Inland Revenue
Te Tari Taake

Investigations and Advice
Whakatewhatewha me te Tohu
Legal and Technical Services
Rātonga Ture me Hangarau

Operational Guidelines: Section 6A Settlements

Internal Use Only

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To: Investigations and Advice Managers
Investigations Managers
LTS Managers

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Guidelines on Operational Approach to Settling Disputes Prior to Challenge

Introduction

1. Interpretation Statement IS 10/07 (the **Statement**) confirms that Inland Revenue can "settle" disputes prior to litigation, 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 Investigations & Advice might settle a dispute (or a potential dispute). These Guidelines apply to settlements that occur at any stage of the disputes process prior to the filing of a challenge in the Taxation Review Authority or the High Court. They also apply to the settlement of cases prior to the commencement of the disputes process.

2. These Guidelines consider the following issues:

   i. Whether the decision being made is a settlement or something else?
   ii. Who is involved in making the decision?
   iii. What process is required before settlement can occur?
   iv. What does the decision itself involve?
   v. What factors will be relevant when deciding whether to settle?

3. Each of these issues is considered separately below. Additional resources are available on the LTS intranet Settlements pages:

[Internal intranet link removed]

[1] At paragraph 156.

General Approach

4. Both the courts and the Statement 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).

5. The starting point is that, where the facts are clear and the law is settled, the Commissioner must apply the law correctly. This will not always be the situation, which is one of the principal reasons for preparing these Guidelines. Even when the position is clear, however, there may still be a basis for accepting an outcome which does not fully reflect the strict legal position.

6. Settlement decisions are to be made by considering the seven 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. Section 6A does refer to the compliance costs of taxpayers and this is not one of the seven factors, but it will be considered as part of the integrity of the tax system and/or voluntary compliance factors.

7. The final task is to stand back and confirm that the decision to settle (or not) is consistent with the dual duties noted above. Above all, the decision to settle should be measured against the impact it may have on voluntary compliance. A too rigid approach can potentially undermine perceptions about compliance, though this is more likely if we too quickly accept a taxpayer's proposal.

<u>One: Deciding whether a section 6/6A decision is required</u>

8. It is first important to determine whether a settlement (as opposed to something else) is being considered, since different scenarios can arise when we are in dispute (or potentially in dispute) with a taxpayer.

9. For the purposes of these Guidelines, a "settlement" or "compromise" involves the use of the Commissioner's general discretion under sections 6 and 6A to accept less tax than would apply if the Commissioner's position were correct. 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 in the dispute. The 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.

10. This can be contrasted to other decisions relating to disputes such as:

    (a) An exchange of information or arguments which enable either Inland Revenue or the taxpayer to change its view on how the law applies to that 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 tax investigations by resolving issues that are in dispute.

    (b) In the process of quantifying a disputed amount of, say, suppressed income, which is inherently uncertain, a manager 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 discussions on cases similar to *Penny & Hooper v CIR*, where the Commissioner can agree a reasonable amount to be returned by the taxpayer though the application of section BG 1.

(c) Management decisions about exactly which periods are to be investigated (e.g. four years rather than three), while arguably a reflection of care and management powers, can usually be made in the normal course of 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. In some cases a general decision might be made about a class of case – technically this would be a care and management decision. An example is found in the agreed approach set out in *Revenue Alert 11/02* concerning the *Penny & Hooper* case. These cases involve the discretion under section GB 1, rather than section 6A directly, but section 6A principles were applied to determining the overall approach.

(d) Certain discretions might be triggered on the basis of information provided or submissions made by the taxpayer, with particular respect to either the write-off of debt (sections 176 and 177*)*, the remission of certain penalties or interest (section 183D*)* or similar remission provisions. This might be logically regarded as a form of settlement, but it is not an exercise of the Commissioner's care and management powers under s 6A. 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 in the hope that it will go away, 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 Investigations team, with assistance from Collections, cannot reach a two-part agreement (first as to the basis of the assessment and second as to recovery). Another example could be around our discretion on reconstruction of tax avoidance arrangements. We can call this sort of situation a "discretionary resolution".

