



Inland Revenue  
*Te Tari Taake*

## Operational Statement

OS 16/01

### Filing an IR 10 and Section 108 of the Tax Administration Act 1994

#### INTRODUCTION

This statement sets out the Commissioner of Inland Revenue's preference for the ways in which taxpayers may bring income to her attention when filing their annual return. Other than the return itself, other common ways are to complete the *Financial statements summary* (the IR 10) or to include a set of financial statements with their annual return.<sup>1</sup>

The Commissioner's preference is that this information is provided using the IR 10. This is because receiving the information via the IR 10 significantly reduces the administrative costs to Inland Revenue in processing the data for use by Inland Revenue, other government agencies (such as Statistics New Zealand) and the private sector. An exception to this are significant enterprises,<sup>2</sup> as the Commissioner requires these taxpayers to provide a package of information (including financial statements) for risk assessment.

Inland Revenue has made several statements about income disclosure by taxpayers who complete an IR 10, rather than provide their financial statements when furnishing their annual tax return, and the impact of this on the time bar under s 108(2) of the Tax Administration Act 1994. These statements are:

- *Tax Information Bulletin* Vol 3, No 5 (March 1992): 11
- *Tax Information Bulletin* Vol 5, No 3 (September 1993): 1
- *Tax Information Bulletin* Vol 6, No 13 (May 1995): 13
- *Tax Information Bulletin* Vol 10, No 3 (March 1998): 40, and
- *Agents Answers*, Issue 133 (March 2011): 1.

This statement amalgamates and replaces these items, and will apply to all decisions that may require the re-opening of a return of income made on or after 26 May 2016. This statement applies to the current IR 10 (for returns filed for the 2012-2013 and later income years) and the old IR 10 *Accounts information form* (for returns filed for the 2011-12 and earlier income years).

This statement also appears in *Tax Information Bulletin* Vol.28, No.6 (July 2016).

Unless specified otherwise, all legislative references in this statement refer to the Tax Administration Act 1994.

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<sup>1</sup> A *Statement in support of a tax interpretation* IR282 is another form that can accompany the return to help explain and support a taxpayer's interpretation or tax position. This form can be found at [www.ird.govt.nz](http://www.ird.govt.nz)

<sup>2</sup> The Commissioner considers "significant enterprises" to be customer groups of companies with a gross turnover of greater than \$80 million per annum where otherwise notified they are subject to the Basic Compliance Package process, or operating in specialist industries or subject to specialised tax laws.

## BACKGROUND

1. In 2012, the IR 10 form was redesigned. The revised form allows taxpayers greater ability to disclose income, gains and receipts (which may or may not be necessarily classed or returned as taxable income), and also limits the potential for discrepancies between amounts recorded on the IR 10 and what is contained in a taxpayer's financial statements. Some unnecessary items were also removed.
2. The changes mean the IR 10 form is now more aligned with financial statements. It also collects better data to help inform Government decisions, creates administrative savings for Inland Revenue and reduces compliance costs for some taxpayers.
3. The insertion of new data boxes provides greater opportunity for taxpayers to disclose income. The data boxes that were added to assist in greater disclosure are:
  - Box 26 Exceptional items
  - Box 28 Tax adjustments, and
  - Box 53 Untaxed realised gains/receipts.

## APPLICATION

### The Time Bar

4. Under s 108, if a taxpayer furnishes a tax return and an assessment has been made, the Commissioner is unable to amend that assessment to increase the tax payable if four years have passed from the end of the tax year in which the taxpayer provided the tax return. This is referred to as the time bar. Section 108 provides:

#### **108 Time bar for amendment of income tax assessment**

- (1) Except as specified in this section or in section 108B, if—
  - (a) a taxpayer furnishes an income tax return and an assessment has been made; and
  - (b) 4 years have passed from the end of the tax year in which the taxpayer provides the tax return,—

the Commissioner may not amend the assessment so as to increase the amount assessed or decrease the amount of a net loss.
- ...
- (1B) Despite subsection (1), the Commissioner may not amend an assessment so as to increase an amount of research and development tax credit under section LH 2 of the Income Tax Act 2007 if—
  - (a) a taxpayer furnishes an income tax return for the 2008–09 or a later tax year; and
  - (b) 2 years have passed from the latest date to provide a return of income for the relevant tax year and, for a member of an internal software development group to which section 68E applies, the latest date means the latest date for any member of the group; and
  - (c) the taxpayer—
    - (i) has not issued a notice of proposed adjustment to the Commissioner for an amount of a tax credit for research and development expenditure for the relevant tax year within the relevant response period; and
    - (ii) has not asked for an assessment to be amended under section 113, having provided a detailed research and development statement under section 68D or 68E, as applicable, within the time limit referred to in paragraph (b).
- (2) If the Commissioner is of the opinion that a tax return provided by a taxpayer—
  - (a) is fraudulent or wilfully misleading; or

(b) does not mention income which is of a particular nature or was derived from a particular source, and in respect of which a tax return is required to be provided,—  
the Commissioner may amend the assessment at any time so as to increase its amount.

