

REVENUE ALERT

Consequences of acquiring, possessing or using electronic sales suppression tools

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RA 22/01

Inland Revenue is aware of the existence of Electronic Sales Suppression tools (ESS tools) which are used to systematically alter point-of-sale data collected by a business in order to understate or completely conceal revenues for the purpose of evading tax.

The Commissioner considers that the threat that such tools pose to the integrity of the tax system is significant. Therefore, a number of measures were introduced in 2022 to respond to the threat posed by the ESS tools, including new civil and criminal penalties. The Commissioner is increasing the compliance focus to more closely monitor the use of ESS tools and will consider all of the options that are available to him whenever these ESS tools are found.

The purpose of this Revenue Alert is to highlight the possible consequences of being involved with ESS tools.

All references are to the Tax Administration Act 1994 unless otherwise specified.

About Revenue Alerts

A Revenue Alert is issued by the Commissioner of Inland Revenue and provides information about a significant and/or emerging tax issue that is of concern to Inland Revenue. At the time an alert is issued risk assessments will already be underway to determine the level of risk and to consider appropriate responses.

A Revenue Alert will identify:

- the issue (which may be a scheme, arrangement, or particular transaction) which the Commissioner believes may be contrary to the law or is inconsistent with policy;
- the common features of the issue;

- our current view; and
- our current approach.

An alert should not be interpreted as being Inland Revenue’s final position. Rather, an alert outlines the Commissioner’s current view on how the law should be applied. For any alert we issue it is likely that some investigatory work has already been carried out.

If people have entered into an arrangement similar to the one described or are thinking about it, they should talk to their tax advisor and/or to Inland Revenue for advice about tax implications.

Background

1. A number of new measures have been introduced to respond to the threat posed by ESS tools to discourage their spread within the New Zealand tax base.
2. ESS tools are software programs, devices, or other tools that systematically alter point-of-sale data collected by a business. The software provides a means to understate or completely conceal revenues, which facilitates tax evasion. These tools can work in a variety of ways, targeting the integrity of transactions, software, internal memory, external filing, or reporting to delete, change, or simply not record select sales data and transactions.
3. Manipulation occurs either at, or after, the point of sale. These tools have varied functionalities but may be able to:
 - Permanently delete and re-sequence transactions.
 - Change transactions to reduce the amount of a sale.
 - Misrepresent records (for example, re-categorising a product to avoid GST).
 - Produce false records.
4. The term “electronic sales suppression tool” is defined in section 3 of the Tax Administration Act 1994 as meaning:

A software program, device, tool, or other thing, part of a thing, or combination of things or parts,—

(a) that can hide, conceal, modify, falsify, destroy, or prevent the creation of a record that—

 - (i) a person is required under a tax law to make or keep; and
 - (ii) is, or would be, created by a system that is or includes an electronic point of sale system; and

(b) the use of which would lead to a reasonable conclusion that 1 of its principal functions is to facilitate the concealment, modification, falsification, destruction, or prevention of the creation of a record.

5. A new civil penalty and two new criminal offences have been introduced in relation to involvement with ESS tools:
 - New section 141EE establishes the ESS penalty of \$5,000 for the acquisition or possession of a suppression tool.
 - New section 143BB establishes an offence of manufacturing or supplying a suppression tool. A person convicted of such an offence is liable to a fine of up to \$250,000.
 - New section 143BC establishes an offence of acquiring or possessing a suppression tool. A person convicted of such an offence is liable to a fine of up to \$50,000.

Current view

6. The Commissioner considers the threat that ESS tools pose to the integrity of the tax system is significant.
7. Therefore, the Commissioner will be increasing his focus on identifying the customers who are or may be thinking of acquiring, creating or using the ESS tools. Where cases are disclosed, the Commissioner will be considering all of the options that are available to him to respond whenever these tools are found.

Offence of manufacturing or supplying suppression tools (section 143BB)

8. It is an offence under 143BB(1) to:
 - Manufacture, develop, or publish a suppression tool that is provided to a person:
 - i) who is liable for an ESS penalty,
 - ii) who commits an offence under section 143BC,
 - iii) or who commits an offence under section 143BB(2).
9. It is an offence under 143BB(2) to:
 - Knowingly supply, make available for use, or otherwise provide a suppression tool, or the right to use a suppression tool, to a person resident in New Zealand, or knowingly provide a service to a person resident in New Zealand that includes the use of a suppression tool (subsection (2)).
10. The penalty for committing any of these offences is a fine up to a maximum of \$250,000.