(e) A manager may make a decision to not commence an investigation (even if an eventual discrepancy seems reasonably certain, after a risk review for example) for a number of reasons including time bar considerations, the tax at stake is low or the collectability of the tax is limited. This is a resource allocation decision rather than an actual compromise for the particular investigation or dispute. This decision is still in a sense made under section 6A. However, this type of decision is outside the scope of these Guidelines.

Two: Who can exercise the delegation and when?

11. Both accepting and rejecting any settlement offer is an exercise of the care and management responsibility, so it must be considered by an appropriate delegation holder (even in circumstances whereby a settlement offer is obviously frivolous).

12. For the purposes of these Guidelines, those with the general care and management discretion will be the Deputy Commissioner (Service Delivery), Director (Litigation Management), Group Manager (Investigations and Advice), Investigations and Advice Manager (Investigations and Advice) and the Group Tax Counsel (Investigations and Advice). Settlements post the filing of a challenge should only

be made by the Director (Litigation Management). Any settlements in the post-adjudication period but prior to challenge need to be discussed with the Director (Litigation Management).

13. Any recommendation to the delegation holders to use care and management to settle an actual or potential dispute is subject to critical task assurance (**CTA**), generally by a Senior Tax Counsel, National Adviser Technical Standards or a Senior Solicitor approved by the Group Tax Counsel. The current list of senior solicitors who can review a settlement proposal for Critical Task Assurance purposes is contained on the intranet page maintained by LTS:

    [Internal intranet link removed]

    Investigations Managers and LTS Managers as decision-makers

14. Investigations Managers and LTS Managers have a more limited discretion. They 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:

    (a) The core tax in dispute is less than $100,000; or

    (b) The settlement offer involves the Commissioner conceding less than $50,000 (including use of money interest (**UOMI**) and shortfall penalties) of the amount in dispute.

15. Investigations Managers and LTS Managers may 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 $100,000).

16. Any care and management recommendation to an Investigations or LTS Manager is subject to Critical Task Assurance by another LTS Manager, Senior Tax Counsel, LTS Team Leader, Senior Solicitor or Senior Technical Advisor.

Some general limitations and issues

Where other case/periods are in dispute:

17. Investigations Managers and LTS Managers should only exercise their delegation if they are confident that the dispute is not similar to other investigations or disputes being undertaken. 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.

    Where a similar case is in litigation

18. **Litigation Management Unit** (**LMU**) **involvement:** All decision-makers (including general care and management delegation holders) should not, regardless of the weight which would otherwise be given to the criteria, agree to settle a dispute (or reject a settlement offer) with a taxpayer if litigation has commenced in respect of another period for the taxpayer on the same issue, or in respect of an associated entity such as a partnership or similar business grouping involving the taxpayer or associated parties. In these cases, no settlement decision is to be taken except with LMU approval.

19. Investigations or LTS should be liaising with LMU management in any event to ensure that any such settlement does not impact on any live proceedings.

Use of tax losses

20. Taxpayers sometimes offer to pay disputed tax through the reduction of tax losses.

21. Our general settlement policy is not to accept income tax losses to pay any tax owing (shortfall penalties are able to be paid with tax losses; see below). This is because the payment of any tax should be the priority and because the cancellation of losses generally requires that an artificial assessment be first raised as part of any settlement. Losses as payment of tax will only be permitted by a general care and management delegation holder (i.e. not an Investigations Manager or LTS Manager) in the following circumstances:

    - 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
    - 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 Collections; and
    - 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
    - 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 be appropriate. Similarly, if the losses are not themselves legally supportable (e.g. because they have been generated from an avoidance arrangement), they may not be used for these purposes.

22. 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 could be acceptable in the circumstances. Note that losses can be used to offset income in the usual way and the prohibition against using tax losses does not apply to those situations.

23. 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.

24. 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.

25. The use of any losses should not in any case however be recorded as constituting a payment for imputation credit or other tax credit purposes.

Settlement periods

26. Usually the settlement applies naturally to the periods in dispute. Sometimes it can be a viable settlement option to limit the periods in dispute by conceding one or more of the earlier periods, for example, if the criteria below appear to indicate that as an option, such as where the evidence is less clear (increasing the litigation risk) for that period.

27. 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 be more than say 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 quite rare.

