Inland Revenue
Te Tari Taake

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COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020

and the

COVID-19 Response (Further Management Measures) Legislation Act 2020

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This article covers the COVID-19-related legislation enacted for the loss carry-back scheme, providing administrative flexibility for Inland Revenue, the Small Business Cashflow Scheme, and the tax treatment of payments to New Zealanders stranded overseas.

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Overview

The COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020 was enacted on 30 April 2020 and the COVID-19 Response (Further Management Measures) Legislation Act 2020 was enacted on 15 May 2020. The measures in these Acts are aimed at assisting the Government's response to the economic impacts of COVID-19.

The Acts make changes to income tax, tax administration, primary industries, consumer protection and crown owned entity regulatory requirement measures.

Loss carry-backs

The COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020 introduces a tax loss carry-back measure. This allows businesses that are or anticipate being in loss in either the 2019–20 or 2020–21 tax year to carry some or all of that loss back to the preceding year where profits were earned.

Loss carry-forwards and carry-backs are intended to prevent systematic over taxation over time. If taxpayers always pay tax when they earn income, but never get relief when they have a loss, they will pay more than the statutory rate of tax over time. Loss carry-backs are one way to address this. The Government has also announced additional policy changes for the loss carry-forward rules, but these do not form part of this Act.

The loss carry-back measure in the Act is intended as a temporary measure to provide fast cash flow for businesses in loss during the period affected by COVID-19. The measure enables tax refunds for a profit year to be paid before the loss year has finished by enabling taxpayers to estimate the loss for the year and transfer it back to the profit year.

The measure provides for a one-year carry-back. The Government has indicated its intention to develop a permanent loss carry-back mechanism to apply from the 2021–22 tax year. The longer-term regime may be more traditional, such as not allowing a refund before the loss has been established and may have more integrity measures to cover some technical risks. The longer-term regime may provide for a one-year or two-year loss carry-back.

Almost all types of taxpayers – companies, trusts and individuals – are eligible to carry back losses.

Administrative flexibility for Inland Revenue

The Act also introduces a new power to give the Commissioner of Inland Revenue the flexibility to quickly provide an extension to due dates, timeframes or modify other procedural requirements for taxpayers who are affected by COVID-19.

This power could be applied to provide flexibility for any due date, timeframe, time period, procedural or administrative requirement across tax or social policy obligations set out in the Inland Revenue Acts and the Unclaimed Money Act 1971.

This power is limited to an 18-and-a-half-month period which can be extended by Order in Council, and to initiatives which are taxpayer friendly.

Small Business Cashflow Scheme

The Acts provide authorisation for the Commissioner to grant loans under the Small Business Cashflow Scheme and to administer the scheme on behalf of the Government. The amendments in the Acts:

- Provide that the Commissioner's decision to grant or decline to grant a loan under the scheme is not a disputable decision for the purposes of the Tax Administration Act 1994.
- Enable information sharing between Inland Revenue and the Ministry of Social Development for the purposes of the administration of the loan scheme.
- Permit Inland Revenue to use existing care and management, and debt management provisions in administering the scheme.
- Ensure that interest under the loan is not subject to resident withholding tax.
- Ensure that if the loan was converted to a grant at any stage this would not create any tax issues for the recipient.
- Ensure that loan amounts are not counted as income for Working for Families.

Tax treatment of payments to New Zealanders stranded overseas

The Ministry of Social Development has established the COVID-19 New Zealanders Stranded Overseas Support welfare programme for beneficiaries and superannuitants stranded overseas as a result of COVID-19.

The Act includes a measure ensuring that benefit and pension equivalent payments paid through this programme to people stranded overseas because of COVID-19 continue to have the same tax treatment as their pensions or benefits would be in New Zealand.

Loss carry-backs

Sections GB 3, GB 4, IC 9, ID 1, IZ 8, RC 7, RM 10, and YA 1 of the Income Tax Act 2007; sections 113G, 120KBB, and 183ABAB of the Tax Administration Act 1994

These amendments introduce a temporary tax loss carry-back measure that allows businesses that are or anticipate being in loss, to carry back some or all of that loss to the immediately preceding income year.

Background

Businesses in New Zealand pay tax on their income when they are profitable. Under existing tax loss continuity rules, losses can be carried forward to reduce taxable income in future years.

Loss carry-forwards and carry-backs are intended to prevent systematic over-taxation over time. If taxpayers always pay tax when they earn income, but never get relief when they have a loss, they will pay more than the statutory rate of tax over time. Loss carry-backs are one way to address this. The Government has also announced policy changes relating to the loss carry-forward rules, but these are not part of this Act.

The economic impacts of COVID-19 have made it more likely that taxpayers will be in loss in the 2019–20 or 2020–21 income years. Carrying a loss forward postpones the benefit of being able to claim losses and means that a taxpayer would still bear a tax liability for previous profitable years. The loss carry-back measure is intended to provide fast cash flow for businesses in loss during the period affected by COVID-19.

The measure enables tax refunds to be paid before the loss year has finished and before an income tax return has been filed for the loss year.

The measure is temporary. However the Government has indicated its intention to develop a permanent loss carry-back mechanism to apply from the 2021–22 tax year, which would replace the temporary measure.

Key features

The Act introduces a temporary measure that applies for losses incurred in the 2019–20 or 2020–21 income years. It allows for refunds of previously paid tax before the loss year is finished. Taxpayers will generally access this provision by changing their estimated provisional tax. The deadline for re-estimating provisional tax has been extended from the final instalment date until the date the tax return is due or filed, whichever is the earlier. Taxpayers are able to choose whether to use this facility.

Almost all types of taxpayers – companies, trusts and individuals – are eligible to carry back losses. The majority of individuals who are taxed through the PAYE system do not have losses so would be unaffected by this measure but those that operate businesses through partnerships, limited partnerships, and look-through companies are able to benefit.

Standard late payment use-of-money interest applies if the loss carry-back is overestimated. Ownership continuity, grouping, and imputation rules also apply.

Application date

The amendments apply from 15 April 2020.

Detailed analysis

The loss carry-back scheme involves amendments to the Income Tax Act 2007 and the Tax Administration Act 1994.

The main features of the scheme are set out in new section IZ 8 to the Income Tax Act 2007.

This section introduces the concept of the offset years – the pair of years affected by the carry-back. The first of these years is named the ***taxable income year*** and the second is named the ***net loss year***.

To be eligible to use section IZ 8, a taxpayer must have made, or estimate that they will make, a loss in 2019–20 or 2020–21 – the ***net loss year***. It must also have had taxable income in the previous year – the ***taxable income year***. Losses would only be carried back for one year. This would mean:

- losses from the 2019–20 year could be carried back to the 2018–19 year; and
- losses from the 2020–21 year could be carried back to the 2019–20 year.

EXAMPLE 1

Armstrong Architects Limited (Armstrong) is a well-known architectural firm based in Christchurch and is known for its innovative designs and earthquake resistant buildings. It has been having a boom in business for the last two years but because most of its current projects are under construction its work has dropped off because of the Level 4 COVID-19 restrictions preventing work on the projects. In the 2019–20 income year it is predicting it will have taxable income of $5.6 million. However, because it has a number of high fixed costs to cover during the COVID-19 period and has no future projects in the pipeline, it anticipates that for the 2020–21 income year it will make a loss of $3.2 million.

Armstrong elects to carry back that anticipated loss to the 2019–20 income year. Armstrong has already paid $1.2 million in provisional tax over the first two provisional tax instalment dates for the 2019–20 income year and was due to pay another $368,000 on 7 May 2020. Armstrong re-estimates its provisional tax for the year to take account of the carry-back loss which will mean its taxable income will only be $2.4 million ($5.6 million − $3.2 million) with the tax liability on that being $672,000 ($2.4 million × 28%). The refund Armstrong will receive is $528,000 ($1,200,000 – $672,000) which will give it funds to assist in meeting its ongoing costs.

There are ownership continuity requirements that match those that apply to loss carry-forward provisions. These mean if a company has had an ownership change of more than 49% since the beginning of the profit year, the loss carry-back would not be available, except on a part year basis. This is to prevent the use of losses to eliminate tax on income that was not connected with the loss-making business when it was earned.

