-176 above. If section 226B does apply to the facts of this example, the Commissioner would declare a business group amnesty rather than undertake the proposed course of action under section 6A(2) and (3). This is because Parliament enacted section 226B for the specific purpose of addressing the situation outlined in the example. It is noted that section 226B imposes specific statutory restrictions on the Commissioner's ability to investigate, assess or reassess and prosecute persons covered by the business group amnesty (section 226B(8) and (9)).

Example 3: Deciding whether to audit where taxpayer discloses undeclared income

A taxpayer informs Inland Revenue that he has discovered an invoice representing income that he has inadvertently excluded from his tax return. The taxpayer wants Inland Revenue to agree not to audit the income year for which the return was filed, and states he will undertake to pay any tax liability and penalty resulting from the adjusted income amount immediately.

179. In this example the Commissioner could decide:

- to audit the taxpayer; or

- not to allocate the resources required to carry out the audit, and instead accept from the taxpayer the payment for the increased tax liability and any penalties incurred.

180. In determining which of the above options is consistent with section 6A(3) and section 6, the Commissioner would take account of the fact that accepting the taxpayer's payment would require fewer resources than would be required to carry out the audit (section 6A(3)(a)). This factor would need to be balanced against the risk that the excluded income indicates that the taxpayer has not been complying with his tax obligations and so could have other undeclared income. In considering this factor, the Commissioner would take account of the taxpayer's compliance history.

181. The Commissioner would also have regard to the likelihood that auditing would increase the taxpayer's compliance costs (section 6A(3)(c)). However, the Commissioner would give little weight to this factor. Taxpayers who file incorrect assessments should expect to incur additional compliance costs as a result of being audited and reassessed.

182. The Commissioner would have regard to the importance of promoting compliance, especially voluntary compliance, by all taxpayers (section 6A(3)(b)). The Commissioner might consider that auditing would promote compliance, because it will better ensure that the taxpayer has complied fully. On the other hand, the Commissioner could take the view that auditing would not promote voluntary compliance by taxpayers. This would be on the basis that the risk of being audited might discourage taxpayers from voluntarily disclosing to Inland Revenue inadvertently excluded income.

183. The Commissioner's decision whether or not to audit the taxpayer would need to be made after weighing up the above considerations.

Example 4: Use of the "care and management" responsibility instead of an existing statutory power

Can the care and management responsibility be used instead of an existing power? For example, if a taxpayer did not satisfy the definition of "serious hardship" in section 177A could the Commissioner write-off that taxpayer's outstanding tax on the basis of hardship under section 6A(2) and (3) rather than under section 177C?

184. No: The Commissioner can write off the debt on the basis of "serious hardship" only if this is authorised by section 177C. The debt cannot be written off under section 6A(2) and (3), even if the taxpayer argues that collecting the debt would cause hardship because, for instance, it would harm the taxpayer's business. In enacting section 177C, Parliament has specified precisely when such a write-off is to be permitted.

Example 5: Exercising statutory discretions

To be zero-rated under the Goods and Services Tax Act 1985, supplies of goods must be exported within 28 days. However, section 11(5) of the Goods and Services Tax Act 1985 provides that the "Commissioner may

extend the 28-day period … if the Commissioner has determined, after the supplier has applied in writing" that either section 11(5)(a) or (b) are satisfied.

Taxpayers who regularly seek extensions have complained that the 28-day period is invariably too short and that making applications imposes significant administrative costs on them. They have asked the Commissioner to state that taxpayers who have in the past received extensions will not be required to make applications and can instead automatically zero-rate supplies that satisfy section 11(5)(a) or (b).

Can the Commissioner inform these taxpayers that they need not apply in writing to obtain extensions, but rather can automatically zero-rate supplies that satisfy section 11(5)(a) or (b)?

185. No: Section 6A(2) and (3) do not allow the Commissioner to exercise the powers and discretions contained elsewhere in the Inland Revenue Acts if he has not satisfied the requirements for their lawful exercise.