Collections Work

28. Though generally all settlements should be on the basis of payment in full, in rare cases it is desirable to resolve payment and collection issues at the same time as settling the tax dispute. Investigations staff should work closely with Collections staff to determine whether it is appropriate to apply the debt provisions such as instalment arrangements. Sections 6 and 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 the Statement.

Personal guarantee or security

29. 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. LTS must assist if a personal guarantee or security forms part of a settlement.

At what stages in the dispute process can a case be settled?

30. Settlement can occur at any point in the investigation and dispute phases (and can also occur later, e.g. in 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 principles discussed below apply in the context of the case in question.

31. However, these Guidelines do not apply to settlements that occur after the taxpayer has been re-assessed and has challenged the assessment. In those circumstances, the decision to settle rests with LMU. As previously mentioned, LMU should be consulted for any post-adjudication but pre-challenge settlement offer. LMU may also form an integral part of settlement decisions made under these Guidelines (as may Crown Law),[2] particularly in relation to assessing dispute risk. In addition, no

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

settlement decision is to be taken except with LMU approval if litigation has commenced in respect of:

- another period for the taxpayer on the same issue;
- a partnership, company group or similar business structure involving the taxpayer or associates and the disputed issue;
- a very similar legal issue involving other parties.

What taxes can be the subject of settlement?

32. 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. However, generally this means:

(a) We may compromise on the quantum of **core tax** in dispute, if a compromise is clearly justified in terms of these Guidelines. In particular, protecting the integrity of the tax system means that the general body of taxpayers should not perceive that disputing a tax issue with us will always lead to a tax bill that is less than core tax. As such, the other factors supporting settlement need to be increasingly compelling, the smaller the percentage of core tax the taxpayer is offering to pay. It is preferable to compromise on shortfall penalties rather than core tax, in most cases.

(b) We can compromise on the quantum of **shortfall penalties** imposed in a settlement. It is also possible to impose a lower level of penalty if that is appropriate (for example imposing an unacceptable tax position penalty rather than an abusive tax position penalty). However, the need to act consistently with sections 6 and 6A is more readily apparent where the penalty that would be otherwise imposed on the taxpayer is at the serious end (for example, abusive tax position or evasion penalties).

(c) 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 we regularly accepted settlements that did not have any UOMI imposed on the settled amount or it was overly discounted. In other words, if settlement results in reduced core tax assessments, UOMI will be lower than if full core tax was paid. However, UOMI may be compromised below that flowing from the level of core tax payable in some circumstances. Section 183D sets out that the Commissioner may remit UOMI (and penalties). The Standard Practice Statement on this section (SPS 15/02) states that remission occurs when the UOMI is correctly charged at the time, but it is decided to relieve the taxpayer of liability. While a compromise of UOMI is different from remission, the SPS provides useful guidance. The SPS does not allow remission where the non-compliant action was the result of a genuine oversight or a one-off situation. It does provide that charging UOMI would be unreasonable where the taxpayer has received incorrect advice from an Inland Revenue officer or the taxpayer has relied on incorrect information in an Inland Revenue publication. Analogously, reducing UOMI in a settlement in these circumstances would be appropriate. Section 120W provides that UOMI is not payable where the taxpayer relied on the "Commissioner's official opinion", as defined in s 3. If that definition applies, the inapplicability of UOMI will not be a compromise of UOMI and will fall outside these Guidelines. 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 by the Commissioner of UOMI.

33. 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 apply a different valuation methodology, where there is flexibility within the law to do so. These approaches should be applied with great care however with precedent in mind.

Three: The General Process for Considering a Settlement

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

Pre-Decision

35. The settlement proposal will have been provided to (or in some circumstances initiated by) Investigations or LTS. The team considering the dispute (or potential dispute) will analyse whether they think accepting the offer would be consistent with our care and management responsibilities – taking into account the matters covered in these Guidelines.

Offers/counter-offers by Commissioner

36. 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 counter-offer can be formally made to the taxpayer.

37. The Inland Revenue case team may have also had further discussions with the taxpayer's advisors regarding the potential settlement. Where potential settlement discussions occur between a taxpayer and the case team, it needs to be made clear that:

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

    (b) Any proposed settlement will need to be approved by the relevant s 6A delegation holder; and

    (c) Any agreed settlement will need to be formalised through the execution of a deed to be prepared by Inland Revenue.