EXAMPLE 2

Buzz Autos Limited (Buzz) is a car dealership specialising in American muscle cars from the 1960s. Being in a very specialised market Buzz relies on steady custom from month-to-month. With the Level 4 lockdown Buzz is struggling to stay afloat. For the 2019–20 income year Buzz estimates that it will have taxable income of $268,000 on which it has already paid $75,040 in tax. Buzz has a standard 31 March balance date.

Collins Cars Limited (Collins) is a car dealership that specialises in American muscle cars from the 1970s. It has been having a great 2019–20 year and its business model has lower fixed costs than Buzz so it has significant cash reserves.

The owner of Collins knows Buzz very well and offers to assist it get through the COVID-19 situation by purchasing 52% of Buzz, which they do on 1 May 2020.

Because of the lack of ability to trade, Buzz is anticipating that for the 2020–21 year they will have a tax loss of $341,000. However, because Buzz has not met the 49% continuity rule it will not be able to carry back that loss to the 2019–20 year. It will, however, be able to carry that portion of the loss arising after 30 April forward to the 2021–22 income year.

The part year continuity rules will allow Buzz to carry back a portion of the 2020–21 loss for the year (from 1 April 2020 to 30 April 2020), which Buzz estimates as $160,000. Buzz will need to meet the requirements to use a part year loss such as preparing part year accounts to the date of the breach in continuity.

The amount that can be carried back will be the smallest of:

- the estimated loss (in 2019–20 or 2020–21), before adjusting for the carry-back;
- the taxable income in the previous year, again before adjusting for the carry-back; or
- an amount determined by the taxpayer.

EXAMPLE 3

Tranquillity Limited (Tranquillity) is an online media site that publishes daily news articles and lifestyle stories with a focus on holistic lifestyles. It proved to be very popular for the year ended 31 March 2019 and made a taxable profit of $140,000.

However, Tranquillity has suffered a number of setbacks in the 2020 income year, both as a result of COVID-19 and also because of unrelated pressures facing the media industry. For the year ended 31 March 2020, Tranquillity is estimating a tax loss of $180,000.

As the limit of the loss carry-back is the lesser of the loss made in the 2020 year and the profit in the 2019 year, Tranquillity Ltd is only able to carry back $140,000 of the loss. The $40,000 excess loss balance can be carried forward to the 2021 year to offset against future profits of the company.

If the company is within a wholly owned group of companies, the amount that can be carried back is only the amount that cannot be offset against profits within its wholly owned group in the loss year. Section IZ 8(7) calculates the amount of loss that can be carried back where the taxpayer is a member of a group of companies. Essentially it requires that any loss be first offset within the wholly owned group to which the taxpayer belongs before it is able to be carried back. This will ensure the net amount of loss for the wholly owned group as a whole is carried back to a prior year.

EXAMPLE 4

Apollo Supplies Group (ASG) is a 100% wholly owned group that manufactures and supplies hospitality and kitchen equipment to a range of commercial operators in New Zealand. Some companies within the group focus on manufacturing while Apollo Distribution Limited (Apollo) is responsible for sales within New Zealand.

In the year ended 31 March 2019, Apollo made a taxable profit of $420,000. It grouped its profits with the losses of other members within the ASG which, overall, made a group taxable profit of $2.5 million.

All companies within the ASG faced a downturn in revenue in the 2020 income year because of COVID-19. Apollo has been the most significantly affected company within the group and, in the year ended 31 March 2020, Apollo made a tax loss of $120,000 largely because of making virtually no sales in the last quarter of the 2020 income year. Apollo wishes to carry back its loss to the 2019 income year and offset it against other companies in the ASG.

Before Apollo carries back its loss to the 2019 year it must first make maximum use of the ability to group the loss in the 2020 year itself with its other 100% wholly owned companies in the ASG.

Together, the other members of ASG (excluding Apollo) made a taxable profit for the year ended 31 March 2020 of $90,000. As a result, the tax loss available to carry back to the 2019 year is $30,000. Apollo can group the remaining $90,000 of the 2020 loss with the profit of other group companies or carry it forward to future years.

Apollo can carry back $30,000 of its 2020 tax loss and offset this against its 2019-year profit. If it did not have sufficient profit, it could group the loss against the profits of other companies in ASG in the 2019 income year.

Section IZ 8(7) specifies the amount of a person's available tax loss where the person is a member of a group of companies. This section specifies that the amount of available net loss is the smallest of:

- The total amount of the initial taxable income and the net income of the person (for a company these amounts will be the same as a company that does not receive a rebate for donations made).
- The excess loss that remains of the total amount of net loss of the person and the other group members (after using non-refundable tax credits) if the person is a member of a wholly owned group.
- The amount elected to carry back by the person.

EXAMPLE 5

The Beans group is a group of companies that sells beans in bulk to Mexican restaurants around New Zealand. Alan is the owner of the Bean Group. The temporary closure of restaurants in New Zealand because of the COVID-19 lockdown has had a big impact on the Beans Group.

The Beans group has a standard 31 March balance date and completed its 2019–20 year on 31 March 2020. Its preliminary results for the year to 31 March indicate the following taxable income for the members of the Beans Group:

Beans Beans Limited (Beans)	$100,000
Blazing Beans Limited (Blazing)	$(60,000)
Saddles Beans Limited (Saddles)	$ 40,000
Total	$ 80,000

It is intended that Blazing will offset its loss of $60,000 against Beans' net income. Beans' taxable income before loss carry back will be $40,000 and for the 2019–20 year the group summary will be:

Beans	$ 40,000
Blazing	$ NIL
Saddles	$ 40,000
Total	$ 80,000

In November 2020, it becomes apparent to the group that for the 2020–21 year the Beans Group is likely to have the following tax position:

Beans	$ 75,000
Blazing	$ (50,000)
Saddles	$ (75,000)
Total	$ (50,000)

Alan would like the group to access the loss carry back available under section IZ 8.

Because Blazing and Saddles are members of a wholly owned group during the relevant years, section IZ 8(3) determines whether or not the two companies can make an election. If the expected loss of $125,000 was offset against Beans' expected income, there would be an excess loss of $50,000. So, Blazing or Saddles may make the election.

Subsection IZ 8(7) sets the amount that may be elected to be carried back. For Blazing, because it has no taxable income in the 2020 year, the amount referred to in paragraph (7)(a) is the amount it can group in the 2019–20 year. Accordingly, it cannot be more than $80,000, which is the amount that could be grouped if Saddles carried back nothing. The amount referred to in paragraph IZ 8(7)(b) is whatever portion of the $50,000 excess loss in 2021 not separately carried back by Saddles.

For Saddles, the amount calculated by section IZ 8(7)(a) is $40,000 plus up to $40,000 which could be grouped with the income of Beans. Amount B is the portion of the $50,000 excess loss in 2021 that is not carried back by Blazing.

Effectively then the amount that can be carried back by the two companies in aggregate is $50,000. Suppose this is all carried back by Saddles. That means Saddles taxable income in 2020 is reduced to a loss of $10,000. The $10,000 loss is then subtracted from Beans' taxable income under subpart IC. The time for the person to notify the Commissioner of the election is extended until the time for filing the 2021 income tax return. Saddles' remaining $25,000 of 2021-year loss, and all of Blazing's loss, can be used to offset Beans' 2021-year income.

Company	2019–20 pre group offset	2019–20 post group offset	2020–21 estimated position	2019–20 post loss carry back
Beans	$100,000	$40,000	$75,000	$30,000
Blazing	$(60,000)	NIL	$(50,000)	NIL
Saddles	$40,000	$40,000	$(75,000)	NIL
Total	$80,000	$80,000	$(50,000)	$30,000

EXAMPLE 6

The facts are the same as in example 5 but suppose that Beans' income for the 2021 year is made up of a $36,000 fully imputed cash dividend, and $25,000 of other income. The imputation credit satisfies the liability to pay tax on $50,000 of income. So, the group position for 2019–20 would be:

Beans	$25,000	(that is, $75,000 less $50,000 sheltered by the ICs)
Blazing	$(50,000)	
Saddles	$(75,000)	
Total	$(100,000)	

Accordingly, the excess loss as defined in subsection (3)(b) is increased by $50,000. This allows all of Saddles' loss to be carried back. This means that Saddles has a tax loss of $35,000 (that is, $40,000 − $75,000) in the 2019–20 year, all of which can be subtracted from Beans' $40,000 of taxable income. Now Blazing can also carry back $5,000 (being the $80,000 income from the 2019–20 year which is the maximum amount that can be carried back as above less the $75,000 loss carried back by Saddles), and this amount can similarly be subtracted from Beans' taxable income. The

Beans Group will end up with a full refund of its 2019–20-year tax provisional tax, and Blazing will have a $45,000 loss able to be carried forward in the 2020–21 income year.