186. Section 11(5) provides the Commissioner with the discretion to extend the 28-day period if he considers that section 11(5)(a) or (b) is satisfied. This discretion can be exercised only after the taxpayer has made an application in writing. If the taxpayer has not made the application, the Commissioner cannot lawfully decide to extend the 28-day period or otherwise zero-rate supplies that have been exported after the 28-day period.

187. On the facts of this example, the Commissioner might consider recommending to the Government that the provision be amended to remove the written application requirement. He may consider this necessary in order to protect the integrity of the tax system.

Example 6: Issuing binding rulings

A taxpayer applies for the Commissioner to issue a private ruling under section 91E of the Tax Administration Act 1994. The Commissioner proceeds to draft the private ruling in accordance with his view of the correct interpretation of the relevant taxation law. Before the ruling is issued, the Supreme Court delivers a judgment on the relevant taxation law. As a result of the Supreme Court's decision, the Commissioner now considers the interpretation contained in the draft ruling to be incorrect.

The taxpayer considers the Commissioner's previous interpretation more commercially advantageous to it than the new correct interpretation. It asks the Commissioner not to redraft the ruling in light of the Supreme Court's decision and instead to issue the ruling immediately.

Could section 6A(2) and (3) authorise the Commissioner to issue a binding ruling other than in accordance with his view of the correct interpretation of the taxation laws?

188. No: Section 6A(2) and (3) do not allow the Commissioner to exercise the powers and discretions contained elsewhere in the Inland Revenue Acts if he has not satisfied the requirements for their lawful exercise. This means that section 6A(2) and (3) do not authorise the Commissioner to disregard the requirements and limitations on his ability to issue binding rulings contained elsewhere in the Inland Revenue Acts.

189. If the Commissioner were to issue binding rulings that did not reflect his view of the correct tax position, he would be invalidly exercising his authority to issue binding rulings. Section 91E confers on the Commissioner the authority to issue binding private rulings "on how a taxation law applies, or would apply to a person and to the arrangement … for which the ruling is sought". Section 91EH(1)(c) provides that a private ruling must state "[h]ow the taxation law applies to the arrangement and to the person". This means that the Commissioner must, at the time of issuing the ruling, consider that the ruling contains the correct interpretation of the relevant taxation law. In this example, the draft ruling contains the incorrect interpretation of the relevant taxation law. Accordingly if the draft ruling were to be issued without amendment, it would not be stating "how the taxation law applies to the arrangement and to the person".

Example 7: Altering taxpayers' obligations

Under section 79(1) of the Estate and Gift Duties Act 1968, a taxpayer is required to provide the Commissioner with a statement where he or she has made gifts in certain circumstances. Under section 79(2), a copy of a gift deed is also required where the gift is created or evidenced by a written instrument.

(a) Can the Commissioner decide not to refer to the deeds routinely?

(b) If the Commissioner decides not to refer to the deeds routinely, can he direct taxpayers not to send in the deeds?

190. In relation to issue (a): The Commissioner could decide not to refer to the deeds routinely if he considers that the resources required could be better used elsewhere to maximise the net revenue collected. This would involve the Commissioner's exercise of the managerial discretion as to the allocation and management of resources recognised by the "care and management" responsibility. Before the Commissioner could make this decision, he would need to determine that it would be consistent with section 6A(3) and section 6. To do this, the Commissioner would balance the costs of referring to the deeds routinely against the risk that incorrect assessments will be made if the deeds are not referred to routinely.

191. In relation to issue (b): The Commissioner could not direct taxpayers not to send in the deeds. Section 6A(2) and (3) do not authorise the Commissioner to purport to release taxpayers from the obligations imposed on them by the Inland Revenue Acts. Moreover directing taxpayers not to send in the deeds would be inconsistent with the Commissioner's obligation in section 6(1) to protect the integrity of the tax system, in particular with "the responsibilities of taxpayers to comply with the law" (section 6(2)(d)).

192. Consequently, on the facts of this example, one appropriate course of action would be for the Commissioner to reallocate resources so that he can deal with the deeds sent in. Alternatively, the Commissioner could consider recommending to the Government that section 79(1) be amended to no longer require the deeds to be sent in.

