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Inland Revenue
Te Tari Taake

Operational Guidelines: Section 6A Settlements

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1. Introduction

1.1 Interpretation Statement IS 10/07 (IS 10/07) confirms that Inland Revenue can settle disputes pursuant to section 6A of the Tax Administration Act 1994 (the TAA).[1] Accordingly, it is important to set out the principles and processes by which Inland Revenue might settle a dispute (or a potential dispute).

1.2 These Guidelines apply to settlements that occur at any stage of the disputes process prior to the filing of a challenge and to the settlement of cases prior to the commencement of the disputes process. The principles in these Guidelines will also generally be relevant to cases in litigation.

1.3 Unless expressly stated otherwise, all legislative references in these Guidelines are to the TAA.

1.4 These Guidelines are structured as follows:

1. Introduction
2. Summary of the key features of section 6A settlements
3. When will a section 6A settlement decision be required?
4. Who can exercise the section 6A delegation?
5. At what stages can a case be settled?
6. What taxes can be the subject of a settlement?
7. The general process for the consideration of a settlement
8. Making a settlement decision
9. The factors to be considered
10. Appendix: Extract on Settlements from Interpretation Statement IS 10/07, October 2010

[1] At paragraph 156. Refer Appendix.

1.5 Each of these topics is considered separately below.

2. Summary of the key features of section 6A settlements

2.1 Both the courts and IS 10/07 are clear that the Commissioner's care and management responsibilities allow for and support the settlement of appropriate disputes. These Guidelines provide guidance in balancing the competing principles that must be taken into account when considering settlement. This requires a consideration of whether the particular settlement complies with the dual duties of collecting the highest net revenue practicable over time (section 6A) and protecting the integrity of the tax system (section 6).

2.2 The starting point is that, where the facts are clear and the law is settled, the Commissioner must generally apply the law correctly. Frequently the facts and law will not be entirely clear, which is one of the principal reasons for preparing these Guidelines. Furthermore, even when the position is clear, there may still be a basis for accepting an outcome which does not fully reflect the strict legal position.

2.3 Settlement decisions are to be made by considering the six factors that are discussed below and determining how important each factor is to the particular dispute. All features of a settlement situation should fall within one or more of these factors.

2.4 When considering whether or not a dispute should be settled, the final step is always to stand back and confirm that the decision to settle (or not) is consistent with the dual duties of collecting the highest net revenue practicable over time and protecting the integrity of the tax system.

2.5 Above all, this requires the decision to settle (or not) to be measured against the impact settlement may have on voluntary compliance. A too rigid approach can potentially undermine compliance, though compliance may also be undermined if Inland Revenue too quickly accepts a taxpayer's proposal.

3. When will a section 6A decision be required?

What is a settlement?

3.1 It is important to first determine whether a settlement (as opposed to something else) is being considered. This is because different scenarios can arise that do not involve a settlement when Inland Revenue is in dispute (or will potentially be in dispute) with a taxpayer.

3.2 For the purposes of these Guidelines, a "settlement" or "compromise" involves the use of the Commissioner's general discretion under section 6A to accept less tax than should, strictly speaking, be collected from the relevant taxpayer. This decision occurs before any re-assessment and is made despite the Commissioner having a clear view of how the law applies to the relevant facts.

3.3 A settlement can only be accepted or rejected where the criteria set out below have been considered and a decision has been made by a person holding a section 6A delegation.

What is not a settlement?

3.4 Settlement decisions can be contrasted with other decisions or scenarios relating to disputes such as:

3.4.1 An exchange of information or arguments which results in either Inland Revenue or the taxpayer changing their view on how the law applies to the taxpayer's situation. In such a case, the matter will be resolved on the basis of that changed understanding, resulting in either an agreed adjustment or the dispute being abandoned by the Commissioner. This is a "resolution" of the dispute rather than a "settlement" or "compromise". SPS 15/01 Finalising Agreements in Tax Investigations sets out the principles for finalising agreements in these circumstances. A resolution made in finalising agreements in tax investigations is based on a genuine agreement as to the relevant facts and will be the result of the application of the law to those facts. Conversely, in a settlement the parties may not reach agreement but may still decide to settle by way of a compromise on the quantum of core tax in dispute or the quantum of shortfall penalties.

3.4.2 In the process of quantifying a disputed amount of, say, suppressed income, which is inherently uncertain, a properly authorised Customer Compliance Services (CCS) officer may agree to assess an imprecise but approximately correct amount (e.g. for the purpose of a default assessment). These Guidelines are not relevant to that scenario. Similarly, these Guidelines do not apply in relation to tax avoidance cases where the Commissioner has simply determined an amount to be assessed to the taxpayer, including by reconstruction, through the application of sections BG 1 and GA 1 of the Income Tax Act 2007 (ITA).

3.4.3 In some cases, a general decision might be made about a class of case, and this may be a care and management decision but not a settlement in relation to a specific case. An example is found in the agreed approach set out in Revenue Alert 21/01, which explains how the Commissioner will apply sections BG 1 and GA 1 of the ITA in relation to the diversion of personal services income.

3.4.4 Decisions about exactly which periods are to be investigated (e.g. four years rather than three), while an exercise of the care and management power, can usually be made in the normal administration of an investigation without compromising an established liability. As a result, these Guidelines will not need to be considered in these circumstances. Conversely, if the years in question have already been quantified, and a proposal involves Inland Revenue abandoning the proposed adjustments for, say, one year out of four, these Guidelines will need to be applied.

3.4.5 Certain discretions might be triggered on the basis of information provided or submissions made by the taxpayer, with particular respect to either the writeoff of debt (sections 176 and 177), the remission of certain penalties or interest (section 183D) or similar remission provisions. This is not an exercise of the Commissioner's care and management powers under section 6A. Rather, it is a legitimate exercise of other discretions, albeit arising in the context of resolving a taxpayer's liability to tax. An example is the situation in which the taxpayer, although disputing the proposed adjustment, is prepared to acknowledge that they have probably got it wrong, but they are unable to pay the tax for financial or other reasons. If a legitimate

case for write-off of the debt can be made, there is no reason why the CCS team cannot reach a twopart agreement (first as to the basis of the assessment and second as to recovery/write off).