Taxpayers are able to claim a refund for a loss carry-back by re-estimating provisional tax (where 2019–20 is the taxable income year) or amending their tax return (where 2018–19 is the taxable income year).[1] The deadline for re-estimating provisional tax has been extended from the final instalment date until the date the tax return is filed (or the due date if this is earlier). This allows taxpayers to have time to consider the estimate of their tax loss for the net loss year.

For example, if a company is in profit for 2019–20 and estimates it would be in loss in 2020–21, it can re-estimate its 2019–20 provisional tax by taking into account the estimated loss carry-back deduction. It can do this any time up to the earlier of:

- the day the 2019–20 tax return is filed; or
- the day the 2019–20 tax return is due.

Provisional tax already paid can then be refunded. The provision also extends to shareholder-employees of a company who may have paid provisional tax on the basis that they would receive a shareholder salary from the company which is not in fact paid because the company's pre-salary income is offset by a loss carry-back.

If the tax return for the profit year has already been filed, the taxpayer is able to request a reassessment and refund because of the loss carry-back.

EXAMPLE 7

Eagle Beach Kayaking Ltd (Eagle) operates kayaking tours in Abel Tasman National Park and makes the majority of its income for the year in the summer months. The company experienced a significant reduction in bookings and a number of cancellations from early December 2019 as a result of COVID-19 which has resulted in it making a loss for the year ended 31 March 2020 of $70,000. In the prior year the company made a taxable profit of $95,000 and paid tax of $26,600. Eagle filed its 2018–19 tax return in December 2019.

Eagle is eligible for the loss carry-back scheme and is entitled to carry its 2020 loss back to the 2019 year. To do so Eagle will need to amend its tax return for the year ended 31 March 2019 to receive a refund of the overpaid tax in 2019. Eagle amends its

[1] Technically it would be possible to also claim a loss carry-back in a 2019–20 income tax return when that was filed, although this will delay the ability to obtain a refund of overpaid provisional tax.

2019 tax return via myIR and receives a refund of $19,600 (($95,000 − $70,000) × 28% less tax paid of $26,600). Alternatively, Eagle could request the Commissioner accept a section 113 of the Tax Administration Act 1994 adjustment in writing, requesting the amendment of its 2019 tax return.

At the time it amended its return Eagle filed an interim imputation credit account (ICA) account which shows a balance in its ICA of $20,500 on the date of the refund and after the refund will have a credit balance of $900. However, if Eagle only had a balance in its ICA of $15,000, the amount of the refund will be restricted to $15,000. This will mean that Eagle will have $4,600 held in its income tax account to use towards other income tax debts or future income tax payments.

Almost all types of taxpayers are eligible to carry back losses (companies, trusts, and individuals). The majority of individuals who are taxed through the PAYE system and are subject to auto-calculation (qualifying individuals) do not have losses so would be unaffected by this measure, but those that operate businesses through partnerships, limited partnerships, and look-through companies would be able to benefit. Taxpayers who have ringfenced rental losses would also not be able to carry back losses.

EXAMPLE 8

For the year ended 31 March 2019 Michael paid tax of $21,940 on $94,000 of income, all of which related to wages and interest income he earned during the year. Michael was therefore a "qualifying individual" in the 2019 income year.

In the year ended 31 March 2020 Michael entered into a partnership with Gus, running a small accounting advisory firm – Michael And Gus Accounting (MAGA). Michael and Gus's partnership made an $80,000 loss in the 2020 income year as it was still a new business with a small number of clients, and it was challenging establishing itself post-COVID-19. Each partner was allocated $40,000 of the partnership's loss to include in their 2020 tax return. After including his other income, Michael has a net loss of $25,000 for 2020.

The loss carry-back scheme does not apply to individuals who are qualifying individuals in the loss year. As Michael was not a qualifying individual in the loss year (the 2020 income year), Michael is eligible to carry his $25,000 loss back to the 2019 income year. This will now make his taxable income $69,000, with tax thereon of $13,720, Michael will receive a refund of $8,220 ($21,940 − $13,720) after amending his return through myIR.

Michael would not be eligible if he only received reportable income such as salary, wages and dividends in the 2020 loss year as it would be impossible for him to have a loss.

EXAMPLE 9

Katherine owns a number of residential rental properties. In the year ended 31 March 2020 she paid $17,320 of tax on her net rental income of $80,000.

In the year ended 31 March 2021 Katherine reduced the rent she was charging her tenants as, because of COVID-19, the majority could not continue to afford to pay the same rent. Overall, Katherine only received $40,000 of rental income from tenants in the 2021 income year, however, her rental expenses largely remained the same and her total rental deductions for 2021 were $60,000. As a result, her rental properties made a loss of $20,000. Katherine wants to carry her $20,000 loss back to the 2020 income year under the new loss carry-back provision and cash out the loss she has made this year.

Under the ring-fencing of residential property rules, the amount of Katherine's rental deductions allowed is capped at the amount of rental income received (that is, $40,000) and her excess deductions will be carried forward to the 2022 income year. Katherine cannot carry her excess rental deductions back.

Multi-rate PIEs (most unit trusts and KiwiSaver funds) may not carry back losses. Multi-rate PIEs (including KiwiSaver) have tax cash-out for losses so already benefit from immediate tax relief for losses.

A restriction on the ability to carry back losses will also arise where a taxpayer has made charitable donations in the taxable income year. In that case the loss is limited to the amount of taxable income reduced by the amount of charitable donations for which that person has received a tax credit under subpart LD (tax credits for gifts and donations). This restriction will not apply to a company, as it does not receive a tax credit but a deduction for a charitable donation.

Charitable donations are only creditable up to the taxable income of a person. Allowing a loss carry-back will reduce taxable income of a person yet the credit for charitable donations will be unaffected. Section IZ 8(2)(a) will prevent a taxpayer carrying a loss back to the extent that the donations will exceed the revised taxable income of the person.

EXAMPLE 10

Jack operates a handyman business as a sole trader. Jack was retired for most of 2019 but towards the end of the year decided to start up his handyman business to keep himself busy. As it was only operating for a few weeks during the last quarter of 2019, for the year ended 31 March 2019, Jack's business made a profit before tax of $5,000.

Jack decided to donate some of his small 2019 profit to a registered charity. He donated $3,000 for which he received a tax credit of $990 for charitable donations he made during the year.

For the year ended 31 March 2020 Jack's business made a $5,000 tax loss. He wants to know whether he can carry back the full 2020 tax loss to 2019.

As the loss carry back provisions do not allow a loss to be carried back and offset against income to the extent that the revised income would be less than the donations for which a tax credit has been claimed, Jack can only carry back $2,000 of his tax loss to the 2019 year. The balance of $3,000 can be carried forward to offset future years' profits.

Standard features from the tax system also apply and are therefore not specified within the Act. These include:

- To obtain a refund of income tax, an imputation credit account company must have an imputation credit account credit balance of at least the amount of the refund at the end of the most recently ended imputation year (meaning, that if a refund is requested for the 2018–19 year, it will be necessary to file an imputation return up to 31 March 2020), or alternatively it can complete an interim imputation return up to the date of the refund request (see example 7).
- If the loss carry-back is overestimated, resulting in tax to be paid later, standard use-of-money interest would apply in the normal way.

EXAMPLE 11

Dorothy and Mary own Hidden Figures Limited (HFL) a company that makes model spacecraft. They have had a pretty good year to 31 March 2020 overall but had a terrible month of March because their main customer base is overseas visitors. Given the current COVID-19 situation and the expected worldwide decline in travel Dorothy and Mary do not see the financial position of the business improving until they get their online sales up and running or the tourist market gets back to previous levels.