Example 8: Anticipated legislation change

A Bill before Parliament provides that all goods and services supplied by a particular industry will be zero-rated for GST purposes. Can the Commissioner decide not to pursue GST that has not been paid by taxpayers in that industry because he expects the Bill will be enacted?

193. Yes: The Commissioner could decide, at this point of time, not to allocate the resources required to pursue the unpaid GST that would not be owed if the Bill were enacted, on the basis that he considers that those resources could be better used elsewhere to maximise the net revenue collected. This would involve the Commissioner exercising his managerial discretion as to the allocation and management of his resources recognised by the "care and management" responsibility.

194. Before the Commissioner could decide not to pursue unpaid GST, he would need to determine that it would be consistent with section 6A(3) and section 6. If the Commissioner is satisfied that the legislative change will be retrospective (ie. the supplies made in the preceding three month period would qualify to be zero-rated), he might take the view that not pursuing the GST would decrease his collection costs. Not pursuing the GST would also minimise the taxpayers' compliance costs, because it would avoid the need for taxpayers to pay the GST and then seek to have it refunded after the Bill is enacted.

195. Under section 6, a decision not to pursue the GST owing might be viewed as inconsistent with the responsibilities of taxpayers to comply with the law (section 6(2)(d)) and the responsibilities of those administering the law to do so "according to law" (section 6(2)(f)). A decision not to pursue the GST owed would involve the Commissioner not enforcing the legislation, in force at that time, which imposes liability for GST. However, the Commissioner might consider that not pursuing the unpaid GST owing under the legislation in force at the time would amount to only a temporary and nominal failure to apply the law given he expects the Bill to be enacted with retrospective effect.

196. The Commissioner could not inform taxpayers that they are not obliged to pay the outstanding GST owing under the legislation in force. Similarly, the Commissioner could not advise taxpayers to assess themselves other than in accordance with the legislation in force. If the Commissioner were to do that, he would be purporting to alter taxpayers' obligations. Section 6A(2) and (3) do not authorise the Commissioner to do this.

Example 9: Relationship between section 6A(3) and the Commissioner's recovery obligations

Taxpayer A has a history of serious non-compliance, involving repeated failures to pay outstanding tax, comply with the Commissioner's information requests and to adhere to instalment arrangements. The Commissioner identifies two alternative courses of action for dealing with taxpayer A: he can enter into another instalment arrangement with her or, alternatively, bankrupt her and wind up her company.

Taxpayer A considers that another instalment arrangement is required by section 176(1). Section 176(1) provides that "the Commissioner must maximise the recovery of outstanding tax from a taxpayer". Taxpayer A argues that an instalment arrangement would maximise the recovery of outstanding tax from her, because it means she can continue to operate her company and thereby generate sufficient income to pay the tax. In taxpayer A's view, bankrupting her and winding up her company would not maximise the recovery of outstanding tax, because she would no longer be earning any income.

The Commissioner takes into account taxpayer A's arguments, but also takes into account the fact that taxpayer A has failed to adhere to past

instalment arrangements. The Commissioner considers that this fact indicates that taxpayer A cannot be relied on to adhere to another instalment arrangement, so it is dubious whether another instalment arrangement would recover any outstanding tax. In addition, the Commissioner considers which course of action is consistent with section 6A(3) and section 6. Having done this, the Commissioner concludes that he should bankrupt taxpayer A and wind up her company.

The taxpayer considers that the Commissioner has incorrectly applied the law. She argues that only section 176(1) is relevant and, accordingly, the Commissioner should not have considered section 6A(3) and section 6. Is the Commissioner required to consider section 6A(3) and section 6 along with section 176(1)?

197. Yes: The Commissioner has correctly applied the law. Under section 176(1) the Commissioner is obligated to maximise the recovery of outstanding tax from a taxpayer. To act consistently with section 176(1), the Commissioner must compare the amount that each course of action would likely recover from the taxpayer concerned.