3.4.6 An officer given the appropriate authority to do so may decide to not commence an investigation after a risk review (for example). This may be the case even if an eventual discrepancy seems reasonably likely. This decision could be made for a number of reasons. For example, there could be time bar considerations, the tax at stake might be a small amount or the collectability of the tax may be limited. This is a resource allocation decision rather than an actual compromise in relation to the particular investigation or dispute. As a result, this type of decision is outside the scope of these Guidelines.

4. Who can exercise the section 6A delegation?

General care and management delegation holders

4.1 Both accepting and rejecting any settlement offer is an exercise of the care and management responsibility. As a result, it must be considered by an appropriate delegation holder (even in circumstances where a settlement offer is obviously frivolous). Roles that hold the section 6A settlement delegation are set out in the Reserved Decision-Making Matrix.

4.2 As decisions under these Guidelines will be primarily made within CCS, those exercising the general care and management discretion within CCS will be the Deputy Commissioner CCS (Individuals or Business) and Customer Segment Leaders.

4.3 The Legal Services Leader is also able to consider settlements and any settlement decisions post the filing of a challenge should only be made by the Legal Services Leader. Any settlements in the post-adjudication period but prior to challenge must also be discussed with the Legal Services Leader before a decision is made.

4.4 CCS Deputy Commissioners, Customer Segment Leaders and the Legal Services Leader are referred to as general care and management delegation holders in these Guidelines.

Group Leads as decision-makers

4.5 Group Leads (reporting to Customer Segment Leaders) with the appropriate capability also have the ability to consider a settlement. However, their discretion is limited as described below.

4.6 Group Leads are empowered to settle a dispute, with careful reference to the criteria set out in these Guidelines, where the settlement offer does not include the cancellation of losses or an undertaking to not use available losses and:

- The core tax in dispute is less than $250,000; or

- The settlement offer involves the Commissioner conceding less than $100,000 of the amount in dispute (including use of money interest (UOMI) and shortfall penalties).

4.7 Group Leads can also **reject** any settlement offer where the amount offered represents less than 50% of the core tax potentially in dispute (whether or not the core tax is less than $250,000 or the settlement involves a concession of more than $100,000).

4.8 It should be noted that a settlement offer of less than 50% of the tax in dispute still requires a detailed consideration of the settlement factors discussed in these guidelines. If a Group Lead considers that an offer of less than 50% should be accepted for any reason, this should be discussed with and considered by one of the general care and management delegation holders referred to above.

Settlement decision limitations

Training and Critical Task Assurance (CTA)

4.9 Those exercising the delegation should also have completed training and should have a good understanding of the principles set out in these Guidelines.

4.10 Any recommendation to the delegation holders to use care and management to settle an actual or potential dispute is also subject to CTA review (subject to any amendments made to the CTA process from time to time). This review will generally be undertaken by a Level 3 Solicitor with appropriate training.

Pre-dispute settlements

4.11 Where the Commissioner is considering a settlement prior to the commencement of the statutory disputes process, the settlement decision must always be made by a general care and management delegation holder (i.e. not a Group Lead). Further discussion of when a settlement in these circumstances may be appropriate is set out below at paragraphs 5.1 to 5.4.

Precedential settlements and settlements where other cases/periods are in dispute

4.12 Group Leads should only exercise their delegation if they are confident that the dispute is not similar to other ongoing investigations or disputes. Where a settlement is intended to apply to multiple investigations, or could potentially impact on another investigation or dispute, or could reasonably be seen as inadvertently providing a precedent for settling a similar investigation or dispute, the decision to settle the dispute should be made by a person holding the general care and management delegation.

Settlement where a similar case or associate is in litigation

4.13 Delegated decision makers should not agree to settle a dispute (or reject a settlement offer) if litigation has commenced in respect of another taxpayer or period on the same issue unless approval has been obtained from the Legal Services Leader.

4.14 Legal Services approval should also be sought if litigation has commenced in respect of an entity associated to the taxpayer. CCS staff should generally be liaising with Legal Services in any event to ensure that any settlement does not impact on any live litigation proceedings.

Use of tax losses

4.15 Taxpayers sometimes offer to settle a dispute by paying tax through the reduction of tax losses which would otherwise not be available to be used. For example, a taxpayer might offer to use losses incurred in subsequent years to meet an earlier year's tax liability in circumstances where this is not provided for by the ITA.

4.16 Inland Revenue's policy is to not generally accept this. However, the use of losses in this way can be accepted if the following circumstances exist and the utilisation of

losses is approved by a general care and management delegation holder (i.e. not a Group Lead):

4.16.1 The tax losses are used to pay income tax only and not other tax types. For the avoidance of doubt, income tax does not include taxes which have been treated as income tax by s YA 2; and

4.16.2 The taxpayer has paid the core income tax to the fullest extent possible. In other words, where there is the ability to pay the core tax, the use of tax losses is not appropriate. The taxpayer's ability to pay will need to be discussed with appropriately trained CCS officers; and

4.16.3 The tax losses to be used as payment would very likely have been used within the next two tax years. In other words, the elimination of the losses means there will now be taxable income in the following two years on which tax will be payable; and

4.16.4 The taxpayer's compliance history is good and there are no future voluntary compliance concerns. This means that in cases of avoidance and evasion, the use of tax losses will not generally be appropriate. Similarly, if there are concerns that the losses themselves may not be legally supportable, e.g. because they may have been generated from an avoidance arrangement, they may not be used for these purposes.

4.17 In this way, the use of tax losses in settlement will mean that the disputed tax will effectively be paid within the next two years. This provides the taxpayer with a limited timing benefit, but one that may be acceptable in the circumstances.

4.18 It should be noted that losses can be used to offset income in the usual way allowed by the ITA and the restrictions on the use of tax losses discussed above does not apply to those situations. This includes any specific provisions that may allow for the carrying back of losses to prior income years.

4.19 Tax losses may also be used to pay shortfall penalties – see sections IA 3(1) and IW 1 of the Income Tax Act 2007. The use of tax losses in this way is therefore not subject to any care and management approval.