Facilitations during conference phase

38. Where the subject of settlement arises during a facilitated conference:

    (a) Any settlement discussion at the facilitated conference should be clearly distinguished 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 positive engagement has been made by the parties in trying to resolve the issue in other ways.

    (b) The facilitator should ensure the parties understand that the settlement discussion is on a "without prejudice" basis and that the dispute facilitation itself is on hold while the settlement discussions take place. 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, see the discussion in the forthcoming SPS on legal advice and other privilege.

(c) 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).

39. 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.

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

Recommendation memo

41. 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. The memorandum should have been approved by an Investigations Team Leader (or an Investigations Manager where they are not making the settlement decision). The recommendation will also be Critical Task Assured to confirm that it is consistent with Sections 6 and 6A and these Guidelines. Additional resources are available on the LTS intranet Settlements pages:

[Internal intranet link removed]

The Decision-Making Framework

42. Once the decision-maker has received the Critical Task Assured recommendation to settle (or reject the offer), he or she will decide whether to accept or reject the proposed settlement in accordance with Part 4 below. That decision can of course be contrary to the recommendation provided by the relevant officers.

43. The delegation holder's decision will be based on a balancing exercise using the factors described in part 5 below. This ensures that, whatever decision is made, it is consistent with the Sections 6 and 6A obligations. It is obviously important that the decision-maker clearly documents the decision-making 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.

44. A settlement process guide is included on the LTS resources page here:

[Internal intranet link removed]

Post-decision

45. **Rejection of the settlement offer**: 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. In particular, the adverse impact on voluntary compliance and tax system integrity should be stressed as the important reasons why the offer was not acceptable. If settlement was rejected on the basis of precedentiality so that only full core tax (and penalties if relevant) is acceptable, we should advise the taxpayer of this position. This eliminates the time and resources needed for making and considering further unacceptable offers.

46. **Accepting the proposal – drafting of settlement deed**: If the delegation holder's accepts a settlement proposal, its terms will need to be formalised in writing and 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 LTS. Normal terms of any settlement would make clear reference to:

    (a) our intended assessment including penalties;
    (b) the taxpayer's obligations in terms of future compliance;
    (c) the confidential and non-precedential nature of the settlement;
    (d) the provision of information;
    (e) the manner in which the settlement is to be effected (for example, if an instalment arrangement is to be entered into, this should be captured and follow the appropriate process in respect of such arrangements);
    (f) any guarantees or security required;
    (g) the consequences of non-payment or default if payment is not required; and
    (h) the position relating to consequential adjustments (including to other tax types, periods, or related parties).

47. Please contact LTS to confirm the appropriateness of any particular draft settlement deed. A template is available on the LTS Settlements page:

    [Internal intranet link removed]

48. The usual process is for the taxpayer to sign the deed first and then the Commissioner.

49. **Letter Agreements:** 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. The template offer letter should be used in these circumstances. This can be found on the LTS website. The offer letter should be signed by an Investigations Manager or LTS Manager.

50. If the Commissioner issues a settlement offer letter which is not subject to conditions, it is important to note that, if a taxpayer accepts the Commissioner's offer, there will likely be a settlement agreement which the Commissioner could not resile from. It is therefore very important that any offer letter is reviewed by LTS.

51. **Settlement Register**: The Investigations Team must then summarise the decision to settle by completing the form and sending this to the Group Tax Counsel's PA, who maintains a register of section 6A settlement decisions for future reporting and integrity purposes. See the Settlements page on the LTS website and the Knowledge Base (Settle an audit case – No Adjudication) for further information.

Four: The Decision Itself

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

    (a) *Is all the relevant information held?* A decision to settle can only be made if the decision maker is fully informed. The Investigations team will need to have obtained sufficient information (from the taxpayer, third parties and, where necessary, independent experts), together with legal input from LTS (and sometimes LMU, OCTC or PAS), 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, he or she should request that information from Investigations and/or LTS; and

    (b) *With that information, is the Commissioner's position correct?* A settlement is only appropriate where we still consider that our 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.

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

    (a) 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 our 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.