198. In addition, the Commissioner must comply with section 6A(3) and section 6 when acting under section 176(1). Section 6A(3) applies in "collecting the taxes committed to the Commissioner's charge" and, therefore, when the Commissioner seeks to recover outstanding tax under section 176(1). Section 6 applies to all aspects of the Commissioner's administration of the tax system and must be complied with "at all times". Accordingly, the Commissioner must compare the available courses of action as to their consistency with his:

- duty to collect over time the highest net revenue that is practicable and having regard to the three factors in section 6A(3); and

- obligation to use best endeavours to protect the integrity of the tax system.

199. On the facts of this example, the Commissioner has concluded that bankrupting taxpayer A and winding up her company is more likely to maximise the recovery of outstanding tax from taxpayer A. Taxpayer A's history of serious non-compliance strongly suggests that she cannot be relied on to adhere to another instalment agreement.

200. Under section 6A(3), the Commissioner has taken into account that entering an instalment arrangement would preserve taxpayer A's ability to earn income. However, the Commissioner considers that bankrupting her and winding up her company are required to promote compliance, especially voluntary compliance, by all taxpayers (section 6A(3)(b)), and to protect the integrity of the tax system, particularly taxpayer perceptions of that integrity (section 6(2)(a)). Given taxpayer A's history of serious non-compliance, a failure to take firm action against her could reduce other taxpayers' expectations that they will be required to comply and, in turn, this could undermine the voluntary compliance system.

Example 10: Statutory prohibitions on the Commissioner

The Commissioner is satisfied that section 176(2)(b) applies to taxpayer B. Section 176(2)(b) provides that the "Commissioner may not recover outstanding tax to the extent that … recovery would place a taxpayer, being a natural person, in serious hardship". The term "serious hardship" is defined in section 177A. Can section 6A(3) and section 6

authorise the Commissioner to collect the outstanding tax despite section 176(2)(b)?

201. No: Section 176(2)(b) prohibits the Commissioner from recovering outstanding tax to the extent it would cause "serious hardship" to the taxpayer. Section 6A(2) and (3) do not authorise the Commissioner to disregard explicit legislative directions or prohibitions on how he may or may not act.

202. Section 6A(3) does not override section 176(2)(b) by virtue of the words "notwithstanding anything in the Inland Revenue Acts". There is no inconsistency between section 176(2)(b) and section 6A(3). Section 176(2)(b) does not require the Commissioner to collect all taxes regardless of the costs and resources involved. Consequently, section 6A(3) does not authorise the Commissioner to act inconsistently with section 176(2)(b).

Example 11: Unfair legislative outcomes

A legislative provision can be clearly interpreted and involves no ambiguity. When that provision is applied it has the perceived effect of taxing income twice. The principles of statutory interpretation do not permit the Commissioner to adopt an interpretation that would avoid this result. Can the Commissioner apply the provision in an alternative manner to avoid taxing income twice?

203. No: Section 6A(2) and (3) do not authorise the Commissioner to interpret or apply the legislative provision in a manner that is inconsistent with the statutory interpretation principles contained in the Interpretation Act 1999 and court decisions. If the legislation interpreted according to those statutory interpretation principles has the perceived or real effect of imposing double taxation, the Commissioner cannot assess the taxpayers on some other basis in order to avoid that effect: *Vestey v IRC*.

204. In this situation the Commissioner could recommend to the Government that the provision be amended in order to remove the double taxation effect. He may consider this necessary in order to protect the integrity of the tax system.

Example 12: Legislative anomalies

The Commissioner considers the original purpose and intent of a legislative provision is clear. However, based upon the ordinary (and unambiguous) meaning of its text, the provision's effect is inconsistent with what is thought to be its purpose and intent. Can the Commissioner depart from the ordinary meaning of the provision and instead apply it in a way that gives effect to its purpose and intent?

205. No: The Commissioner cannot decide that, because the provision results in anomalous outcomes or is otherwise unfair, he will interpret or apply the provision in a way that is not supported by statutory interpretation principles contained in the Interpretation Act 1999 and court decisions.

206. The Commissioner could recommend to the Government that the provision be amended. He may consider this necessary in order to protect the integrity of the tax system.

