

QUESTION WE'VE BEEN ASKED

QB 10/04

Shortfall penalty for evasion or a similar act – knowledge required and Interpretation Statement IS0062

Section 141E(1)(d) to (f) – shortfall penalty for evasion or similar act – Tax Administration Act 1994

All legislative references are to the Tax Administration Act 1994.

Question

1. We have been asked whether paragraphs (d) to (f) of section 141E(1) require knowledge of the unlawfulness of the act in question. It has been suggested that the Interpretation Statement for the shortfall penalty for evasion or a similar act is potentially ambiguous on this point.

Answer

2. Knowledge of the unlawfulness of the act is necessary for paragraphs (d) to (f) of section 141E(1) to apply.
3. The Commissioner accepts that the first sentence in paragraph 4.54 of the Interpretation Statement for the shortfall penalty for evasion or a similar act is potentially ambiguous when read in isolation. However, paragraph 4.71 of the Interpretation Statement and section 141E(1) make it clear that knowledge of the unlawfulness of the act is necessary for paragraphs (d) to (f) of section 141E(1) to apply.

Background

4. The Commissioner issued the Interpretation Statement 'Shortfall penalty—evasion' (IS0062) in November 2006 and published it in *Tax Information Bulletin* Vol 18, No 11 (December 2006). The Interpretation Statement concerns the interpretation of section 141E(1).
5. Section 141E(1) currently states:
 - (1) A taxpayer is liable to pay a shortfall penalty if, in taking a tax position, the taxpayer—
 - (a) Evades the assessment or payment of tax by the taxpayer or another person under a tax law; or
 - (b) Knowingly applies or permits the application of the amount of a deduction or withholding of tax made or deemed to be made under a tax law for any purpose other than in payment to the Commissioner; or
 - (c) knowingly does not make a deduction, withholding of tax, or transfer of payroll donation required to be made by a tax law; or
 - (d) Obtains a refund or payment of tax, *knowing that the taxpayer is not lawfully entitled* to the refund or payment under a tax law; or
 - (da) attempts to obtain a refund or payment of tax, *knowing that the taxpayer is not lawfully entitled* to the refund or payment under a tax law; or

- (e) Enables another person to obtain a refund or payment of tax, *knowing that the other person is not lawfully entitled* to the refund or payment under a tax law; or
- (f) attempts to enable another person to obtain a refund or payment of tax, *knowing that the other person is not lawfully entitled* to the refund or payment under a tax law—

(referred to as **evasion or a similar act**). [Emphasis added.]

6. Minor amendments have been made to section 141E since the Interpretation Statement was issued. However, those amendments do not affect the analysis.
7. The provisions of paragraphs (d) to (f) are explicit that the relevant act must be done “knowing that [the person] is not lawfully entitled” to the refund or payment.
8. The Interpretation Statement discusses *Case W3* (2003) 21 NZTC 11,014. In *Case W3* Judge Barber states (at page 11,025) that “knowledge of the existence of the facts in question without knowledge of the unlawfulness of an act will be sufficient”. (See also *CIR v Gordon* (1989) 11 NZTC 6,082.) The Interpretation Statement then draws the following conclusions from *Case W3* at paragraph 4.54:

- 4.54 **Although Case W3 was on paragraph (b) of section 141E(1), the observations on “knowingly” are applicable to all the paragraphs of section 141E(1) which use that term.** It can be seen that many of the points made are consistent with the discussion above on “evasion”, however, unlike evasion it does not require any “blameworthy” intent to breach a law that is either known or suspected to exist. “Knowingly”:
- requires knowledge of the doing of the act (or of the omission) that amounts to a breach;
 - is a subjective test;
 - can be satisfied by recklessness, but
 - negligence or carelessness is insufficient to satisfy the test. [Emphasis added]

9. The first sentence in paragraph 4.54, when read in isolation, could be interpreted to mean that knowledge of only the existence of the facts described in paragraphs (d) to (f) of section 141E(1) is required. This sentence, along with the first bullet point of paragraph 1.5 of the Interpretation Statement, could be viewed as inconsistent with the legislative requirements of this section.
10. However, as outlined in paragraph 4.71 of the Interpretation Statement, the correct interpretation is that paragraphs (d) to (f) of section 141E(1) require a taxpayer to have knowledge of the unlawfulness of the particular act in question. Paragraph 4.71 of the Interpretation Statement states:

4.71 **Paragraphs (d), (da), (e), and (f) relate to the obtaining of a refund or payment of tax, knowing that there is no entitlement to that refund or payment of tax.** Paragraphs (d) and (da) provide that the penalty will apply whether or not the taxpayer is successful in obtaining the refund or payment of tax. Paragraphs (e) and (f) provide that the penalty will also apply to a person who enables or attempts to enable another person to obtain a refund or payment of tax. [Emphasis added]
11. Therefore, paragraph 4.71 of the Interpretation Statement makes it clear that knowledge of the unlawfulness of the act is necessary for paragraphs (d) to (f) of section 141E(1) to apply.

12. Further, nothing in paragraph (b) of section 141E(1) requires a taxpayer to know that they are acting unlawfully, which is why Judge Barber in *Case W3* held that knowledge of the existence of the facts is sufficient. However, paragraphs (d) and (da) of section 141E(1) expressly require a taxpayer to know that they are not lawfully entitled to the refund or payment under a tax law. Similarly, paragraphs (e) and (f) of section 141E(1) expressly require a taxpayer to know that another person is not lawfully entitled to the refund or payment of tax under a tax law. Therefore, section 141E(1) itself also makes it clear that knowledge of the unlawfulness of the act is necessary for paragraphs (d) to (f) of section 141E(1) to apply.
13. Note that this Question We've Been Asked considers only the requirements for paragraphs (d) to (f) of section 141E(1). Other paragraphs have different requirements, which are set out in the Interpretation Statement.