...

5. If the Commissioner is of the opinion that the tax return provided by a taxpayer is fraudulent or wilfully misleading, or the return does not mention income of a particular nature or that was derived from a particular source, the Commissioner may amend the taxpayer's assessment, despite the time bar: s 108(2). This is irrespective of the manner in which the income, receipt or gain has been returned to the Commissioner (ie by a financial statement or IR 10).
6. Before amending an assessment that has been time barred, the Commissioner must form the requisite opinion under either para (a) or para (b) of s 108(2).
7. In *Vinelight Nominees Ltd & Anor v Commissioner of Inland Revenue (No 2)* (2005) 22 NZTC 19,519 (HC), Lang J referred to the requisite opinion as "but one of the steps to be taken by the Commissioner before he issues an assessment" (at [26]).
8. Another step is that the formation of the opinion satisfies a threshold requirement of being made in good faith on the evidence available. Willy DJ explained this more fully in *Case Q58* (1993) 15 NZTC 5,330, with reference to the earlier decision of the Court of Appeal in *Maxwell v CIR* [1962] NZLR 683. At 5,349, Willy DJ stated:

It is therefore all the more important in my view that the caution expressed by Gresson P in *Maxwell* (above) that the Commissioner, and by extension this Court should act bona fide, and with a sense of responsibility in first forming an opinion. It is not until that opinion is formed that any onus rests on the objector to show an absence of fraud, or conduct which could be described as wilfully misleading.
9. Whether the tax return is fraudulent or wilfully misleading will depend on the individual circumstances of each case. Under s 149A(2), the onus of proof is on the taxpayer in all civil matters, except evasion. Therefore, if an opinion has been formed that a tax return is fraudulent or wilfully misleading, the taxpayer will need to disprove the Commissioner's view.
10. If the return does not mention income of a particular nature, it does not need to be a fraudulent, deliberate or intentional act to permit the Commissioner to amend an assessment (see *Babington v CIR* [1957] NZLR 861 (SC) at 869).
11. Whether income of a particular nature, or income derived from a particular source, has been mentioned or omitted also depends on the circumstances of each case. In *Cross v CIR* (1987) 9 NZTC 6,101 (CA), McMullin J stated at 6,110:

It is neither possible nor practical to lay down a rule of general application by which questions of alleged omission of particular sources of income can be judged. Whether there has been an omission of 'all mention of income' must be considered in the circumstances of each case.
12. The court also held that it is not necessary for a taxpayer to return the income as assessable, as it is sufficient for the taxpayer to mention, or draw the Commissioner's attention to, the income in the tax return. How far one needs to go then becomes a matter of fact and degree. See *Cross v CIR*; *Case M102* (1990) 12 NZTC 2,634.
13. The Commissioner must be able to form her own views as to the correct treatment of the item based on the information provided by the taxpayer. What facts are

relevant and whether a taxpayer has done enough to draw an item to the Commissioner's attention again depends on the circumstances of each case.

### **Decision to reopen or not reopen an assessment**

14. Once the Commissioner has formed the view that there has been an omission of all mention of income (which is of a particular nature or was derived from a particular source) or considers that the tax return is fraudulent or wilfully misleading, the Commissioner's next step is to decide whether to reopen an assessment under s 108(2).
15. The Commissioner's ability to use s 108(2) is a discretionary power, which does not have to be exercised in every case. In deciding whether to reopen a time-barred assessment, the Commissioner will need to consider ss 6 and 6A:

#### **6 Responsibility on Ministers and officials to protect integrity of tax system**

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

#### **6A Commissioner of Inland Revenue**

- (1) The person appointed as chief executive of the department under the State Sector Act 1988 is designated the Commissioner of Inland Revenue.
  - (2) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.
  - (3) In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—
    - (a) the resources available to the Commissioner; and
    - (b) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and
    - (c) the compliance costs incurred by taxpayers.
16. The Commissioner is required to maximise the collection of revenue. Therefore, there is the expectation that the Commissioner will generally amend an assessment. Under s 6A, the Commissioner may elect to forgo the immediate collection of revenue if it is considered that the course of action (not reopening the time-barred assessment) will "collect over time the highest net revenue that is practicable within the law". In making such a decision, the Commissioner will have regard to:
- the resources available to her (s 6A(3)(a));
  - the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts (s 6A(3)(b)); and
  - the compliance costs incurred by taxpayers (s 6A(3)(c)).