    (b) In this regard, while it is important to consider the factors described below in combination when considering the particular settlement proposal, the *overriding* obligation is to ensure that any settlement decision is consistent with collecting the highest net revenue over time, protecting the tax system's integrity and promoting voluntary compliance by taxpayers. The decision to settle a dispute or not must be consistent with those objectives. This means that factors specific to the settlement proposal not discussed in the Guidelines may still be relevant to the process.

    (c) In most circumstances, consideration of the factors described in the next section will involve a balancing exercise. This is because some of those factors may favour settlement whereas others may 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, where the settlement becomes more widely known.

Five: The Factors to be Considered

54. 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 ones that will generally be more relevant to settlement decisions are discussed first. In particular, the last two categories 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.

55. 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 the taxpayer had 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.

56. The portion of the Interpretation Statement 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 the Statement, should be used as a guide.

57. The following commentary expands on and explains those criteria in a more practical context. The criteria discussed below are consolidated into seven 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 the Interpretation Statement itself is also appropriate, in decision-making, but this should not generally be necessary.

Factor One: Inland Revenue's Resources

Section 6A(3) confirms that the use of our resources and the compliance costs imposed on taxpayers are two relevant factors when applying care and management. In terms of our resources, the question is whether those finite resources could be better used for other purposes.

58. The decision-maker should consider the resources necessary to develop the dispute from this point onwards, including litigation costs, against the revenue to be gained.

59. 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 being placed in the way of the dispute, which all need to be taken into account.

60. 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 we have 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 there is another large different case looming, involving considerably more tax in dispute where it is strategically more important for Inland Revenue to apply investigation resources to that case instead.

61. It might be useful to establish a reasonable figure for the commitment of resources going forward in the dispute, and weigh that against the revenue at stake. By this we do not mean just the revenue at stake in terms of the particular individual dispute. We would also need to take into account the wider implications of the dispute. That is, if there are 100 other similar cases (which can be determined by discussing the proposed settlement with people such as portfolio holders in Investigations, LTS or with LMU) that would be affected by this decision, then that needs to be considered (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.

62. This factor will favour a settlement where the resource that Inland Revenue will need to deploy (in terms of personnel time and cost mainly, but also taking into account possible external costs such as expert advice etc.) to fully 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 precedent 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).

63. 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 it needs to be balanced against the other factors.

Factor Two: Likelihood of Success in the Dispute

There is risk in any dispute that our view will not be accepted. What must be weighed here is the extent to which our position may or may not succeed in the dispute. It is possible that our position may not be accepted by either 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.

64. Although we consider we have 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:

    (a) 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).

    (b) 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. So, the credibility of a witness may be an important factor. Similarly, there may be uncertainty where the taxpayer's expert is at odds with ours (over, for example, a valuation issue).

    (c) 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 we are alleged to have made a tentative assessment.

65. LTS 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. This will often require discussions to occur with LMU and, occasionally, the Crown Law Office. 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) LMU's advice on litigation risk should be obtained.

66. This factor becomes increasingly relevant to a settlement decision as our 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 will generally not be very relevant.

Again, there is always some risk of failure, but decision-makers should not be excessively swayed by this. The other factors remain critical.

Factor Three: Promoting Voluntary Compliance

This may involve promoting voluntary compliance generally or in relation to a specific taxpayer. Where the promotion of voluntary compliance relates to taxpayers generally, it will be closely aligned to protecting the tax system's integrity, which is considered separately below.

67. The starting point is that a settlement that is too low does not encourage voluntary compliance.

68. A careful judgment must be made about the potential impacts of a settlement, on both the particular taxpayer, any related parties and on taxpayers in general (e.g. if the matter was to become widely known).

69. In respect of the particular taxpayer, the decision maker is entitled to take into account the past compliance record of those involved in the dispute. If this is particularly bad, then it is less likely that a settlement would be contemplated. The taxpayer's known appetite for tax risk may also impact on their likely compliance with the settlement terms or future compliance in general.

70. Their compliance behaviour could also be affected by the type of dispute in question (even if the taxpayer had generally been compliant). For example, if it is a question about evasion or avoidance it is less likely that we would want to settle. See also the *Integrity of the tax system* factor below.