Example 13: Interpreting ambiguous legislation

Can care and management be used in determining the meaning to be applied to a provision that is ambiguous — such as where two constructions of a provision are open based upon the ordinary meaning of the words employed?

207. No: "Care and management" is not a "principle" to be used to resolve ambiguity in legislation. Legislation must be interpreted according to the statutory interpretation principles contained in the Interpretation Act 1999 and court decisions. However, this does not preclude reference being made to sections 6 and 6A to assist the interpretation in contexts where this would be normal under those principles: see for instance, *Westpac Banking Corp v CIR; Raynel v CIR*.

208. The Commissioner could recommend to the Government that the provision be amended in order to remove the ambiguity. He may consider this necessary in order to protect the integrity of the tax system.

Example 14: Unworkable legislation

Where the Act fails to provide a method to calculate the amount of tax in a particular circumstance, does the "care and management" responsibility authorise the Commissioner to "fill the gap" by supplying the calculation method?

209. No: The "care and management" responsibility does not authorise the Commissioner to remedy legislative errors and other deficiencies: *Vestey v IRC; R (on the application of Wilkinson) v IRC; NZ Film Services Ltd v CIR* (1984) 6 NZTC 62,062. The Commissioner must apply the law according to the statutory interpretation principles contained in the Interpretation Act 1999 and court decisions. The Commissioner can "bridge a hiatus" to make the legislation work as Parliament intended only to the extent he considers the courts would do so: see *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530.

210. The Commissioner would recommend to the Government that the provision be amended to provide the calculation method, because he would consider this necessary in order to protect the integrity of the tax system.

Example 15: Minor non-compliance by taxpayers

A non-resident company proposed to re-purchase and cancel a percentage of its shares. A statement is published in the Tax Information Bulletin states that, based on several assumptions, any payment received by shareholders will not constitute a "dividend" for New Zealand tax purposes. It is later discovered that a (minor) assumption has not been met. As a result, a significant percentage of the New Zealand shareholders may have derived a small dividend. The average amount of tax payable on any such dividend is likely to be less than one dollar and may be zero in some cases.

Can the Commissioner decide not to reassess the taxpayers to include any additional tax liability?

211. Yes: The Commissioner could decide not to allocate resources to reassessing the taxpayers if he considers that doing so would be consistent with section 6A(3) and section 6.

212. On the facts of this example, reassessing the taxpayers would result in the taxpayers' liability being determined according to law (section 6(2)(b)) and is consistent with taxpayers' responsibilities to comply with the law (section 6(2)(d)). Reassessing could promote compliance, especially voluntary compliance, by all taxpayers (section 6A(3)(b)). It might emphasise to taxpayers that they will be expected to comply fully, and encourage them to carefully follow the Commissioner's published items.

213. However, the costs that would be incurred (both by the Commissioner and the taxpayers) by reassessing are likely to be greater than the additional tax collected (section 6A(3)). Before the Commissioner could reassess the taxpayers, he would need to allocate resources to gathering information, answering taxpayer queries and reviewing taxpayer compliance. The Commissioner could take the view that reassessing would not significantly promote taxpayer compliance, given that the non-compliance here is due to the mistake of the company and not the taxpayers. The Commissioner could also take the view that, since the non-compliance is one-off, minor and inadvertent, he does not need to take firm action against the taxpayers so as to protect taxpayer perceptions of the integrity of the tax system (section 6(2)(a)).

214. Therefore, on the facts of the example, the Commissioner would likely consider that section 6A(3) and section 6 support him deciding not to allocate resources to reassessing. It should be noted that the taxpayers would still be liable for the unpaid tax even though they will not be reassessed at this point of time. Consequently, if the Commissioner were to audit and reassess any of the taxpayers at a later date, he potentially would be obligated to include the unpaid tax (subject to any statutory provision preventing this).