They sit down and work out that even by cutting costs HFL will probably make a loss to 31 March 2021 of at least $1,200,000. In the 2019–20 income year HFL used the standard method to pay provisional tax. Its instalments for the year were $240,000 on both the 28th of August 2019 and 15th of January 2020. Dorothy and Mary have calculated that, pre-COVID, they think HFL was likely to make taxable income of $2,670,000 with tax payable on that of $747.600 and they were planning to make a final instalment of provisional tax on 7 May 2020 of $267,600.

They elect to carry back the anticipated loss from the 2020–21 income year to the 2019–20 income year. This will give them a revised taxable income of $1,470,000 ($2,670,000 − $1,200,000) and a tax liability of $411,600. At the third instalment they decide to estimate HFL's tax liability at $411,600 via myIR. This means there is no payment required at the third instalment date and Inland Revenue will issue HFL a refund of $68,400 ($480,000 − $411,600).

In October 2020 Dorothy and Mary realise that the business has been doing worse than expected and now anticipate the 2020–21 loss to be $1,700,000. When they are preparing HFL's 2019–20 income tax return they reflect this increased loss in the return and when they file they receive an additional refund of $140,000.[2]

However, when completing the 2020–21 tax return for HFL Dorothy and Mary calculate that the loss for the 2020–21 income year will only be $1,100,000 given the quick recovery of the tourist industry in the first quarter of calendar year 2021. They complete the 2020–21 return and then amend the 2019–20 return for HFL. The reduced loss will mean that HFL has taxable income of $1,570,000 ($2,670,000 − $1,100,000) and a residual income tax (RIT) liability of $439,600 in 2019–20. It has only paid tax of $271,600 so will have tax payable of $168,000. Interest will be calculated as follows:

[2] Calculated as ($2,670,000 − $1,700,000) × 28% = $271,600 − $411,600 = $140,000.

	First instalment (P1)	Second instalment (P2)	Third instalment (P3)
One third of RIT	$146,533	$146,533	$146,533
Less paid at instalment date	($240,000)	($240,000)	NIL
Plus (less) excess prior instalment	NIL	($93,467)	($118,534)[3]
Amount subject to debit (credit) UOMI	($93,467)	($186,934)	$28,000 shortfall at P3 plus from October 2020 the refund amount of $140,000 (total $168,000)

- The loss carry-back must ultimately be supported by a net loss shown on a tax return filed for the loss year.
- If the tax return for the loss year is not filed, the loss carry-back deduction could be disallowed.
- If a loss company is a member of a group of companies, its loss can be carried back to the profit year and offset against the income of those other group companies. This requires that all of the companies in the group are 66% or more commonly owned from the beginning of the year of profit to the end of the year of loss, with provision made for part periods.
- Section RM 10(4) of the Income Tax Act 2007 has been amended so if the taxpayer owes a debt on other tax types, Inland Revenue will not apply any of the refund arising from the loss carry-back to satisfy tax debts.
- Where use-of-money interest applies because of an overestimate of the loss carry-back, the taxpayer cannot use the remission of interest provisions in section 183ABAB of the Tax Administration Act 1994.
- A taxpayer estimating their provisional tax to take advantage of the loss carry back scheme will not take provisional tax associates out of the interest concession rules in section 120KBB of the Tax Administration Act 1994.

A new anti-avoidance provision has also been inserted as new section GB 3B. This would apply where a share in a company has been subject to an arrangement which allows a loss company to meet the requirements of the new section IZ 8 and the purpose of that

[3] Calculated as $25,067 overpayment from P1 ($93,467 less $68,400 refund) plus $93,467 from P2.

arrangement is to defeat the intent of section IZ 8. Any arrangement subject to this provision would not be treated as meeting the requirements of section IZ 8.

An amendment has also been made so that sections GB 4(1)(b) and GB 4(2), which deal with arrangements for grouping tax losses for companies, would also apply to section IZ 8.

EXAMPLE 12

Saturn Five Limited's (SFL) taxable income in the 2019–20 income year was $2 million. By August 2020, it becomes clear to the company's directors that, because of the impacts of COVID-19 on the company's trading activities, SFL is likely to have significant tax losses for the 2020–21 income year. The losses for the part-year to August 2020 are already $1 million. It is also clear to the directors that SFL needs a significant injection of funds to continue trading. The company directors identify a potential new investor, von Braun Limited (vBL).

The shares in SFL are 100% owned by Mr and Mrs Wernher. After a period of negotiation, the directors of SFL and Mr and Mrs X conclude a memorandum of understanding with VBL under which VBL will provide the necessary debt financing in addition to acquiring a controlling interest of 60% of the ordinary shares in SFL. Mr and Mrs Wernher will continue to hold the remaining 40% of the shares after the transaction is completed.

The parties realise that one effect of implementing this arrangement in August 2020 is that SFL would breach the continuity of ownership rules and therefore would not satisfy the requirements to permit an election under section IZ 8. This means that any losses incurred for the remaining part of the 2020–21 income year would be unable to be carried back. SFL's ability to carry losses back to the 2019–20 income year under section IZ 8 and the consequent tax refund could be maximised if any change in ownership does not occur during the 2020–21 income year.

Accordingly, when the arrangement is implemented in August 2020:

- VBL unconditionally agrees to acquire 60% of the ordinary shares of SFL as at the end of the 2020–21 income year (1 April 2021) at the same price as originally contemplated in the memorandum of understanding but with an adjustment of 50% of the tax relief arising from any additional tax losses available to SFL attributable to the period 1 June 2020 to 31 March 2021.
- VBL agrees to provide the capital injection immediately by way of a loan on interest-only terms and at market rates in return for debentures issued by SFL with security over the assets of the company.

- The loan principal advanced is the same amount of consideration VBL is required to pay for the shares under the agreement for sale and purchase of 60% of the shares in SFL.
- The loan arrangement is made on usual commercial terms, including lender protection:
  - to satisfy the share purchase price, VBL will assign the loan to Mr and Mrs X;
  - the directors of SFL resolve immediately to appoint to the board a director nominated by VBL.
- The shareholders of SFL, subject to the sale and purchase of the shares agreement with VBL, immediately enter into an agreement with VBL in which they agree not to exercise their shareholder decision-making rights in a way contrary to the directions and interests of VBL.

SFL's net loss for the 2020–21 income year is $1.8 million. SFL elects to apply section IZ 8 to carry the loss back to the 2019–20 income year.

This arrangement would be subject to section GB 3B. SFL is treated as not meeting the requirements of section IZ 8 from the date of the arrangement (while the losses up to the date of the arrangement may still meet those requirements). The shares in SFL are subject to an arrangement that enables the company to continue to meet the requirements of section IZ 8 for the entire 2020–21 income year. A purpose of the arrangement is to defeat the intent and application of section IZ 8 by preserving the ability to carry back the full amount of SFL's loss for that income year, while the commercial and economic reality of the arrangement is that VBL has immediately acquired a controlling interest in SFL as though the share sale had already taken place. This defeats the intent and application of the temporary loss carry-back regime.

The temporary loss carry back scheme is a response to the current COVID-19 situation and has the aim of assisting businesses with their cash flow issues during the period of reduced economic activity because of Alert Level 1–4 restrictions. However, some taxpayers may seek to take advantage of the provisions. General anti-avoidance provisions within the Income Tax Act 2007 may apply to transactions which seek to generate tax losses in order to benefit from the loss carry-back scheme.

EXAMPLE 13

Dodgy Duke Tax Advisors Limited (Duke) works through the loss carry-back provisions and comes up with a scheme to get a timing advantage out of the loss carry-back provisions. One of the partners, Charles, identifies a number of clients who are generally unaffected by the COVID-19 situation but rent premises from associated companies.

Charles suggests to these clients that they increase the amounts the company pays in rent to the associated company to an excessive level in the 2020–21 income year which pushes the usually profitable businesses into a loss.

The clients then elect under section IZ 8 to carry back that loss to the 2019–20 year to obtain a refund of provisional tax for the year. This creates a timing advantage to the client as the client benefits from the refund in the 2019–20 income.