71. Whether a taxpayer has disclosed a particular tax position taken may be a relevant consideration. A taxpayer can voluntarily disclose a potential tax shortfall, albeit that the taxpayer does not accept that the full shortfall should be paid, often because there may be arguments which suggest a contrary view. Such a disclosure 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 a far less persuasive a reason for settling.

72. The decision-maker should also take into account the likely future compliance of the taxpayer. 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. It is particularly important except in quite rare cases to obtain a clear undertaking that the disputed items will be treated correctly in future returns however.

73. This factor will be more relevant where a decision to settle may affect the behaviour of other taxpayers. The obvious example is where other taxpayers have similar disputes (e.g. in a mass marketed scheme situation). As mentioned, in these circumstances the settlement of individual cases should not occur unless there are very strong reasons to settle. The existence of a settlement, if publicised, may often undermine the general perception of other taxpayers, and lead to a net loss of integrity, especially if the issue in the dispute is a common one. A unique or "one off" dispute, if settled, is less likely to have this effect.

74. A dispute where the taxpayer has sought a ruling application is also 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. Awareness of the Commissioner's view of the tax treatment of an arrangement should not generally be seen negatively in a settlement context, especially where the issue is not straightforward. Ultimately, the taxpayer has brought the issue to the Commissioner's attention via the ruling application and this should be encouraged.

75. However, the Commissioner should generally take a harder line in cases of tax avoidance and should certainly do so where evasion is alleged. A slightly more favourable approach might be made for those avoidance cases where the taxpayer is not the instigator or promoter of the tax avoidance, was likely to be unaware of the avoidance and has taken reasonable steps in the circumstances to check the tax treatment.

76. It is possible in some cases that a settlement will improve not only the individual taxpayer's compliance in the future, but that of associates, and other taxpayers if they became aware of the now-compliant behaviour.

77. The issue becomes more neutral if settlement is unlikely to positively impact on either general or specific voluntary compliance.

Factor Four: The Integrity of the tax system

> *Here we are concerned with the impact that any settlement may have on perceptions about the tax system's integrity. Will the general body of taxpayers' confidence in the tax system and the way we administer it be enhanced or reduced if we settle a particular dispute?*

78. Another important factor is the potential impact which settlement may have on public perception of the tax system's integrity.

79. The meaning of "integrity of the tax system" is set out in s 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.

80. One question which arises from s 6(2) is therefore whether taxpayers would see the Commissioner's approach to settlement at a discounted amount as reasonable. Or is the Commissioner being overly lenient or unduly harsh in her 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. Some of the issues discussed above may be relevant again here (e.g. large tax at stake or aggressive tax planning). However, it is important to appreciate that any decision to settle can either promote or detract from this overarching objective.

81. Where we are perceived to be "lenient" on a particular type of taxpayer or making concessions on a perceived difficult area (e.g. evasion or avoidance, but also many areas of "black letter" complexity), then the public may have less regard for the tax system. On the other hand, a similar reaction could occur if we invest 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 fall out of the dispute, rejecting an individual's reasonable settlement offer may adversely impact on taxpayers' perception of the system's integrity and trust in Inland Revenue.

82. To restate, by contrast, the public may have more confidence in the tax administration if the reverse occurs – i.e. we stay the course in a dispute with difficult issues or aggressive taxpayers, but settle cases where taxpayers have attempted to be compliant, or that have a small amount of tax at stake and do not impact on taxpayers more generally.

83. The tax system's integrity may also be impacted where we are considering a settlement proposal that is comparable to one that we have accepted in relation to a materially similar dispute. There would need to be appropriate reasons provided as to why a comparable settlement would not be accepted by us, but this is an extremely difficult area, as it is important that Inland Revenue does not find its hands tied and has the flexibility to treat different fact 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.

Factor Five: Precedential Value of the Dispute

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 we would like the position to be made more certain.

84. 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 uncertainty in the relevant law clarified for a much wider group.

85. If we consider that a particular dispute will formally or indirectly determine the Commissioner's position in relation to either a number or category of taxpayers or of an issue generically, then it is often not 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). Similarly, where the dispute relates to a potential tax avoidance arrangement that a number of taxpayers have replicated, this would count against settlement, at least unless significant consideration has been given nationally to the approach to the particular type of arrangement. 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.

86. Please also note the comments above limiting the ability to settle where other directly relevant litigation or disputes are already under action. This must be checked with LMU.