Example 16: Duty to maximise the net revenue collected

The Commissioner has audited HIJK Ltd, a large corporate taxpayer that employs several hundred New Zealanders. The audit indicates that HIJK Ltd's tax liability is greater than it has been assessed for in the last three income years. HIJK Ltd's representatives inform the Commissioner that if HIJK Ltd is required to pay this increased tax liability, it will no longer be competitive for it to operate in New Zealand and consequently it would move its operations offshore.

Can the Commissioner decide not to amend HIJK Ltd's assessment on the basis that it will "collect over time the highest net revenue" by ensuring that HIJK Ltd continues to operate in New Zealand?

215. No: The Commissioner would not be acting consistently with section 6A(3) and section 6 if he were to decide not to reassess HIJK Ltd so to ensure that it continues operating in New Zealand.

216. The duty to maximise the net revenue collected in section 6A(3) does not allow the Commissioner to forgo collecting the full amount of tax owing on the basis that doing so might encourage taxpayers to remain in New Zealand. Tax obligations are imposed directly on taxpayers by the Inland Revenue Acts. Accordingly only Parliament may address concerns that tax obligations are detrimental to New Zealand's economic activity.

217. On the facts of the example, not reassessing is inconsistent with "[t]he responsibilities of taxpayers to comply with the law" (section 6(2)(d)). If the Commissioner does not reassess, HIJK Ltd will not be required to discharge the

tax liability Parliament has imposed on it. Not reassessing would undermine taxpayer perceptions of the integrity of the tax system (section 6(2)(a)) and would not promote compliance, especially voluntary compliance, by all taxpayers (section 6A(3)). Other taxpayers will consider it unfair that HIJK Ltd is not required to comply when they are required to do so. If the Commissioner were to not reassess, other corporate taxpayers might consider that they too could avoid their tax obligations by threatening to cease New Zealand operations.

Example 17: Treating taxpayers differently

An audit of four taxpayers in the same industry revealed that these taxpayers had assessed themselves on the basis of an incorrect interpretation of the law. Two of these taxpayers have been reassessed, with the result that their assessed tax liability has increased. Information suggests that the same issue is likely to be applicable to thousands of taxpayers in the same industry. The Commissioner has decided that these industry-wide taxpayers will not be audited at this time due to resource constraints. In addition, the industry as a whole has agreed to change its practices in future.

Can the Commissioner decide to:

(a) reverse the two reassessments; and

(b) not reassess the remaining two audited taxpayers?

Reassessed taxpayers

218. With respect to the two reassessed taxpayers, the Commissioner cannot amend the assessments to reflect the earlier incorrect interpretation of the law. If the Commissioner were to do so, he would not be validly amending the assessments under section 113. Section 113 provides that the Commissioner "may from time to time, and at any time, amend an assessment as the Commissioner thinks necessary **in order to ensure its correctness**" (emphasis added).

Audited, but not reassessed, taxpayers

219. While a final decision would depend on the facts of any particular case, the Commissioner could decide to reassess the audited taxpayers in circumstances such as these.

220. Reassessing the audited taxpayers would involve the Commissioner exercising the section 113 amendment power for the very purpose Parliament enacted it, that is, to ensure the **correctness** of the taxpayers' assessments. Reassessing the audited taxpayers would require few resources (section 6A(3)(a)). It would result in the taxpayers complying fully with their tax obligations (section 6(2)(b) and (d)) and, in turn, this would enhance their and other taxpayers' expectations that they will be required to comply with their obligations (section 6A(3)(b); section 6(2)(a)).

221. It is acknowledged that the audited taxpayers would need to rearrange their affairs once they are reassessed and, as a result, would incur additional compliance costs (section 6A(3)(c)). However, these additional compliance costs will be ultimately due to the audited taxpayers having adopted an incorrect legal interpretation. Consequently, in reaching his decision the Commissioner would give less weight to the compliance cost factor.

222. In this example, a decision not to reassess could be seen to potentially undermine the integrity of the tax system, on the basis that:

- the Commissioner would be accepting the audited taxpayers' assessments that he knows are incorrect, and this might compromise taxpayer perceptions of the integrity of the tax system (section 6(2)(a)) and not promote voluntary compliance by all taxpayers (section 6A(3)(b));

- the audited taxpayers would not be required to comply with their tax obligations (section 6(2)(b) and (d)); and

- the two reassessed taxpayers and other taxpayers might consider it unfair given they have been required to comply with their obligations (section 6(2)(a)).