17. Furthermore, under s 6, the Commissioner is also required to consider whether the decision not to reopen a time-barred assessment will protect the integrity of the tax system.

*Reconstructed income, aggressive tax schemes or tax avoidance*

18. The operational approach set out in this statement is intended to apply to cases where an IR 10 is filed instead of a financial statement and also generally where the limitations of the IR 10 form inhibits the disclosure of income. However, there are two circumstances - reconstructed income and aggressive tax schemes or tax avoidance - where this statement will not apply if an IR 10 is filed (instead of a financial statement).
19. Amounts that have been reconstructed by the Commissioner under s GA 1 of the Income Tax Act 2007 (also known as reconstructed income) are either practically or highly unlikely to have been recorded on the IR 10, financial statements or the taxpayer's returns. Consequently, this statement could not apply to those situations.
20. It also follows that the Commissioner will not want to fetter her discretion to reopen (or not reopen) an assessment that is time barred by the application of this statement in cases where she is of the view that the taxpayer is involved in an aggressive tax scheme or tax avoidance.<sup>3</sup>
21. In the circumstances above, the Commissioner still has the discretionary power under s 108 to determine whether the taxpayer has fraudulently or wilfully misled the Commissioner or whether there has been an omission of income.
22. Due to the importance of reopening the time bar to both the Commissioner and taxpayers, decisions to reopen a time-barred assessment in relation to tax avoidance cases that potentially involve reconstructed income will be subject to the Critical Task Assurance process. Critical Task Assurance is intended to ensure that key pieces of work are subject to an independent review by the Legal and Technical Services unit of Inland Revenue before being issued.

## **IR 10 Application**

*Section 108(2)(a) Fraudulent and wilfully misleading*

23. If a tax return is fraudulent or wilfully misleading, irrespective of the manner in which the income, receipt or a gain is returned (or not returned), the Commissioner has the ability to reopen an assessment.

*Section 108(2)(b) Omission of income*

24. Where a taxpayer has filed a fully completed IR 10, and the IR 10 is consistent with the financial statements, the taxpayer will be afforded the same protection of the time bar as would apply had the taxpayer provided their financial statements. This is in line with current Inland Revenue practice, as well as previously published statements by the Commissioner.

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<sup>3</sup> More information on the Commissioner's view of the law on tax avoidance in New Zealand is outlined in *IS 13/01 Tax Avoidance and the interpretation of sections BG 1 and GA 1 of the Income Tax Act 2007*, available at <http://www.ird.govt.nz/technical-tax/interpretations/2013/>.

25. The operational approach of the Commissioner where an IR 10 has been filed (subject to [18]-[22] of this Operational Statement) is as follows:
- If the IR 10 discloses the income, gain or receipt, the time bar will apply.
  - Where the IR 10, although fully completed and consistent with the financial statements, does not disclose the income, gain or receipt due to limitations in the IR 10 form, the following approach will be adopted:
    - If the unfiled financial statements disclose the income, gain or receipt, the return will not be amended even though the financial statements were not sent to Inland Revenue at the time the income tax return was filed.
    - If neither the IR 10 nor the unfiled financial statements disclose the income, gain or receipt, the return will be subject to a review by senior Service Delivery management to determine whether the time bar applies.