The integrity module within Inland Revenue's new START system flags this transaction as suspect for one of Duke's clients. The Commissioner undertakes an audit, discovering that for that one year the rent paid is excessive compared to prior years and market rates, with no particular reason for the increase other than to create a tax loss to carry back.

The Commissioner applies section BG 1 of the Income Tax Act 2007 to void the transactions to reverse the tax benefit of the advantage which is the amount of the rent that puts the company into a loss. Duke's client is also assessed shortfall penalties of 100% for taking an abusive tax position in respect of the transaction.

EXAMPLE 14

C&S Modules Limited (CSM) is a company that provides cleaning and sterilising modules for decontaminating buildings from contamination including viruses. They are in hot demand as New Zealand approaches COVID-19 Alert Level 2. This should mean that most employees can go back to work.

They have only been minimally affected by COVID-19 during the lockdown and will see significant upside because of this increased demand for office and sterilisation services. CSM's accountant Deal 4 U Accounting Limited (D4U) takes a look through CSM's records to see if there is any way they can take advantage of the new loss carry-back provisions notwithstanding CSM has been largely unaffected by COVID-19 and is not expected to make a loss in the 2020–21 income year.

D4U notices that CSM has an item of specialised depreciable property in its tax fixed asset register that has a very high written down tax value compared to its market value. If CSM were to realise this loss it would tip it into an overall loss for 2021 of $10 million. Carrying this loss back to the 2019–20 income year will enable CSM to claim a refund of all of its $2.3 million of provisional tax paid in that year. It will also create a timing advantage for CSM in terms of provisional tax in future years.

D4U suggests that CSM sell the property to a company associated with D4U for the market value which will crystalise the loss in CSM. The day after, the associated company will sell the asset back to CSM for market value plus a share in the tax advantage obtained by CSM.

CSM undertakes this transaction and crystalises a tax loss of $10 million of which it carries back $8.2 million to the 2019–20 income year which is sufficient to allow it to receive a refund of its $2.3 million in provisional tax back.

Sometime later the Commissioner investigates CSM and notices this transaction. She applies GB 33 (arrangements involving depreciation loss) to the transaction which will result in the reversal of the tax advantage under the arrangement. She also imposes an abusive tax position shortfall penalty on CSM of 100% of the tax advantage.

In formulating the policy and operational guidelines on the loss carry-back scheme, officials consulted and presented the scheme to various interest groups and a number of questions on the new regime arose:

FREQUENTLY ASKED QUESTIONS

Application process and timing

How do you ask for a refund where you use tax pooling to make tax payments and are yet to file the 2018–19 tax returns? Do you request the refund through the pooler or through Inland Revenue?

Using a tax pooler will allow you to have overpaid tax taken out of the pool at any stage, however, to claim a loss carry-back you will need to reflect that in your tax returns. If the 2018–19 return is yet to be filed, you can reflect the loss carry-back in the return rather than amending a filed return.

What about a look through company (LTC) that already had a loss in 2020 but expected a further loss in 2021? Can it carry back the loss from 2021 so it can pass on the higher loss to the shareholders?

For purposes of the Act, an LTC does not have a loss which it can push back or carry forward. Its owners have a share of any loss from its operations, just as for a partnership. If an LTC has a loss in 2020, that loss will be attributed to its owners in that year. If an owner has a net loss in 2020, then the owner will not be able to carry back a loss from 2021 to 2020. On the other hand, suppose an owner who in 2020 had other sources of income, such that the owner's share of the LTC's 2020 loss did not mean the owner had a net loss. This owner will be able to carry back the 2021 loss, including its share of the LTC loss, to 2020 for offset against its initial taxable income.

If you make a profit in 2020, but then a loss in 2021, can you still go back and recover tax paid in 2019?

No, under the temporary loss carry-back scheme you can only carry back a loss to the immediately preceding year. A 2021 loss can only be carried back to 2020. Similarly, a 2020 loss can only be carried back to 2019.

Two companies with 100% the same shareholding both made a loss in the 2020 year. Under normal rules, there is no offset/subvention as both made losses. As one of the companies made a profit in the 2019 year, can we use the losses from both companies to claim back 2019 tax paid from the one company?

Yes, to the extent of the net income of the group in the 2019 year and subject to the loss continuity rules.

What if you don't need to carry back the entire loss so some would be carried back and some would be carried forward?

Yes, you would only elect for the amount you wanted to carry back to be carried back and the remaining losses will carry forward subject to the usual loss rules.

Eligibility and tax types (including provisional tax)

Will loss carry-back apply to non-residents (for example, Australians with property ownership apartments in commercial hotels that operate as a partnership in New Zealand and file an IR3NR)?

Yes, there is no restriction on non-residents carrying back a loss to offset other New Zealand sourced income in the prior year.

What about companies paying provisional tax using the GST ratio method?

Taxpayers who use the GST ratio method can carry a loss back but they will need to become an estimator for provisional tax purposes under the temporary loss carry-back scheme. Unlike taxpayers who are using the accounting income method (AIM) who can have a loss carry-back without exiting the AIM method.

Are expected partnership losses able to be carried back by a partner limited to the expected investment basis in the partnership?

This will depend on the type of partnership. You can only carry back a loss as calculated under the other rules in the Act. If an expense or loss incurred in a year is not deductible until a later year, then that expense will obviously not be part of any loss in the year it is incurred, and therefore will not be able to be carried back. Similarly, all the partnership rules will apply so if the partner is unable to attribute losses from a partnership because they exceed their investment basis this rule will apply to limit the amount of losses able to be carried back.

Does the requirement to offset losses in a group before carrying a loss back apply if the companies are not part of a consolidated group?

Yes, it will apply to a wholly owned group in the loss year whether or not they are a consolidated group.

Shareholder employees

Do you opt-in for shareholder employees that you intend estimating the 2020 provisional tax and getting a refund of overpaid 2020 provisional tax or do you opt-in for the company that will incur the 2021 loss and bring this back to 2020 and reduce salaries as a result?

Although only the company would undertake a loss carry-back practically within the system you will need to opt-in for both the shareholder employee and the company to enable the overpaid provisional tax paid by the shareholder to be refunded.

For companies, will you be allowed to equalise the shareholder salaries between years by declaring a salary in the loss year which creates a loss to carry back?

It is likely that such a transaction would not be economically viable, however, it is likely that sections BG 1 or GB 25 would apply to such payments. An abusive tax position penalty of 100% could also apply.

Rental losses

Can domestic rental losses be carried back or does ring-fencing override?

No, for losses that are ring-fenced in a given year there is no deduction in that year (the expenditure is carried forward) and therefore no loss to carry back to the prior year.

Will Inland Revenue revisit the ring-fencing of rental losses for LTCs given the impact to landlords under COVID-19?

At this time no changes are expected to be made to the loss ring-fencing rules as a result of COVID-19.

Interest and penalties

Are there potentially late payment penalties as well, for a person who pays tax on the basis of an estimated loss carry-back that does not eventuate, or is smaller than estimated?

This will depend on the nature of the underpayment and the provisional tax method the person is using. For a taxpayer who estimates and has paid the estimated amount no late payment penalties should arise although the taxpayer will need to take reasonable care in making their estimate. This will be the case even if they end up with a higher tax liability because of an overestimate of a loss to carry back as long as they have paid the amount of the estimate.

For taxpayers using the standard uplift method and who have overestimated their loss carry-back late payment penalties may apply where they have not paid at least the lower of their instalment amount or RIT.

Social policy

What impact will a loss carry-back have on family assistance, child support and student loans?

The carry back of a loss will have no effect on working for families or student loan obligations, but it may have an effect on child support payments.

More practical information on how to claim a loss carry-back and how the scheme works in practice is available at https://www.ird.govt.nz/covid-19/business-and-organisations/temporary-loss-carry-back-scheme

Administrative flexibility

Sections 3, 6H, and 6I of the Tax Administration Act 1994

New sections 6H and 6I of the Tax Administration Act 1994 introduce a temporary discretionary power the Commissioner may use to provide flexibility for due dates, deadlines, time periods, timeframes or procedural and administrative requirements for taxpayers who are affected by COVID-19, making compliance with current tax obligations impossible, impractical, or unreasonable.