4.20 If the reduction in available tax losses is part of the settlement, then the settlement deed will need to record the assessment of the loss balance carried forward. The Commissioner will stipulate in the deed that this loss balance carried forward figure will be included in the taxpayer's next income tax return to be filed. The use of any losses should not in any case be recorded as constituting a payment for imputation credit or other tax credit purposes.

Settlement periods

4.21 A settlement will usually apply across the periods in dispute. However, it can sometimes be a viable settlement option to limit the periods in dispute by conceding one or more periods. This could occur, for example, if the settlement criteria indicate that this is appropriate as the evidence relating to a particular period is less clear (increasing the litigation risk).

4.22 In unusual cases, the settlement agreement can relate to future (i.e. not-yet disputed) periods, but only in respect of an arrangement which is continuing for a definite period (which shouldn't generally be more than two years), and not in the case of tax avoidance arrangements. However, as the key goal is to achieve full compliance, agreeing to future tax returns being made on a known incorrect basis should be rare.

Payment and collection issues

4.23 Generally, settlements should be on the basis of payment in full. However, in some cases it may be desirable to manage payment and collection issues as part of the settlement of the tax dispute.

4.24 CSS staff involved in the case should seek expert advice from specialists in debt collection to determine whether it is appropriate to apply debt provisions such as those relating to instalment arrangements. Section 6A settlements should not be a substitute for the correct application of write-off provisions, such as sections 176 and 177C: see examples 9 and 10 in IS 10/07.

Personal guarantees or security

4.25 To support collection of the settlement amount, a personal guarantee or security may be appropriate as a term of settlement in certain circumstances. In such a case, the settlement should not be finalised until the personal guarantee or security has been approved for Critical Tax Assurance purposes. Please refer to the taking of securities item in the CTA matrix for further explanation. Legal Services must assist if a personal guarantee or security forms part of a settlement.

5. At what stages can a case be settled?

Settlement of cases in dispute or pre-dispute

5.1 Settlement can occur at any point in an investigation or during the disputes process (including during the conference phase, see below). This includes the period prior to the issue of a NOPA. However, the Commissioner will only be in a position to settle prior to the issue of a NOPA if the Commissioner:

- has determined what amount is properly assessable;
- has a thorough understanding of the taxpayer's position; and
- understands how all of the settlement principles discussed below apply in the context of the case in question.

5.2 In limited circumstances a pre-dispute settlement might be appropriate even if the Commissioner has not determined exactly what amount is properly assessable. It may be sufficient for the Commissioner to have a reasonable understanding of the amounts payable so that he can weigh that up against the resources needed to continue the audit and enter a dispute.

5.3 The other settlement factors will obviously still be relevant and must point to a settlement being appropriate in the circumstances. It would not be appropriate to settle with a taxpayer where the Commissioner has little or no idea of the amount of tax at stake, especially where gross carelessness, avoidance or evasion are suspected.

5.4 Where the Commissioner is considering a settlement prior to the commencement of the statutory disputes process, the settlement decision must always be made by a general care and management delegation holder (i.e. not a Group Lead).

Settlement of cases subject to challenge and post-adjudication settlements

5.5 These Guidelines do not strictly apply to settlements that occur after the taxpayer has been re-assessed and has challenged the assessment, although the settlement factors discussed below will generally be relevant to any settlement decision. In those circumstances, the decision to settle rests with the Legal Services Leader.

5.6 As previously mentioned, Legal Services should also always be consulted for any post-adjudication but pre-challenge settlement offer. Legal Services may also form an integral part of settlement decisions made under these Guidelines, as may the Crown Law Office, particularly in relation to assessing dispute or litigation risk.[2]

5.7 In addition, and as already noted above, no settlement decision is to be taken except with Legal Services approval if litigation has commenced in respect of another taxpayer or period on the same or a very similar issue. Likewise, Legal Services approval must also be sort if litigation is ongoing in relation to a partnership, group company or other entity the taxpayer is associated with.

6. What taxes can be the subject of settlement?

6.1 Disputes about most tax types can be the subject of settlement (but not student loans). Different compromises may occur in relation to one aspect of the settlement amount but not others.

6.2 In addition to simply adjusting the taxable amount for a period, consideration can be given to agreeing to limit the periods affected, to use a lesser penalty type, or to applying a different valuation methodology, where there is flexibility within the law to do so. These approaches should be applied with care and with precedent in mind.

6.3 Set out below is a brief discussion of how settlement should operate in relation to core tax, shortfall penalties and UOMI.

Core tax

6.4 Inland Revenue may compromise on the quantum of core tax in dispute if a compromise is justified in terms of these Guidelines. However, protecting the integrity of the tax system means that the general body of taxpayers should not perceive that disputing a tax issue with Inland Revenue will always lead to an assessment that is less than core tax. As such, the smaller the percentage of core tax the taxpayer is offering to pay, the increasingly compelling the other factors supporting settlement need to be.

Shortfall penalties

6.5 It is often preferable to compromise on shortfall penalties rather than core tax and Inland Revenue can compromise on the quantum of shortfall penalties in a settlement. It is also possible to accept a lower level of penalty if that is appropriate (for example agreeing an unacceptable tax position penalty rather than an abusive tax position (ATP) penalty.[3])

[2] Consistent with the Protocol agreed between Inland Revenue and Crown Law: see http://www.crownlaw.govt.nz/assets/uploads/irdprotocols.pdf

[3] When the penalty is for ATP or evasion, and there are assessments which are not in dispute, so there are no challenge or dispute rights remaining, section 177C(3) prohibits the writing off of outstanding tax. Unless there are very strong integrity and/or voluntary compliance reasons, the Commissioner would be very unlikely to

UOMI

6.6 The amount of UOMI should generally follow the amount of core tax payable (as reduced if applicable). The purpose of UOMI is to compensate the Crown for being out of pocket through the taxpayer not paying tax on time. This purpose would be generally undermined if Inland Revenue regularly accepted settlements that did not have any UOMI imposed on the settled amount or if it was overly discounted.

6.7 However, UOMI may be compromised below that flowing from the level of core tax payable pursuant to a settlement in some circumstances where it is considered appropriate.