223. The audited taxpayers may well consider it unfair that they are reassessed while the rest of the industry is not. However, the Commissioner would necessarily take into account the fact that tax obligations are imposed on taxpayers directly by Parliament and, accordingly, taxpayers should expect to comply with them, and that it is the Commissioner's role to collect those taxes: "[e]very ordinarily sophisticated taxpayer knows that the Revenue is a tax-collecting agency, not a tax-imposing authority" (*R v Board of Inland Revenue, ex parte MFK Underwriting Agencies Ltd* [1990] 1 All ER 91, 110) and that the Commissioner's "primary duty is to collect, not forgive, taxes" (*Preston v IRC* [1985] 2 All ER 327).

Example 18: Taxpayer reliance on incorrect Inland Revenue published item

The Inland Revenue booklet Qualifying Companies contained a statement that loss-attributing qualifying companies could elect to offset their losses against other group companies' income, before accounting for any remaining loss to the shareholders. This booklet was subsequently discovered to be incorrect and misleading. The Commissioner is aware that many taxpayers are likely to have relied on the booklet, so their self-assessments will be incorrect.

Some of the affected taxpayers have asked the Commissioner not to apply the current interpretation of the law to returns for years before the year in which the error was discovered.

224. It is important to note that the booklet is not a binding ruling, so the Commissioner is not legally bound to apply the interpretation it contains. Nevertheless, the Commissioner could decide not to allocate the resources required to identify, audit and reassess the taxpayers who relied on the booklet. However, before doing so, he would need to determine whether this course of action is consistent with section 6A(3) and section 6.

225. In making this determination, the Commissioner would take account of:

- the likely amount of the increased tax liability (section 6A(3)); and

- the resources required to identify, audit, and reassess the taxpayers, and the alternative uses for those resources (section 6A(3)(a)).

226. The Commissioner would also consider the risk that reassessing would be detrimental to taxpayers' confidence in relying on Inland Revenue publications. If this occurs it might result in increased numbers of incorrect assessments (section

6A(3)(b)). The Commissioner would also take account of the possibility that the taxpayers might consider it unfair that they are reassessed given they relied on the booklet and that they will incur additional compliance costs as a result. However, the Commissioner would weigh this consideration against the fact that he is not bound by the booklet (unlike binding rulings).

227. Under section 6, the Commissioner would take into account the following factors in favour of allocating resources required to reassess:

- reassessing would result in the taxpayers being required to comply with their obligations (section 6(2)(b) and (d));
- reassessing would enhance taxpayers' expectations that they will be required to comply fully (section 6(2)(a) and section 6A(3)(b)); and
- other taxpayers might consider it unfair if those taxpayers who relied on the booklet are not required to comply fully (section 6(2)(a)).

228. Whether resources are allocated to identifying, auditing, and reassessing the taxpayers who relied on the booklet would be made after the Commissioner has weighed up these factors.

229. If the Commissioner were to reassess the taxpayers, the taxpayers might be liable for use of money interest on the shortfall. The Commissioner would consider remitting this interest if authorised to do so by the relevant remission provision. (Under the Commissioner's current practice, he would remit use of money interest under section 183D where it is established that the taxpayer has relied on an incorrect statement by the Commissioner: see SPS 05/10 "Remission of penalties and interest", published in *Tax Information Bulletin* Vol 17, No 9 (November 2005)). The taxpayers would not be liable for a late payment penalty on the shortfall if they were to pay that tax by the new due date for payment fixed by the Commissioner.

[Note: It might also be necessary to consider the application of any specific provisions that relieve taxpayers from liability for interest or penalties in specified circumstances, such as where taxpayers have relied on Inland Revenue advice or publications.]