The discretionary power is intended to provide the Commissioner with a timelier mechanism to assist taxpayers who encounter practical difficulties in complying with certain requirements under the Inland Revenue Acts, or under provisions in the Unclaimed Money Act 1971. The power is intended to supplement existing provisions already available to taxpayers affected by COVID-19. That is, where there is existing time flexibility provided in other provisions, these provisions will be used instead.

Where taxpayers comply with a modified timeframe or requirement made under this power, they will be treated as if they complied with the requirement set in legislation. The variations are intended to be exercised in a way that provide taxpayers with more time or options, that is, the measure is taxpayer-friendly and taxpayers may choose whether or not to comply with a variation or with requirements set in legislation.

Background

The Commissioner of Inland Revenue is charged with the administration of the Inland Revenue Acts. As part of that administration, the Commissioner must use her best endeavours to protect the integrity of the tax system.

There is existing flexibility for the Commissioner to accommodate taxpayers affected by COVID-19. This includes the ability for the Commissioner to remit late filing penalties or use-of-money interest when a taxpayer files or pays late and is affected by COVID-19, to change some dates by Order in Council or the Commissioner's care and management power.

Given the process and time required for an Order in Council, and the concern that existing provisions may be unable to resolve particular difficulties, providing a time-limited discretion to allow the Commissioner to extend due dates and timeframes or to modify other procedural requirements is a more efficient way to respond quickly and provide relief to those affected by COVID-19.

This new discretionary power will be used for situations where it may be impossible, impractical or unreasonable for taxpayers to comply with requirements because of the impacts of COVID-19 and where the Commissioner considers an appropriate outcome is not possible or is difficult to achieve under a current provision.

Key features

The Act introduces a temporary discretionary power for the Commissioner to issue a COVID-19 response variation.

It allows the Commissioner to:

- extend a due date, deadline, time period or timeframe in relation to a requirement; and
- modify a procedural or administrative requirement that must be met under a provision, for example, modifying the nature or form of information that is required to meet the provision.

If a taxpayer complies with an alternative set out in a variation they would be treated as if they complied with the requirements set out in legislation.

Variations must be made within and relate to the approximately 18-month period from 17 March 2020 to 30 September 2021. This limit recognises that this is a discretionary power conveyed on the Commissioner for the purpose of assisting taxpayers with certain compliance issues in the wake of COVID-19.

Application dates

The amendment applies from enactment and may be exercised for obligations which arose from 17 March 2020. The discretion only applies until 30 September 2021 for dates and variations within that timeframe.

The discretion can be further extended by Order in Council, as set out in S6H(4), if this is required to account for ongoing effects of COVID-19.

Detailed analysis

Section 6I(1) provides the Commissioner with a discretionary power to vary due date, deadlines, time periods, timeframes and administrative or procedural requirements for taxpayers who are adversely affected by COVID-19.

It allows the Commissioner discretion to:

- extend a due date, deadline, time period, or timeframe in relation to a requirement (section 6I(1)(a)); and

- modify a procedural or administrative requirement that must be met under a provision, for example, modifying the nature of form of information that is a requirement to meet the provision (section 6I(1)(b)).

Extension of due dates, deadlines, timeframes or time periods (section 6I(1)(a))

This allows the Commissioner to use her discretion for due dates, timeframes or time periods specified in provisions. The Commissioner may extend a due date, deadline, time period, or timeframe by, within, or, in relation to which:

- a person must comply with a requirement set out in the provision;
- a person must make an election under the provision; and
- a person's entitlements, rights or obligations are affected.

EXAMPLE 15

A taxpayer is required to notify the Commissioner of an election by 30 May in order to opt into the XYZ regime. The election includes certain information on the taxpayer's business. For some taxpayers these records may be only readily accessible from a taxpayer's business premises.

Given Level 4 and Level 3 restrictions taxpayers are likely to have had limited time where they were able to access their business premises. Recognising this, and that focus is likely to be on setting up businesses for re-opening, the Commissioner chooses to exercise her discretion in accordance with section 6I(1)(a)(b) for the due date for elections to be made to 30 June.

The Commissioner issues instructions on this variation on the Inland Revenue website, including that the taxpayer is not required to separately inform the Commissioner that they will be providing this information after 30 May if they make the election by 30 June.

If a taxpayer makes the election to opt into the XYZ regime by 30 June, they will be treated as if they met the requirement to make the election by 30 May.

Modify a procedural or administrative requirement (section 6I(1)(b))

The Commissioner also has the power to modify a procedural or administrative requirement that a person must meet under a provision of the Inland Revenue Acts or the Unclaimed Money Act 1971. This may relate to how a taxpayer is required to provide something, for example, in what form information must be provided.

EXAMPLE 16

A taxpayer is required to make a declaration to the Commissioner which includes supporting evidence, including proof of address which must be provided by a specific agency. Because of COVID-19 the agency is experiencing backlog and is unable to process information requests in a timely manner. The Commissioner considers this requirement may therefore be currently impractical for taxpayers to comply with and comes to the view that proof of address may be provided in a different form, such as by a copy of an addressed letter from a utilities company.

A variation in accordance with section 6I(1)(b) is provided which states alternative forms of proof of address which are acceptable for this provision for declarations made until 30 November 2020.

If the taxpayer complies with an alternative set out in this variation, they are treated as meeting the information requirements set out in the relevant legislation.

The discretionary power does not extend to an ability to vary rates of tax or change a tax liability. The exercise of a discretionary power may, however, affect a person's tax liability (if, for example, the due date by which a person must do something in order to avoid a liability, or time period that triggers particular consequences, is extended).

When the Commissioner can exercise the discretion (supplementary nature)

Section 6H sets out the purpose of the discretion, including how it will be used within the framework of existing provisions which provide relief or flexibility. The Commissioner can exercise the power at her discretion, consistent with her obligations to maintain the integrity of the tax system, when current requirements are likely to be either impossible, impractical or unreasonable to meet.

The provision is intended to ensure the Commissioner can exercise sufficient flexibility across tax types and compliance requirements to account for practical compliance concerns arising from COVID-19. However, discretion under the power is intended to be used where the Commissioner considers an appropriate outcome is either not possible or may be difficult to achieve under the terms of the existing provisions. Existing provisions include recently introduced rules around the remission of use of money interest and the Commissioner's care and management provision. This is reflected in subsection 6H(3).

Temporary application over an 18-month period

Subsection 6H(4) provides that the Commissioner may exercise discretion under this provision for a period of approximately 18 months. This applies for dates, timeframes or requirements that may arise for a taxpayer over this 18-and-a-half-month period, ending on 30 September 2021. Any variation made must be confined to obligations or dates that occur within this period.

In addition, subsection 6H(4) provides that this timeframe could be extended through an Order in Council on recommendation by the Minister of Revenue, if that is required for longer lasting effects of COVID-19.

Applies to taxpayers affected by COVID-19

Subsection 6H(2) provides that the Commissioner could exercise this discretion where compliance with current requirements is impossible, impractical or unreasonable, because of circumstances arising from COVID 19 or response measures to COVID-19, including by the Government.

Section 6I(3) provides that a variation applies generally unless the Commissioner specifies that it applies to a specific class of taxpayers or if specific circumstances or conditions are required. The intention is where taxpayers are in a similar position, they should be able to access the same variation of requirements.

This would provide consistency across taxpayers in similar situations where they are affected by COVID-19 and allow Inland Revenue to automatically apply the benefit of a variation for a group of affected taxpayers, for example, an extension of a due date or time period, as variations would only be advantageous to taxpayers.

Taxpayers may choose whether or not to comply with variation or existing requirements

COVID-19 variations are intended to either provide taxpayers with more time or modify a procedural or administrative requirement in a way that provides additional options or less onerous compliance requirements to recognise the impact of COVID-19 circumstances.

However, taxpayers may always choose to comply in the way set out in the legislation rather than in line with any published variation. This ensures the measure is taxpayer friendly.