6.8 Guidance on when this may be appropriate can be taken from Standard Practice Statement: *Options for relief from tax debt* (SPS 18/04). Section 183D provides that the Commissioner may remit UOMI (and penalties) and SPS 18/04 discusses when it may be appropriate to do so. While a compromise of UOMI is different from remission, the SPS provides useful guidance in relation to when a UOMI compromise may be appropriate in a settlement context.

6.9 Note that taxpayers are allowed to use tax pooling to reduce their UOMI exposure and so the effect of tax pooling should not be seen as a compromise of UOMI.

7. The general process for the consideration of a settlement

7.1 Ordinarily, the process for agreeing or rejecting a settlement will involve the following steps:

Pre-Decision

Considering a taxpayer's offer

7.2 The settlement proposal will usually have been provided by a customer. The team considering the dispute (or potential dispute) will analyse whether they think accepting the offer would be consistent with Inland Revenue's care and management responsibilities, taking into account the matters covered in these Guidelines. It would be rare for the Commissioner to initiate a settlement, although this is possible.

Offers/counteroffers from the Commissioner

7.3 On the rare occasion that the Commissioner is considering making a settlement offer without first receiving a settlement proposal from the taxpayer, any such offer must first be considered in accordance with these Guidelines and a recommendation put forward for consideration and signed off by the appropriate delegated decision maker.

7.4 There will be circumstances where settlement seems appropriate, but not on the terms offered by the taxpayer. In those circumstances, it may be appropriate to provide a counter-offer recommendation that is consistent with sections 6 and 6A for the delegation holder's consideration. Once that has been signed off, the counteroffer can be formally made to the taxpayer.

compromise on penalties pursuant to sections 6 and 6A when a taxpayer is liable to pay an ATP or evasion shortfall penalty and no dispute rights remain.

Discussing settlement with taxpayers or their advisors

7.5 The Inland Revenue case team may have discussions with the taxpayer or their advisors regarding a potential settlement. Where potential settlement discussions occur between a taxpayer and the case team, it needs to be made clear that:

- Those discussions are on a 'without prejudice' and confidential basis;

- Any proposed settlement will need to be approved by the relevant section 6A delegation holder; and

- Any agreed settlement will need to be formalised in writing, generally through the execution of a binding deed, ideally to be prepared by Inland Revenue (an exchange of letters is sometimes an acceptable alternative).

Facilitated conferences

7.6 Where the subject of settlement arises during a facilitated conference:

7.6.1 Any settlement discussion at a facilitated conference should be clearly delineated from discussions about the legal and factual issues in dispute. The discussion should be directed by the facilitator who should ensure that, as far as possible, all of the factual differences between the parties have been resolved. The facilitator should only support the request for a settlement discussion if satisfied that the parties have positively engaged in trying to resolve the issue in other ways.

7.6.2 The facilitator should ensure the parties understand that the settlement discussion is on a "without prejudice" basis and that the dispute facilitation itself is adjourned. A "without prejudice" discussion is one that is subject to 'settlement privilege'. This means that documents and communications related to the attempt to settle do not have to be disclosed as part of any litigation. For a detailed explanation, please contact Legal Services.

7.6.3 The facilitator should also ensure that the Inland Revenue officers who are involved in the settlement discussion are aware of these Guidelines and the need to obtain sign-off at the appropriate delegated level (whether the recommendation is to settle or not to settle).

7.7 It must be made clear to the disputant that any settlement discussions will proceed in accordance with the criteria and processes set out in these Guidelines. In particular, taxpayers need to be aware that settlement on a "splitting the difference" or purely arbitrary basis to conclude the dispute is not acceptable.

7.8 Depending on the result of settlement discussions, the parties may need to reconvene the conference or bring the conference phase to an end.

Preparation of a recommendation memo

7.9 Once those discussions have been completed, the team should draft a memorandum that provides a recommendation to the relevant decision-maker. That memorandum will need to take into account the settlement criteria set out in these Guidelines.

7.10 The memorandum should have been approved by a CCS Team Lead (or a Group Lead who is not making the settlement decision). The recommendation must also be

Critical Task Assured to confirm that it is consistent with sections 6 and 6A and these Guidelines.

The Decision-Making Framework

7.11 The decision-maker, having received the recommendation to settle (or reject the offer), will decide whether to accept or reject the proposed settlement in accordance with Part 8 below. That decision can of course be contrary to the recommendation provided by the relevant officers.

7.12 The delegation holder's decision will be based on a balancing exercise using the factors described below. This ensures that, whatever decision is made, it is consistent with the Commissioner's section 6 and 6A obligations.

7.13 It is obviously important that the decision-maker clearly documents the decisionmaking process. This will include what the decision is, what information he or she has had regard to in reaching the decision and the reasons for the decision.

Post-decision

Rejection of a settlement offer

7.14 If the delegation holder has decided to reject the offer, the taxpayer will need to be informed. Often the taxpayer asks for reasons why the offer was not acceptable. It is appropriate to briefly explain why the offer was rejected. In most cases, the explanation will be that the core tax payable and/or shortfall penalties and/or UOMI was too low given the Commissioner's view of the application of the settlement factors.

7.15 In particular, the impact on voluntary compliance and tax system integrity from accepting the offer should be stressed. If settlement was rejected on the basis of the precedent it would create, so that only full core tax (and penalties if relevant) is acceptable, the case team should advise the taxpayer of this position. This eliminates the time and resources needed for making and considering further unacceptable offers.

Accepting a settlement – drafting of a settlement deed

7.16 If the delegation holder accepts a settlement proposal, its terms will need to be formalised in writing and this document will need to be signed by the delegation holder on behalf of the Commissioner. This will normally be by way of a deed, which should be prepared by Legal Services. Normal terms of any settlement would make clear reference to:

7.16.1 the intended assessments including penalties;
7.16.2 the taxpayer's obligations in terms of future compliance;
7.16.3 the confidential and non-precedential nature of the settlement;
7.16.4 the provision of information;
7.16.5 the manner in which the settlement is to be affected (for example, if an instalment arrangement is to be entered into, this should be captured and the appropriate process followed in respect of such arrangements);
7.16.6 the date for events to occur (in many cases payment) and terms relating to default in payment;
7.16.7 any guarantees or security required;
7.16.8 the consequences of non-payment or default if payment is not required; and
7.16.9 the position relating to consequential adjustments (including to other tax types, periods, or related parties).