11. If you are considering involvement in some way in creating or providing ESS tools you should be aware Inland Revenue will be actively considering prosecution under section 143BB in appropriate cases.

Acquiring or possessing electronic sales suppression tools

Electronic sales suppression penalty (section 141EE)

12. Section 141EE of the TAA establishes a civil penalty for taxpayers who knowingly acquire, possess or control a suppression tool, or have the right to use the suppression tool, with the purpose of evading their own, or some other person's, assessment or payment of tax (referred to as the ESS penalty).
13. It is important to note that a person is treated as meeting the purpose test if they have used the suppression tool to evade the assessment or payment of tax.
14. An exception to the penalty exists for taxpayers who acquire a business whose operations include the use of a suppression tool if the taxpayer could not reasonably have known of the tool's existence and has not used the tool. This ensures taxpayers who accidentally acquire a tool in this way are not penalised for this unintentional acquisition.
15. The ESS penalty amount is set at \$5,000.

Offence of acquiring or possessing suppression tools (section 143BC)

16. Section 143BC of the TAA establishes the criminal equivalent of the civil ESS penalty. It provides that it is an offence for a taxpayer required to keep records under a tax law to knowingly acquire, possess or control a suppression tool, or have a right to use the suppression tool, with the purpose of evading their own or some other person's assessment or payment of tax.
17. The penalty for committing this offence is a fine of up to a maximum of \$50,000.
18. If you are considering getting ESS tools you should be aware that Inland Revenue will be actively considering prosecution under section 143BC in appropriate cases.

Further consequences of using electronic sales suppression tools

19. As well as the new civil and criminal penalties further consequences could arise for taxpayers who use ESS tools.
20. Firstly, the Commissioner considers that the use of sales suppression tools to reduce sales with a resulting decrease in the income tax and/or GST that might otherwise arise is tax evasion.

21. Where ESS tools are used the Commissioner will consider whether to prosecute in relation to the tax evasion (for example under section 143B). A person who is convicted of an offence under that section is liable to:
 - (a) imprisonment for a term not exceeding 5 years; or
 - (b) a fine not exceeding \$50,000; or
 - (c) both.
22. This is in addition to any prosecution for acquiring or having possession or control of an electronic sales suppression tool or a right to use a suppression tool.
23. Importantly, taxpayers who use these tools to artificially decrease tax liabilities may also be subject to the shortfall penalty that applies for evasion or similar act. The penalty is 150% of the resulting tax shortfall.
24. This is in addition to being required to pay the actual tax shortfall that arises from using the ESS tools as well as any resulting use of money interest and late payment penalties.

Reduction in penalty for previous behaviour not available

25. Further, the reduction in a shortfall penalty for previous behaviour is not available in relation to the 150% shortfall penalty where ESS tools have been used.

Write-off

26. It is important to note that the Commissioner cannot write off amounts owing (including the shortfall penalty imposed) when a taxpayer is liable to pay a shortfall penalty for an abusive tax position or evasion or a similar act, in relation to the outstanding tax.
27. This means that where ESS tools have been used to evade tax, the outstanding amount tax plus any penalties and interest that will also arise cannot be written off. The options left to the Commissioner when the outstanding tax cannot be paid (even by instalment) are bankruptcy or liquidation.

Time-bar

28. There are time limits in place for both GST and Income Tax which generally prevent the Commissioner from increasing assessments after the expiry of the applicable four-year period (this restriction is commonly referred to as the time-bar). Due to the nature of the activity if ESS tools are used to artificially reduce tax liability this restriction does not apply.

Current status

29. Inland Revenue is currently investigating the extent to which ESS tools are present in New Zealand.
30. Where we identify specific instances of ESS tools being used to evade tax, Inland Revenue will consider all of the options available to the Commissioner to respond to the presence of those tools. This will include consideration of the imposition civil penalties and the possibility of prosecution.
31. The Commissioner will require payment of any evaded tax, plus penalties and use of money interest. Where payment is not made, the Commissioner will consider applying for the taxpayer to be put into bankruptcy or liquidation.
32. If you consider that you may have become involved with ESS tools, we recommend you discuss the matter with your tax advisor, or with us and consider making a voluntary disclosure.
33. Guidelines for making a voluntary disclosure are contained in Standard Practice Statement SPS 19/02 and on the Inland Revenue website.

Authorised by

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Legislative References

Ss 141EE, 143B, 143BB, 143BC of the Tax Administration Act 1994.

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