Subsection 6I(4) achieves this optionality by providing that taxpayers who are covered by a variation may elect whether or not to use it by either informing the Commissioner or taking a tax position that reflects their choice. Generally, we expect taxpayers will not need to separately inform the Commissioner and may act in accordance with the variation.

Subsection 6I(2) provides that where taxpayers comply with a variation made under this power, they would be treated as if they complied with the requirement set in legislation.

A variation does not change an underlying due date or requirement. However, if a variation is available to a taxpayer and they comply with it they would be treated, through subsection 6I(2), as if they complied with the requirement set out in legislation.

If a taxpayer is still unable to comply with a variation, they should contact Inland Revenue to discuss their circumstances.

The Commissioner will publish details of a varied requirement

Subsection 6I(5) requires the Commissioner to publish any variation made using this discretion. This is intended to provide information in a central place, such as the Inland Revenue website, to communicate the COVID-19 variations to any affected taxpayers.

Publishing this information provides transparency and will help promote consistency for treatment of taxpayers in similar positions. Variations will be published on our website at https://www.taxtechnical.ird.govt.nz/apply-for/legislation-modification/covid-19-response-variations

Amendment to confirm the exercise of this discretion is not a disputable decision

Amendments to the definition of disputable decision in section 3 of the Tax Administration Act 1994 provide that the decision to issue, or to decline to issue, a variation under section 6I is not a disputable decision.

Extension of the meaning of the Inland Revenue Acts

Subsection 6H(1) clarifies that the discretion can be exercised for any provision in the Inland Revenue Acts listed in schedule 1 of the Tax Administration Act 1994. Subsection 6H(5) extends the definition of the Inland Revenue Acts for this purpose to include the Unclaimed Money Act 1971.

This is to ensure that where appropriate, the Commissioner may exercise this discretion for the provisions of the Unclaimed Money Act 1971 that Inland Revenue administers.

COVID-19 New Zealanders Stranded Overseas Support Ministerial welfare programme

Sections CW 33, MD 6, and YA 1 of the Income Tax Act 2007; section 80KK of the Tax Administration Act 1994; and sections 2, 9, 27, 35A, and 142 of the Child Support Act 1991

The Income Tax Act 2007 and Tax Administration Act 1994 have been amended to ensure that payments made under the COVID-19 New Zealanders Stranded Overseas Support (NZSOS) Ministerial welfare programme in lieu of another payment normally payable under the Social Security Act 2018, New Zealand Superannuation and Retirement Income Act 2001, or Veteran's Support Act 2014 are subject to the same tax treatment as those payments.

Amendments to the Child Support Act 1991 also ensure that when such payments are made and the person is a receiving carer for child support the usual child support rules apply.

Background

On 17 April 2020, the Minister for Social Development made a Ministerial welfare programme under section 101 of the Social Security Act 2018 for beneficiaries and superannuitants stranded overseas as a result of COVID-19 (COVID-19 NZSOS programme).[4] Payments under the COVID-19 NZSOS programme began on 20 April 2020.

The COVID-19 NZSOS programme allows the Ministry of Social Development to make payments to individuals who cannot otherwise receive their standard payment because they are stranded overseas as a consequence of COVID-19. These payments are equivalent to what the individual would otherwise receive had they been able to return to New Zealand and the intention is that there should be no difference for the recipient in terms of the tax treatment and associated obligations.

The COVID-19 NZSOS programme covers the following payments:

- main benefits payable under the Social Security Act 2018;
- orphan's benefit and unsupported child's benefit payable under the Social Security Act 2018;
- New Zealand superannuation payable under the New Zealand Superannuation and Retirement Income Act 2001;

[4] The Ministerial welfare programme is available at https://www.msd.govt.nz/documents/about-msd-and-our-work/about-msd/legislation/notice-of-change/2020/new-zealanders-stranded-overseas-programme.pdf

- veteran's pension payable under the Veteran's Support Act 2014; and
- supplementary assistance.[5]

Under section CF 1 of the Income Tax Act 2007, income-tested benefits (defined term that covers the same payments as the term main benefit), New Zealand superannuation and veteran's pension are currently subject to income tax. All other monetary benefits payable under the Social Security Act 2018 (excluding income-tested benefits) are exempt from income tax under section CW 33.

Key features

The Act amends the definitions of income-tested benefit, New Zealand superannuation and veteran's pension in section YA 1 of the Income Tax Act 2007 to include the equivalent payments made under the COVID-19 NZSOS programme, by introducing new defined terms "main benefit equivalent assistance", "New Zealand superannuation equivalent assistance", "veteran's pension equivalent assistance", and "COVID-19 New Zealanders Stranded Overseas Support Programme".

These ensure that:

- individuals in receipt of COVID-19 NZSOS payments are subject to the same income tax rules as if they had received their income-tested benefit, New Zealand superannuation or veteran's pension directly;
- the Ministry of Social Development (MSD) is required to deduct and pay the relevant PAYE to Inland Revenue as is currently required with income-tested benefits, New Zealand superannuation and veteran's pension;
- an individual's entitlement to Working for Families tax credits is not impacted and MSD can continue to pay the family tax credit and Best Start credit to COVID-19 NZSOS recipients who would otherwise be eligible; and

[5] Defined in clause 2 of the COVID-19 NZSOS programme as:
(a) Accommodation Supplement;
(b) Child Disability Allowance;
(c) Disability Allowance;
(d) Orphan's Benefit;
(e) Special Benefit;
(f) Special Disability Allowance;
(g) Temporary Additional Support;
(h) Unsupported Child's Benefit;
(i) Winter Energy Payment; and
Temporary Accommodation Assistance, Transitional Assistance Payment and Transitional Subsidy paid under the Ministerial Welfare Programme of those names.

- student loan repayment obligations remain the same.

Other payments made under the COVID-19 NZSOS programme are made in lieu of payments and benefits that are exempt from tax. These remain exempt from tax under section CW 33 of the Income Tax Act 2007.

While orphan's benefit and unsupported child's benefit remain exempt from income tax, the Act adds definitions of these terms to section YA 1 to ensure that their equivalent COVID-19 NZSOS payments are appropriately considered for Working for Families purposes.

The amendments to the Child Support Act 1991 ensure that:

- child support payments made to receiving carers who receive NZSOS payments equivalent to the sole parent rate of benefit or the unsupported child's benefit, continue to be retained to offset the cost of that benefit to the Crown; and
- the correct living allowance is applied to those receiving the equivalent of a supported living payment.

Application date

The amendments apply from 20 April 2020.

Detailed analysis

The intent of the amendments is to ensure that an individual in receipt of a COVID-19 NZSOS payment is subject to the same tax treatment, Working for Families entitlements, and student loan and child support obligations that apply for their normal benefit, pension or supplementary assistance payment.

Changes to definitions

Several new defined terms are added to section YA 1 of the Income Tax Act 2007 and some existing definitions are amended to achieve this.

The new defined term "COVID-19 New Zealanders Stranded Overseas Support Programme" in section YA 1 is a reference to the COVID-19 NZSOS programme made under section 101 of the Social Security Act 2018 and forms the basis of the new defined terms:

- main benefit equivalent assistance;
- New Zealand superannuation equivalent assistance;
- veteran's pension equivalent assistance;
- orphan's benefit equivalent assistance; and

- unsupported child's benefit equivalent assistance.

These new definitions refer to the specific clauses in the COVID-19 NZSOS programme under which the relevant equivalent payments are made:

- payments equivalent to veteran's pension and New Zealand superannuation are provided for in clause 10 of the programme;
- payments equivalent main benefits/income-tested benefits are provided for in clause 11; and
- payments equivalent to supplementary assistance (including orphan's benefit and unsupported child's benefit) are provided for in clause 12.

As some individuals may have already lost their entitlement to their benefit or pension prior to 20 April 2020, clause 9 of the COVID-19 NZSOS programme enables MSD to make a lump-sum payment to the individual for this period.

The new equivalent assistance definitions therefore refer to both clause 9 and either clause 10, 11 or 12.

The definition of income-tested benefit has been amended to include main benefit equivalent assistance, the definition of New Zealand superannuation to include New Zealand superannuation equivalent assistance, and the definition of veteran's pension to include veteran's pension equivalent assistance.