7.17 Please contact Legal Services to assist with the drafting of any deed and please note that a settlement deed is subject to CTA.

7.18 The usual process is for the taxpayer to sign the deed prior to the Commissioner's representative. This may occur electronically. A witness to the deed, must be over eighteen and not be a party to the deed themselves. They must sign the deed and add the relevant details (I.e., where they reside and their occupation or description).

Letter agreements

7.19 A less formal exchange of letters can also give effect to the agreed settlement, if the core tax being resolved is small (under $50,000), the issue is not precedential and approval is obtained from a general care and management delegation holder.

7.20 If the Commissioner issues a settlement offer letter which is not subject to conditions, and it is accepted, it is important to remember that it constitutes an obligation which the Commissioner will not resile from unless there is non-payment, misrepresentation, or significant non-disclosure. Please note that the settlement offer letter is also subject to CTA.

The Settlement Register

7.21 The CCS Team must summarise the decision to settle by completing a settlement register form and sending this along with the settlement deed and memo to the Legal Services Leader, who maintains a register of section 6A settlement decisions for future reporting and integrity purposes.

8. Making a settlement decision

8.1 Before deciding on the proposed settlement's merits, the decision maker will need to ensure that certain 'threshold' issues have been satisfied. These are:

8.1.1 Is all the relevant information held? A decision to settle can only be made if the decision maker is fully informed. The CCS team will need to have obtained sufficient information (from the taxpayer, third parties and, where necessary, independent experts), together with legal input from Legal Services (and sometimes TCO or PaRS), to determine whether its position is robust. If the decision maker considers that there is potentially more relevant information that could impact on the decision, they should request that information; and

8.1.2 With that information, is the Commissioner's position correct? A settlement is only appropriate where it is considered that Inland Revenue's view of how the law applies to the taxpayer's facts is correct. Although any dispute will involve risks, where it is considered that the taxpayer's position clearly represents the better view of the law, the Commissioner should not be considering settlement. In those circumstances, the Commissioner should withdraw from the dispute.

8.2 Once the decision-maker is satisfied that there is sufficient information to determine that Inland Revenue is correct, they then need to decide whether or not the proposed settlement should be accepted. The starting point for that decision involves the following:

8.2.1 Inland Revenue is under an on-going obligation to apply the law. As such, a compromise for less than the properly imposed amount (including UOMI and penalties where relevant) can only be entertained when it is consistent with

the Commissioner's care and management responsibilities. The starting point is that taxpayers are obliged to pay the correct amount of tax and a departure from that should only be mandated after a careful application of the criteria in these Guidelines.

8.2.2 In this regard, while it is important to consider the factors described below in combination when considering the particular settlement proposal, the overriding obligations are to ensure that any settlement collects the highest net revenue over time, protects the tax system's integrity and promotes voluntary compliance by taxpayers. The decision to settle a dispute or not must be consistent with those objectives.

8.2.3 In most circumstances, consideration of the factors described in the next section will involve a balancing exercise. This is because some of those factors will favour settlement whereas others will suggest a settlement should not be entertained. For example, where a settlement involves significant resources and complexity, there may well be net savings if the dispute was settled and high dispute risk if it is not. This needs to be tempered by the possible negative impact a settlement may have on promoting voluntary compliance, both in relation to that taxpayer and taxpayers more generally if the settlement were to become widely known.

9. Discussion of the factors to be considered

Introduction

9.1 These Guidelines provide a framework for making consistent decisions about settling or compromising actual or potential disputes, by making it mandatory to consider a number of factors, which will generally be relevant to any settlement decision. The factors that will generally be more relevant to settlement decisions are the first four factors. The last two factors discussed (tax in dispute and taxpayer's ability to pay) are ordinarily unlikely in their own right to justify accepting or rejecting a settlement proposal.

9.2 Decision-makers should not assume that particular factors will always be the most relevant to the proposed settlement under consideration. They will often require application or balancing in different ways in different factual scenarios. For example, what involvement did the taxpayer have in a scheme (e.g. in designing or promoting

it), has the taxpayer co-operated to date and what stage is the dispute at (e.g. what level of resource has already been committed?). Finally, it is important not to take into account any irrelevant factors.

9.3 The portion of IS 10/07 dealing with settlement agreements, which forms the basis of these Guidelines, is attached. The non-exhaustive list of criteria, mentioned at paragraphs 151 to 161 in IS 10/07, should be used as a guide.

9.4 The following commentary expands on and explains those criteria in a more practical context. The criteria discussed below are consolidated into six factors, which should adequately address any circumstances which arise in a dispute context. There may be times when a direct reference to the criteria specified in IS 10/07 will also be appropriate, but this should not generally be necessary.

Factor one: impact on voluntary compliance and the integrity of the tax system

9.5 Every proposed settlement must be considered against its impact on the inter-related goals of voluntary compliance for taxpayers generally and protecting tax system integrity. A settlement proposal that significantly erodes voluntary compliance would not be protecting the integrity of the tax system. Even if other factors support a settlement, the Commissioner should not settle at the proposed compromise if voluntary compliance by all taxpayers would be meaningfully impacted and tax system integrity is not protected.

The relationship between voluntary compliance and tax system integrity

9.6 Section 6(1) requires the Commissioner and his delegated officers to protect the integrity of the tax system at all times. The meaning of "integrity of the tax system" is set out in section 6(2). The section refers to taxpayer perceptions of that integrity. It also refers to the Commissioner acting fairly and within the law and the corresponding rights of taxpayers in this regard. Under this section, taxpayers also have rights to be treated with no greater or lesser favour than other taxpayers.

9.7 Section 6A(2) provides that in collecting taxes, the Commissioner must consider the importance of promoting voluntary compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts. Promoting voluntary compliance includes encouraging proactive taxpayer behaviour to get things right.

9.8 A taxpayer's primary tax obligations are set out in section 15B of the TAA. They include correctly determining the amount of tax to pay, paying that tax on time, filing returns and complying with other obligations imposed by the tax laws. Where the correct tax treatment is uncertain, compliance can be measured by taxpayers proactively requesting the Commissioner's view as to the correct tax treatment.