Example 19: Taxpayer reliance on incorrect Inland Revenue advice

A taxpayer rang an Inland Revenue call centre to ask whether a specific transaction was subject to GST. The call centre advised the taxpayer that the transaction was not subject to GST. The taxpayer based her assessment on this advice. Later, as a result of auditing the taxpayer, Inland Revenue becomes aware of the transaction and concluded that the taxpayer is required to pay GST on it. The taxpayer informs Inland Revenue of the advice she received from the call centre, and asks that she not be reassessed because she relied on this advice. Can the Commissioner decide not to reassess the taxpayer and instead accept her assessment?

230. On the facts of this example, the Commissioner would be likely to reassess the taxpayer.

231. Reassessing the taxpayer would involve the Commissioner exercising the section 113 amendment power for the purpose Parliament enacted it, that is, to ensure the **correctness** of the taxpayer's assessment. Reassessing the taxpayer would require few resources (section 6A(3)(a)). It would result in her complying fully

with her tax obligations (section 6(2)(b) and (d)) and, in turn, this would help to enhance taxpayers' expectations that they will be required to comply with their obligations (section 6A(3)(b) and section 6(2)(a)).

232. By contrast, a decision not to reassess could be seen as likely to undermine the integrity of the tax system, on the basis that:

- the Commissioner would be accepting an assessment he knows to be incorrect, and this would compromise taxpayer perceptions of the integrity of the tax system (section 6(2)(a)) and not promote voluntary compliance by all taxpayers (section 6A(3)(b));

- the taxpayer would not be required to comply fully with her tax obligations (section 6(2)(b) and (d)); and

- other taxpayers might consider this decision to be unfair, given that they are required to comply with their obligations (section 6(2)(a)).

233. It is acknowledged that the taxpayer may consider it unfair that she is reassessed given that she relied on call centre advice, and that she will incur additional compliance costs as a result. There could also be a risk that reassessing her would result in other taxpayers becoming less confident in using Inland Revenue's call centres. If this occurs, it might result in increased numbers of incorrect self-assessments (section 6A(3)(b)). These considerations are important and the Commissioner would necessarily take them into account. However, the Commissioner could well take the view that they are outweighed by the following factors:

- Reassessing would result in the taxpayer complying with her tax obligations. The tax obligations are imposed directly on the taxpayer by Parliament and, accordingly, she should expect to comply with them.

- The call centre advice does not alter the taxpayer's legislative obligations. The Commissioner is not legally obliged to adhere to that advice (unlike binding rulings).

234. If the Commissioner were to reassess the taxpayer, the taxpayer might be liable for use of money interest on the shortfall. The Commissioner would consider remitting this interest if authorised to do so by the relevant remission provision. (Under the Commissioner's current practice, he would remit use of money interest under section 183D where it is established that the taxpayer has relied on incorrect Inland Revenue advice: see SPS 05/10 "Remission of penalties and interest", published in *Tax Information Bulletin* Vol 17, No 9 (November 2005)). The taxpayer would not be liable for a late payment penalty on the shortfall if she were to pay the shortfall by the new due date for payment fixed by the Commissioner.

[Note: It might also be necessary to consider the application of any specific provisions that relieve taxpayers from liability for interest or penalties in specified circumstances, such as where taxpayers have relied on Inland Revenue advice or publications.]

Example 20: Settling litigation

X Ltd proposes to Inland Revenue's Litigation Management Unit that a tax dispute set down for a court hearing be settled on the basis that X Ltd pays an agreed proportion of the tax claimed in the Commissioner's

Notice of Proposed Adjustment. Would it be a valid exercise of the "care and management" responsibility for the Commissioner to settle on this basis?

235. Yes: The Commissioner could settle with the taxpayer if he considers that doing so is consistent with section 6A(3) and section 6. The courts have held that section 6A(2) and (3) authorise the Commissioner to settle tax disputes rather than undertake litigation.

236. In determining whether to settle, the Commissioner would have regard to the factors identified in paragraph 157 above, and any other relevant factors.

237. The Commissioner's decision whether to settle would also be made consistently with the Protocol between the Solicitor-General and Commissioner of Inland Revenue, dated 29 July 2009: see paragraph 160 above.