Previously, orphan's benefit and unsupported child's benefit were undefined terms but appeared in section MD 6, the definition of dependent child in section YA 1 and in section 80KK of the Tax Administration Act 1994. The Act removes these in-text section references and introduces new definitions of orphan's benefit and unsupported child's benefit in section YA 1, which respectively include the new terms orphan's benefit equivalent assistance and unsupported child's benefit assistance.

An amendment to the definition of financially independent in section YA 1 has also been made to ensure all payments made under the COVID-19 NZSOS programme are covered.

Impact of definitional changes and other changes

One result of these definitional changes is that the main benefit equivalent assistance, New Zealand superannuation equivalent assistance, and veteran's pension equivalent assistance are taxed as income under section CF 1(1) and are subject to the PAYE rules under section RD 5(6). This means that when MSD makes a COVID-19 NZSOS payment that is paid instead of an income-tested benefit, New Zealand superannuation or veteran's pension, they are required to account for PAYE on the payment as they normally would with a pension or benefit.

Monetary benefits payable under the Social Security Act 2018 are exempt income under section CW 33(1), including amounts payable under a section 101 Ministerial welfare programme. There is a pre-existing exclusion for income-tested benefits, which now includes main benefit equivalent assistance. The Act makes two additional exclusions to cover New Zealand superannuation equivalent assistance and veteran's pension assistance. This ensures that these payments are taxable under section CF 1 and not exempt under section CW 33.

This means that for an individual normally in receipt of a benefit or pension, there is no difference in treatment when they receive a COVID-19 NZSOS payment instead.

For the purposes of the Working for Families rules, the term "social assistance payment" is defined in section MA 8 as meaning income-tested benefits, New Zealand superannuation and veteran's pension. Through the amendments to these three definitions, an individual in receipt of the equivalent payments under the COVID-19 NZSOS programme is entitled to the same Working for Families tax credits as if they had received their normal benefit or pension instead.

As the definitions used in the Income Tax Act 2007 flow through into the Tax Administration Act 1994, MSD are able to continue paying the Best Start and family tax credits to eligible individuals.

As the Student Loan Scheme Act 2011 also uses the definitions from the Income Tax Act 2007, the amendments ensure there is no difference in student loan obligations.

The changes to the Child Support Act 1991 ensure that when MSD makes a COVID-19 NZSOS payment that is paid to a sole parent beneficiary or recipient of an unsupported child's benefit, the child support rules apply as they would normally.

The amendments ensure that:

- Child support payments made to receiving carers who receive NZSOS payments equivalent to the sole parent rate of benefit or the unsupported child's benefit, continue to be retained to offset the cost of that benefit to the Crown.
- Recipients of NZSOS payments that are equivalent to a supported living payment continue to receive the higher rate of living allowance.
- Recipient of NZSOS payments equivalent to an unsupported child's benefit are still required to apply for child support only for the child(ren) for whom they receive the unsupported child's benefit, unless they receive any other social security benefit.
- Recipients of NZSOS payments equivalent to benefits paid at sole parent rate or unsupported child's benefit are not be able withdraw from child support.

- Child support payments for child(ren) for whom an unsupported child's benefit is paid continue to be distributed separately to child support payments made for any other children for whom the carer receives a social security benefit.

Small Business Cashflow Scheme

Sections CW 33, DF 1, EW 45, MB 13, and YA 1 of the Income Tax Act 2007; sections 3, 7AA, 157, and schedule 7 of the Tax Administration Act 1994

The Acts provide authorisation for the Commissioner to grant loans under the Small Business Cashflow Scheme (SBCS) and to administer the scheme on behalf of the Government.

A further provision enables information sharing between Inland Revenue and the Ministry of Social Development for the purposes of the administration of the loan scheme.

Background

The Acts contain a number of amendments to support the SBCS, to assist small to medium businesses who are adversely affected by COVID-19.

The SBCS is to be administered by Inland Revenue and the Acts make a number of amendments to support the administration of the SBCS.

More detailed information on the operation of the SBCS is available at https://www.ird.govt.nz/covid-19/business-and-organisations/small-business-cashflow-loan

Key features

The Acts provide for a number of amendments to support the SBCS:

- The insertion of a new section 7AA of the Tax Administration Act 1994 which authorises the Commissioner of Inland Revenue to enter into a loan contract with an applicant and permits the exchange of information relating to a wage subsidy scheme between the Ministry for Social Development (MSD) and Inland Revenue.[6]
- An amendment to the definition of tax in section 3 of the Tax Administration Act 1994 to allow Inland Revenue to use its existing debt management and care and management powers to administer the loan.

[6] The COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020 first introduced the information sharing provision to schedule 7 of the Tax Administration Act 1994. The COVID-19 Response (Further Management Measures) Legislation Act 2020 incorporated the information sharing provision into section 7AA and repealed the equivalent provision in schedule 7. These changes ensure that the information sharing powers are wide enough for the purposes of the administration of the loan scheme.

- Amendments to the Income Tax Act 2007 to ensure that expenditure funded by the loan is subject to the normal deductibility rules and interest on the loan will not be subject to resident withholding tax and the loan is not counted as income for Working for Families.

Application dates

The amendments apply from 30 April 2020.

Detailed analysis

The COVID-19 Response (Taxation and Other Regulatory Urgent Measures) Act 2020 inserts a new section 7AA into the Tax Administration Act 1994 to give the Commissioner of Inland Revenue the ability to enter into a loan agreement with an applicant under the SBCS. It provides for the Commissioner to be able to receive information from the applicant for the loan and the repayment of the loan where the applicant does not meet any criteria for the SBCS.

It also provides for a loan contract issued by the Commissioner not to be a credit contract or a consumer contract for the purposes of the Credit Contracts and Consumer Finance Act 2003.

Section 7AA of the Tax Administration Act 1994 also provides for the facilitation of the exchange of information between Inland Revenue and the Ministry of Social Development for the purpose of administering the SBCS.

It provides for the exchange of information for the wage subsidy scheme. The Commissioner will be able to use this information in connection with any of the Commissioner's duties, powers or functions under the Inland Revenue Acts.

To ensure the application of the information sharing provision is wide enough for Inland Revenue to use the information effectively, the COVID-19 Response (Further Management Measures) Legislation Act 2020 moved the provision to section 7AA, repealing the amendments made to schedule 7 in the process.

Two amendments are also made to the Income Tax Act 2007. Section DF1(1)(cb) is added to ensure that business expenditure that is funded by the loan is not subject to the restrictions on deductibility that apply to expenditure financed by certain government grants and loans. Instead, the normal deductibility rules apply to the business expenditure.

The second amendment ensures that if conversion to a grant occurs this does not trigger debt forgiveness income under the financial arrangement rules. Section EW 45 is amended to include any release from an obligation to repay the SBCS loan through conversion to a grant. This will ensure the base price adjustment does not result in taxable income.

The COVID-19 Response (Further Management Measures) Legislation Act 2020 (Response Act) contains further amendments to support the SBCS. It amends section MB 13 of the Income Tax Act 2007 to ensure that loan amounts are not counted as family scheme income for Working for Families purposes.

It also amends the definition of exempt interest in section YA 1 to ensure that interest payments made under the SBCS will not be subject to resident withholding tax.

The Response Act also makes amendments to the Tax Administration Act 1994 including in the definition of "tax" an amount payable under the SBSC to ensure that the Commissioner can use her care and management and debt management provisions to assist in the administration of the SBSC.

Amendments are also made to the definition of Small Business Cashflow Scheme and wage subsidy scheme.

References

Legislative references

Income Tax Act 2007: sections BG 1, CF 1, CW 33, DF 1, EW 45, GB 3, GB 4, GB 25, IC 9, ID 1, IZ 8, MB 13, MD 6, RC 7, RD 5, RM 10, and YA 1

Tax Administration Act 1994: sections 3, 6H, 6I, 7AA, 13G, 80KK, 120KBB, 157, 183ABAB, and schedule 7

Child Support Act 1991: sections 2, 9, 27, 35A, and 142

Social Security Act 2018: section 101

About this document

New legislation articles provide an explanation of the changes made in recently enacted tax-related legislation including acts, general and remedial amendments, and Orders in Council.