9.9 The Commissioner's view is that the requirement to protect the integrity of the tax system means protecting the system of voluntary compliance on which the tax system relies for proper functioning. The matters that need to be considered in terms of the integrity of the tax system are therefore inextricably linked with the effect of a settlement on voluntary compliance.

A settlement that is too low undermines voluntary compliance and tax system integrity

9.10 The starting point is that a settlement that is too low does not encourage voluntary compliance or support tax system integrity. This is because a perception that the Commissioner will readily settle any dispute creates a perception that there is no or limited cost to risk-taking behaviour.

9.11 A question which arises from section 6(2) is whether taxpayers will see the Commissioner's approach to settlement at a discounted amount as reasonable. If not, is the Commissioner being overly lenient or unduly harsh in his approach to settlement given the circumstances? In other words, does the proposed settlement give the general body of taxpayers' confidence that the tax system is operating fairly and consistently.

9.12 The encouragement of voluntary compliance and maintenance of tax system integrity also requires any decision to settle to be taken carefully where the issue under consideration is relevant to a large number of taxpayers. In these circumstances the existence of a settlement, if publicised, could undermine the general perception of

other taxpayers, and lead to a net loss of integrity and voluntary compliance. In contrast, a unique or "one off" dispute, if settled, is less likely to have this effect.

9.13 Where Inland Revenue is perceived to be "lenient" on a particular type of taxpayer or making concessions on a perceived difficult area (e.g. evasion, avoidance or areas of "black letter" complexity), then the public may have less regard for the tax system. The Commissioner should take a firmer line in cases where behaviour deliberately undermines the integrity of the tax system, such as where evasion is alleged.

Voluntary compliance and tax system integrity as a factor in favour of settlement or a neutral factor

9.14 On the other hand, voluntary compliance and tax system integrity could be undermined if Inland Revenue invests a great deal of resource disputing an issue that is either not material or is otherwise unmeritorious. So, where there is little tax at stake, and no general clarifying proposition of law is likely to come from the dispute, rejecting an individual's reasonable settlement offer may adversely impact taxpayers' perceptions of the system's integrity.

9.15 By contrast, the public may have more confidence in the tax administration if the reverse occurs – i.e., Inland Revenue stays the course in a dispute with difficult issues or aggressive taxpayers but settles cases that have a small amount of tax at stake and do not impact on taxpayers more generally, especially where the Commissioner has limited resources.

9.16 However, it should be kept in mind that, even in relation to difficult issues or aggressive taxpayers, other settlement factors might strongly indicate that settlement is appropriate. For example, where Inland Revenue's limited resources could be deployed more effectively elsewhere and there is significant litigation risk, the appropriate settlement of a difficult issue would be unlikely to undermine tax system integrity and voluntary compliance.

9.17 In some cases, a settlement might be expected to have a neutral impact on voluntary compliance. This means that other factors will be the reasons for compromising on the tax, shortfall penalties or UOMI payable. While a compromise on the amounts payable may not increase voluntary compliance, it may also not reduce it and therefore undermine tax system integrity. In other words, if other factors support a settlement, then settlement would be appropriate unless it would reduce voluntary compliance generally.

The relevance of the specific taxpayer's past and future compliance

9.18 A decision maker is entitled to take into account the past compliance record of the taxpayer involved in the dispute. The taxpayer's known appetite for tax risk may be relevant to assessing their future compliance, and if past compliance is particularly bad, then it is far less likely that a settlement would be contemplated.

9.19 The likely future compliance of the taxpayer will also be relevant. Sometimes we can legitimately say that we are confident that the taxpayer now understands the error which has occurred, has taken steps to fix it and will be compliant in the future (perhaps because there is very good past compliance behaviour). This can be important in terms of promoting voluntary compliance, since continuing to vigorously pursue the dispute might well undermine that future compliance.

Consistency

9.20 Taxpayers in the same situation should generally be treated consistently. However, this does not mean that taxpayers must be treated identically just because the issue in dispute is the same.

9.21 In the context of a group of taxpayers who have adopted an incorrect tax position in the same circumstances, it is permissible to offer a better settlement to members of that group that are willing to settle earlier in the disputes process. However, it should also be noted that this will not always be the case. If for example, the Commissioner has settled with a taxpayer during the conference phase of the disputes process and a court decision subsequently clarifies the law, the same settlement may not be appropriate for another taxpayer seeking to settle at the conference phase.

9.22 As a general proposition there needs to be appropriate reasons why a comparable settlement would not be accepted in comparable circumstances. However, it is important that Inland Revenue has the flexibility to treat different situations appropriately. Therefore, if possible, settlements should be made on the basis that they are not indicative of what might be agreed in a future case, and the terms are to be kept strictly confidential.

9.23 In summary, the Commissioner should always be endeavouring to treat taxpayers in similar circumstances as consistently as possible while following the law, but it must be acknowledged that there will often be differences that justify different treatment. Furthermore, Inland Revenue should not adopt a consistent position with a previous settlement if that previous settlement can no longer be justified.

Taxpayer disclosures and voluntary compliance

9.24 There are situations where settling might improve voluntary compliance so this factor could support a compromise on what is payable. Providing information proactively through voluntary disclosures and seeking the Commissioner's views on what the law requires through rulings and indicative views are also part of what it means to be voluntarily compliant. These situations are discussed below.

9.25 Whether a taxpayer has disclosed a particular tax position taken may be a relevant consideration. A taxpayer can voluntarily disclose a potential tax shortfall, but the Commissioner may not agree that the disclosed shortfall is correct. If the disclosure is full and complete, this usually indicates that the taxpayer is attempting to be compliant, and this should be encouraged. However, a voluntary disclosure where an audit commencement has been indicated is less persuasive when considering whether a settlement should be accepted.

9.26 Where the disclosure is less than complete, this raises questions as to why information may have been withheld from the disclosure. Such a disclosure may not be supportive of a compromise on the amount the Commissioner considers payable.

9.27 Whether a taxpayer has sought a ruling may also be a factor that the Commissioner might take into account in terms of taxpayer compliance. A ruling application generally indicates a taxpayer wishing to be compliant by seeking the Commissioner's view of the tax treatment of an arrangement. As such, this should be seen more favourably than an issue identified in an audit, otherwise the Commissioner could be seen to be discouraging compliance through ruling applications.