87. We may also want to pursue a dispute in circumstances where the law is unclear and obtaining clarity on the law will also 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). The implications of disputing (and losing) may instead be that the Commissioner receives a multitude of relatively small s 113 applications requiring a significant amount of Inland Revenue resources.

88. Conversely, where the dispute is relatively fact specific and is not going to provide any guidance for other taxpayers in like situations, the case for settlement is greater, so this factor becomes less relevant to resisting a settlement proposal (however consider the comments above in respect of factor five).

89. Finally, the terms of the settlement (as opposed to whether we settle 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.

Factor Six: Quantum of Tax in Dispute

Obviously 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 a number of taxpayers. In the latter situation, the tax at risk may be closely aligned to the dispute's precedential possibilities.

90. 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 Investigation, LTS and LMU 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 should certainly be taken into account.

91. 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 Seven: The Taxpayer's Capacity to Pay

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

92. The primary aim is to correctly assess the taxpayer. It is sometimes legitimate 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. 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 possibility 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 aim of correctly assessing the taxpayer

93. Where the taxpayer's capacity to pay is an issue, it is recommended that the investigations team liaise with the Collections unit to see whether they have any views on collection issues relating to the taxpayer.

94. Section 177C(3) of the TAA states that outstanding tax is not written off if a taxpayer is liable to pay abusive tax position (ATP) or evasion penalties. Even where ATP penalties are only proposed, clearing a tax debt with losses is something that the Commissioner would not consider is appropriate.

95. 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 not otherwise. For example, certain cases on care and management, including *Raynel v CIR* (2004) 21 NZTC 18,583 or *Clarke and Money v CIR* (2005) 22 NZTC 19,260, clearly indicate that we are not required to cease recovery action just because the taxpayer may be insolvent, per Clarke and Money:

> 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.

In those circumstances, there are solid care and management reasons for continuing to pursue a dispute or take recovery action in the face of serious non-compliance regardless of whether the taxpayer can pay. Inland Revenue has other powers with respect to debt.

Summary

96. To summarise, where considering a "settlement" of a tax liability in a dispute, 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, and where a dispute is commenced with the taxpayer these Guidelines provide:

    (a) a set of criteria which can be taken into account, depending on the particular case; and
    (b) some guiding principles as to how much weight should be applied to those criteria.

97. A proposal relating to the application of those criteria to the dispute in question needs to be set out in writing by the Investigations and Advice staff involved, and a decision made by a delegation holder with assistance from LTS (Critical Task Assurance at a high level) and potentially LMU (depending upon the stage at which the dispute has reached) or possibly Crown Law.

98. The decision to settle should always be measured against the impact it may have on voluntary compliance and the integrity of the tax system. While we seek a proportional and balanced outcome, by default the law should be applied, and Inland Revenue should be cautious in departing from the legal position. Any other approach can potentially undermine public perceptions about compliance and the integrity of the tax system.

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Attachment – Extract on Settlements from Interpretation Statement IS 10/07, October 2010

Settlements and agreements

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

(a) 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;* and *AG v Steelfort Engineering*; *Fairbrother v CIR).*

(b) 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 resource 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):

(a) the resources required to undertake litigation;

(b) the alternative uses of those resources;

(c) the amount of the tax liability at stake;

(d) an assessment of the litigation risk (e.g., the likelihood of the Commissioner succeeding);

(e) the implications of the Commissioner succeeding (in whole or part) if litigation is undertaken;

(f) whether settling or litigating would better promote compliance, especially voluntary compliance, by all taxpayers;

(g) the amount the taxpayer would pay if the Commissioner were to settle;

(h) whether the subject matter of the dispute might be determinative of, or have broader application to, other situations;

(i) whether the Commissioner would be prepared to settle on an equivalent basis with other taxpayers in a similar position;

(j) the uncertainty in the tax system that might be created should the subject matter not be authoritatively determined by the courts; and

(k) the likely effects on taxpayer perceptions of the integrity of the tax system of settling or litigating.

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

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

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

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

(a) the Commissioner is acting pursuant to a condition in the settlement or agreement that allows him to resile;

(b) the taxpayer has failed to adhere to the settlement or agreement; or

(c) 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.