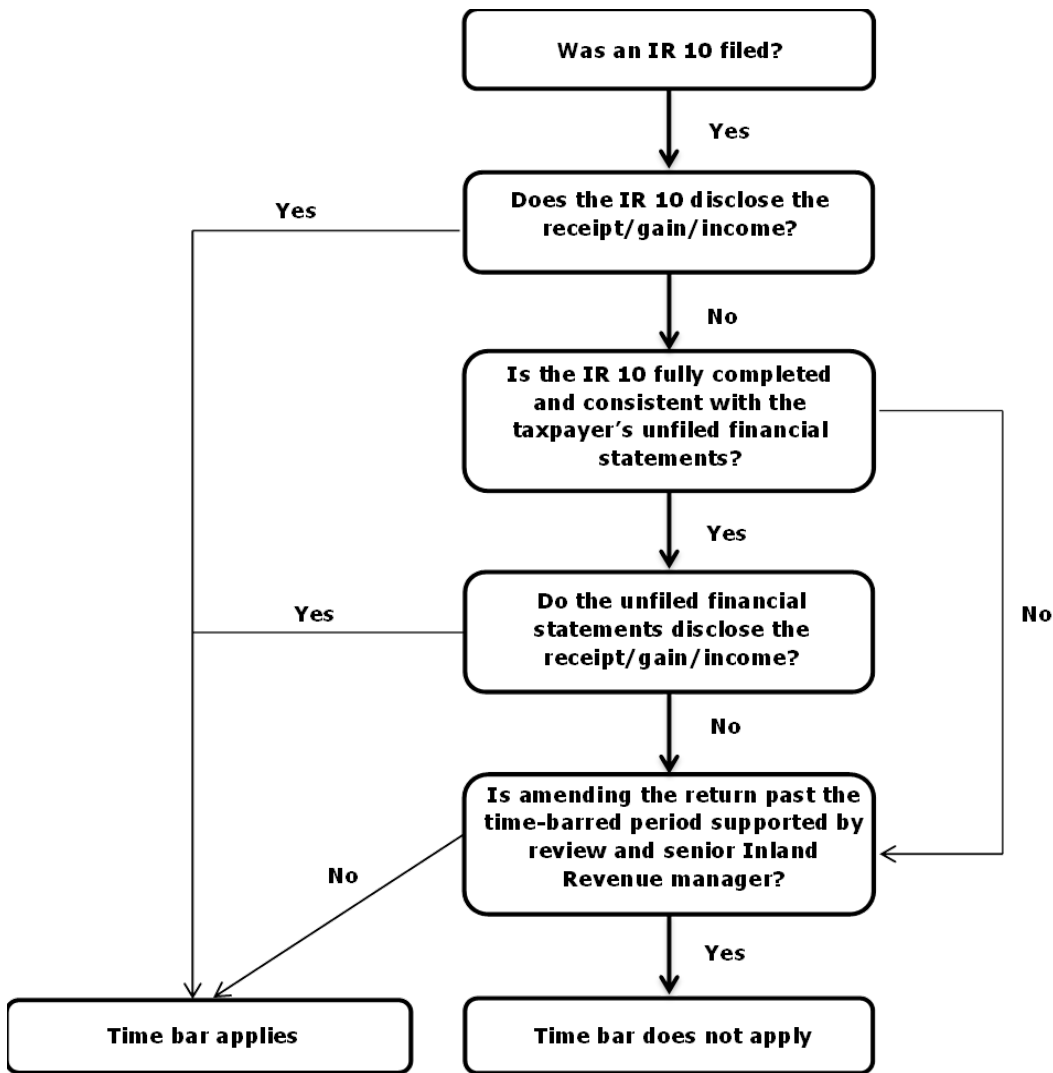
***Examples of limitations of the IR 10***

Taxpayer A files an IR 10 with nothing in box 53 for “Untaxed realised gains/receipts” or box 55 for “Disposals of fixed assets”. The Commissioner learns that the taxpayer was dealing in land or other fixed assets. Although the taxpayer disclosed the sales in their financial statements, which were not provided to the Commissioner, the taxpayer should have disclosed the sales in box 53 or box 55. Therefore, in this case, more information from the taxpayer will be required as to why the sales were not disclosed in the appropriate box before the Commissioner can form her view regarding the time bar.

Taxpayer B files an *Account Information IR 10* with his 2010 tax return. In 2016, the Commissioner finds the taxpayer has not returned a \$250,000 gain on the sale of a share. This gain was disclosed in the financial statements, but was not returned on the basis that the gain was a capital receipt. The financial statements were not attached to the taxpayer’s 2010 tax return. A fully completed *Account Information IR 10* accompanied the taxpayer’s 2010 tax return. The IR 10 did not disclose the \$250,000 gain because it did not request any information about untaxed realised gains/receipts. Under this Operational Statement, the time bar will apply.

26. This means taxpayers will get the same benefit of the time bar without having to send in their financial statements to Inland Revenue. Any decision to reopen an assessment will be made once the taxpayer’s IR 10 and their financial statements (which will be requested as part of an investigation) are analysed. Consequently, taxpayers who file an IR 10 will only need to send their financial statements to Inland Revenue if they are requested to do so.

27. This approach can be reflected as follows:



28. Any recommendation by an Inland Revenue officer to reopen the time bar due to an omission of income will also be subject to Critical Task Assurance and review by a senior manager. The review and consideration by a senior manager will take place as early as possible, and before a letter or notice is issued to the taxpayer advising that it is proposed to amend the return(s).
29. When deciding whether to amend an assessment, senior management will consider relevant factors, including the nature and amount of the income omitted and the circumstances leading to the omission of income.

This Operational Statement is signed on 26 May 2016.

**Rob Wells**  
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