9.28 Awareness of the Commissioner's view of the tax treatment of an arrangement in these circumstances should not generally be seen negatively in a settlement context, especially where the issue is not straightforward. Ultimately, if a taxpayer has brought

the issue to the Commissioner's attention via a ruling application, this should be encouraged. A dispute flowing from an indicative view request should be seen similarly to that arising from a ruling application.

Incorrect Inland Revenue guidance

9.29 A further scenario where voluntary compliance might be promoted with a more lenient settlement approach is in relation to penalties and/or UOMI where Inland Revenue was at fault either through the provision of incorrect guidance to a particular taxpayer or through the provision of incorrect information in a publication. This is consistent with the approach in SPS 18/04 *Options for relief from tax debt,* albeit that a compromise under a settlement is different from the remission of an assessed penalty or consequential UOMI.

Factor two: Inland Revenue resources and taxpayer compliance costs

9.30 Section 6A(2) confirms that the use of Inland Revenue resources and the compliance costs imposed on taxpayers are two relevant factors when making a settlement decision.

9.31 Paragraphs 124 to 126 of IS 10/07 make the point that excessively high taxpayer compliance costs could undermine voluntary compliance. However, IS 10/07 also notes that Parliament contemplated that taxpayers would incur compliance costs to comply with their tax obligations and as a result of the Commissioner exercising the powers conferred on him to ensure taxpayer compliance. As a result, although taxpayer compliance costs may be relevant to a settlement decision, they will not generally be determinative or of significant weight.

9.32 In terms of Inland Revenue resources, the question is whether those finite resources could be better used for other purposes. The decision-maker has to have a reasonable idea of the amount of cost to Inland Revenue if it applies the resources necessary to continue the dispute, including potential litigation costs.

9.33 The cost of investigative, legal and other resources (such as forensic or Crown Law Office resources) need to be estimated. More complex cases will clearly occupy more time and cost more. The dispute will often involve senior technical and investigative staff, as well as external consultants and advisors. There is also the possibility of procedural and other impediments, which all need to be considered.

9.34 Secondly, the decision maker is entitled to take into account the alternative use of Inland Revenue's resources, or the "opportunity cost". In the past Inland Revenue has occasionally considered that bringing a dispute to an end, particularly where it is about a small quantum of tax can be more economical than continuing and succeeding in the case itself. In those circumstances, opportunity costs are valid considerations. Compromise may be preferable where the Commissioner needs resources to apply to a different case that is either strategically more important or involves considerably more tax in dispute.

9.35 The calculation is about establishing a reasonable figure for the commitment of resources going forward in the dispute and weighing that against the revenue at stake. This does not just mean the revenue at stake in terms of the particular individual dispute. Inland Revenue would also need to take into account the wider implications of the dispute (although this might happen under the "precedential value" factor, below). This is ultimately about determining, or at least estimating, what is the "net revenue" (in terms of section 6A), which could be affected by the decision.

9.36 This factor will favour a settlement where the resource that Inland Revenue will need to deploy to complete a dispute outweighs the benefit achieved. This may be relevant where, for example, a historic dispute involving a single taxpayer with little tax at stake and no precedential value is still likely to require significant Inland Revenue resources (e.g. because of the complexity of the issue and the need for expert advice).

9.37 By contrast, it may be a more neutral factor where the dispute will not require significant additional resources (e.g. the dispute builds on work previously done by the Commissioner). In any case, the resource factor will need to be balanced against the other factors.

Factor three: likelihood of success in the dispute

9.38 There is risk in any dispute that Inland Revenue's view will not be accepted. What must be weighed here is the extent to which Inland Revenue's position may or may not succeed in a court or the TRA. In considering the likely dispute risk, a number of factors need to be considered: interpretative uncertainty; evidential issues; and administrative or procedural concerns. Each of these needs to be separately taken into account.

9.39 Although Inland Revenue may consider that it has the better view of the law, there is still a risk that a court will disagree with that position. What must be weighed here is the likelihood of succeeding where there is uncertainty as to the law or the facts. So, for example:

9.39.1 The relevant legislation may not have been previously considered by the Courts or there may be commentary on the law suggesting it can be interpreted in different ways. Alternatively, it may be a novel application of settled law (such as a novel capital v revenue issue).

9.39.2 Where the propositions of law are not in doubt, there may still be dispute risk arising from the standard of the evidence. This can be either factual or expert opinion evidence and the credibility of a witness may be an important factor. Similarly, there may be uncertainty where a taxpayer's expert is at odds with ours (over, for example, a valuation issue).

9.39.3 Finally, there will be rare occasions where administrative or procedural issues heighten our dispute risk. This may occur in relation to something like time bar (in a novel setting) or where the Commissioner is alleged to have made a tentative assessment.

9.40 Legal Services will be able to assist with this generally, but what is required is an aggregate assessment of the matters that impact on IR's chances of succeeding. In particular, where there is a very significant dispute (either because it will act as a precedent or because of the quantum of tax involved) Legal Services' advice on litigation risk should be obtained. Legal Services may also involve the Crown Law Office if appropriate.

9.41 This factor becomes increasingly in favour of settlement as Inland Revenue's chances of succeeding are lessened. Conversely, where there is little or no litigation risk (for example, a scheme replicates in all material respects a case which has been considered by the courts), then this factor may weigh more in favour of not settling.

9.42 There is always some risk of failure, but decision-makers should not be excessively swayed by this. It is an assessment of all of the relevant factors together that remains critical.

Factor four: precedential value of the dispute

9.43 A settlement is more likely to be approved if it is confined to its own facts and will not impact on other taxpayers. By contrast, it will be more difficult to justify a compromise where the dispute may impact on a number of taxpayers or where Inland Revenue would like the position to be made more certain.

9.44 The value of a dispute, in terms of its impact on others, may be two-fold. First, there is the impact it may have on other taxpayers in comparable situations. Secondly, there may be a need to have the relevant law clarified for a much wider group.

9.45 If we consider that a particular dispute will formally or indirectly determine the Commissioner's position in relation to either a number of taxpayers or an issue generally, then it is not as desirable that such a dispute should be settled. For example, if we are in dispute with a taxpayer over whether certain expenditure is capital or revenue expenditure and consider that the issue may apply to the same or similar facts across an entire industry, then this factor would favour the dispute continuing rather than settling (even where other factors might indicate settlement).

9.46 Similarly, where the dispute relates to a potential tax avoidance arrangement that a number of taxpayers have replicated, this would count against settlement. In such circumstances, continuing and resolving (rather than settling) the dispute may ultimately positively impact on matters such as voluntary compliance and resource savings, if only by clarifying the law.

9.47 Inland Revenue may also want to pursue a dispute in circumstances where the law is unclear and obtaining clarity on the law will promote voluntary compliance. A decision to settle might not be contemplated where, for example, it is unclear whether an individual is entitled to claim a deduction for certain accrual or interest expenditure and the interpretation of the provisions could have far-reaching implications for many other investors.

9.48 Conversely, where the dispute is relatively fact specific and is not going to provide any guidance for other taxpayers in like situations, the capacity for settlement is greater, so this factor becomes more neutral to positive in considering a settlement proposal in these circumstances.

9.49 Finally, the terms of the settlement (in addition to whether Inland Revenue settles at all), although confidential can be seen as creating a precedent. While each case should be approached on its merits, we need to be very mindful of this if there are likely to be other similar cases to resolve.

9.50 Please also note the comments above explaining the need to contact Legal Services where other directly relevant litigation or disputes are already under action.

Factor five: quantum of tax in dispute

9.51 The greater the potential tax in dispute, the more compelling the other reasons for settlement need to be. Determining the tax at risk is relatively easy for a simple dispute but an aggregation of tax at risk might be required when there is a comparable arrangement involving several taxpayers. In the latter situation, the tax at risk may be closely aligned to the dispute's precedential possibilities.

9.52 The amount of tax which is affected by the possible settlement is also relevant. There are overlaps with the other criteria of course. So, for example, if the tax is quite small, then it is relatively easy to see that applying substantial investigative and legal resources, which could easily exceed the tax in dispute, could produce a negative net

revenue figure. This would never be a decisive factor on its own, but it should be taken into account.

9.53 Where the revenue at stake is very large, say in the millions of dollars, this will be a significant factor in deciding to continue the dispute. Of course, the higher the dispute or litigation risk, the greater the chance that some or all of the tax will not be able to be assessed.

Factor six: the taxpayer's ability to pay

9.54 There may be situations in which the ability to receive a settlement payment from the taxpayer decreases over time.

9.55 The primary aim is to correctly assess the taxpayer. However, it is sometimes appropriate to consider whether Inland Revenue would eventually recover the full tax, UOMI and penalties if the dispute continues. That is, an agreement now with the taxpayer to a reduced assessment and the payment of that assessment may increase the revenue collected compared to an assessment and payment in the future without that agreement.

9.56 That may be the case if funds are currently available for the taxpayer to pay on the basis of a compromised settlement, but there is a real likelihood that the funds will not be there in the future. In this way this factor may be a relevant consideration, though it should not obscure the primary aims of correctly assessing the taxpayer, promoting voluntary compliance and maintaining the integrity of the tax system.

9.57 The mere fact that a taxpayer cannot immediately pay the full amount that should be assessed based on the other settlement factors is not a reason to compromise further. This factor can only be potentially relevant if it is likely that a taxpayer's financial situation will be materially worse in the near future so that a delay in assessing jeopardises the collection of real money. It may also be relevant that a person currently has money in New Zealand but will shortly leave for a jurisdiction where debt recovery possibilities are limited or non-existent.

9.58 Where the taxpayer's capacity to pay is an issue, it is recommended that the case team liaise with those who have debt expertise to see whether they have any views on collection issues relating to the taxpayer.

9.59 It should be noted that section 177C(3) of the TAA states that outstanding tax is not written off if a taxpayer is liable to pay ATP or evasion penalties that have been established, rather than just proposed.

9.60 The fact that the taxpayer is currently insolvent and not able to pay the tax could also be a relevant consideration if all other things were evenly balanced, but an inability to pay does not mean a settlement is required. For example, cases on care and management, including *Raynel v CIR* (2004) 21 NZTC 18,583 and *Clarke and Money v CIR* (2005) 22 NZTC 19,260, clearly indicate that the Commissioner is not required to cease recovery action just because the taxpayer may be insolvent. The Court in *Clarke and Money* stated:

> In the exercise of his discretion under section 177 the defendant is fully entitled to consider a whole range of factors including the circumstances which led to the plaintiffs' taxation debts; the nature and extent of the plaintiffs' co-operation and negotiating stance; the speed with which they have provided requested information and the extent of that information; his obligations under section 6 and section 6A(3); and matters of consistency in administration.

9.61 In those circumstances, there may be solid care and management reasons for continuing to pursue a dispute or take recovery action in the face of serious

noncompliance regardless of whether the taxpayer can pay. Inland Revenue has other powers with respect to debt.

Summary

9.62 When considering a settlement of a tax liability or potential tax liability, the starting point is that the law should be applied correctly and that we should seek to recover all of the tax which is due. Recognising that we cannot do so in all cases, these Guidelines provide:

9.62.1 a set of criteria which can be taken into account, depending on the particular case; and

9.62.2 some guiding principles as to how much weight should be applied to each of the criteria.

9.63 A proposal relating to the application of those criteria to the dispute in question needs to be set out in writing by the CCS team involved, and a decision made by a delegation holder with assistance from Legal Services (including the completion of the required CTA review).

9.64 If consideration of the above factors leads to a conclusion that a settlement should be entered into with the taxpayer, a final check should be undertaken to ensure that that settlement is consistent with the obligation under section 6 of the TAA to protect the integrity of the tax system, which relies on voluntary compliance. A settlement agreement should not be entered into if doing so would have a material adverse effect on voluntary compliance generally.

9.65 Whether or not a specific settlement would adversely affect voluntary compliance, and therefore the integrity of the tax system, depends on the terms of the settlement, the nature of the non-compliance and the likelihood of the settlement being regarded as precedential.

10. **Appendix: Extract on settlements from IS 10/07, October 2010, paragraphs 151 to 161**

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 prelitigation 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.