TAX INFORMATION BULLETIN

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This TIB has no appendix

Inland Revenue
Te Tari Taake

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TIB on the Internet – new online service available

The Tax Information Bulletin is also available on the Internet – usually about ten days before we can get the paper copy to you, because of the time needed to print and mail it. We supply it in two formats:

Online TIB (HTML format)

This is a new service introduced to meet customer demand. All TIBs from January 1997 (Volume Nine, No.1) are available in HTML, which makes them easier to read on-screen. The articles are in single-column format, and where one refers to other material that's available on our Website, a link will take you directly to the second article.

On the website we've included a survey about the online TIB – if you use this format then please let us know if you have any comments.

Individual TIB articles will print satisfactorily from the online TIB, but it's not the best format if you want to print out the whole TIB.

Printable TIB (PDF format)

All TIBs from July 1989 (the start of the TIB) are available in Adobe's Portable Document Format (PDF). Use this version if you want to print out the whole TIB to use as a paper copy. The result you get will look essentially the same as the hard copy TIB that we mail out. However, the double-column layout means this version is not easy to read on-screen.

Where to find us

Our website is at:

www.ird.govt.nz

It also includes other Inland Revenue information which you may find useful, including any draft binding rulings and interpretation statements that are available.

If you find that you prefer the TIB from our website and no longer need a paper copy, please let us know so we can take you off our mailing list.

Legislation and determinations

This section of the TIB covers items such as recent tax legislation, accrual and depreciation determinations, livestock values and changes in FBT and GST interest rates.

1998 national standard costs for specified livestock

Under the authority of section EL 4(1) of the Income Tax Act 1994 the Governor-General has declared the national standard costs for specified livestock for the 1997/98 income year.

These standard costs, released annually, allow farmers to value their livestock under the national standard cost option for the 1997/98 income tax year. Farmers using the scheme apply the national standard costs to stock bred on the farm or to immature animals on hand at the beginning of the year, while stock purchased are valued at their purchase price. The average of these costs is applied to the stock on hand at year's end to derive the closing value of livestock on hand.

In announcing the values, the Rt. Hon. W F Birch, Minister of Revenue, said the average production costs for sheep, beef cattle, and goats have all risen slightly compared with the previous year. Pig costs have changed little.

"Costs for rising 1-year dairy cattle have increased more than other livestock classes - the average number of homebred calves raised on farms was lower than in the previous survey year, increasing the per head cost of this class [of animal]".

"The national average market values of livestock, which farmers use to value livestock under the herd scheme, will be released in May this year after a national survey of market values taken at 30 April," Mr Birch said.

The national standard costs for the 1997/98 income year are:

Kind of Livestock	Category of Livestock	National Standard Cost $
Sheep	Rising 1 year	15.50
	Rising 2 year	9.10
Dairy Cattle	Purchased bobby calves	115.00
	Rising 1 year	464.00
	Rising 2 year	73.40
Beef Cattle	Rising 1 year	131.00
	Rising 2 year	76.40
	Rising 3 year male non-breeding cattle (all breeds)	76.40
Deer	Rising 1 year	50.40
	Rising 2 year	24.80
Goats (Meat and Fibre)	Rising 1 year	11.60
	Rising 2 year	7.30
Goats (Dairy)	Rising 1 year	73.70
	Rising 2 year	13.00
Pigs	Weaners to 10 weeks of age	72.00
	Growing pigs 10 to 17 weeks of age	56.40

Copyright in Sound Recordings

Depreciation Determination DEP31

In TIB Volume Nine, No.11 (November 1997) at page 5, we published a draft general depreciation determination for copyright in sound recordings. The determination follows the Taxation (Remedial Provisions) Act 1997 which added the copyright in certain sound recordings to schedule 17 of the Income Tax Act 1994. Schedule 17 lists intangible property that can be depreciated and now includes:

The copyright in a sound recording, if the copyright was produced or purchased by the taxpayer on or after 1 July 1997, and copies of the recording have been sold or offered for sale to the public.

The Taxation (Remedial Provisions) Act 1997 also amended section EG 17 – Depreciation deduction where depreciated asset acquired by taxpayer from associated person. Section EG 17(7) provides that no depreciation deduction will be allowed where:

- the taxpayer acquired the depreciable intangible property from an associated person on or after 1 July 1997 where that property was not listed in schedule 17 before that date; and
- the asset was not property the cost of which was allowed as a deduction to the associated person by virtue of amortisation or similar deduction allowed under the Income Tax Act 1994.

As a result, this determination will only apply where the copyright in the sound recording was produced, or purchased by the taxpayer from an unrelated party, on or after 1 July 1997 and copies of the sound recording must also have been sold or offered for sale to the public.

No submissions were received in relation to the draft so the Commissioner has now issued the determination, which is reproduced below. The determination may be cited as "Determination DEP31: Tax Depreciation Rates Determination General Determination No. 31". The determination is based on an estimated useful life of 1 year and a residual value of 13.5%.

General Depreciation Determination DEP31

This determination may be cited as "Determination DEP31: Tax Depreciation Rates General Determination Number 31".

1. Application

This determination applies to taxpayers who own the asset classes listed below.

This determination applies to "depreciable property" other than "excluded depreciable property" produced or purchased on or after 1 July 1997.

2. Determination

Pursuant to section EG 4 of the Income Tax Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by:

- Inserting into the "Audio and Video Recording Studios and Professional Photography" industry category the general asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below:

Audio & Video Recording Studios and Professional Photography	Estimated useful life (years)	DV banded dep'n rate (%)	SL equivalent banded dep'n rate (%)
Copyright in sound recordings, produced or purchased on or after 1 July 1997	1	100	100

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 1994.

This determination was signed by me on the 18th day of February 1998.

Jeff Tyler
Assistant General Manager (Adjudication & Rulings)

Library Books and Periodicals

Depreciation Determination DEP32

In TIB Volume Nine, No.7 (July 1997) at page 3, we proposed new general depreciation rates for library books and periodicals, and invited TIB readers to make submissions.

The determination is reproduced below. The general determination sets two new asset classes for library books, as reproduced below. The determination sets a new depreciation rate of 63.5% DV for books whose editions are published annually or more frequently. This rate is based on a useful life of 2 years and a residual value of 13.5% of cost.

The other new asset class covers all other books, for which the rate is 18% DV. This rate is based on a useful life of 10 years and a residual value of 13.5% of cost.

Newspapers and periodicals may be written off in the year of purchase. Periodicals cover soft-covered publications such as journals or magazines (as opposed to books) which are published periodically, i.e. weekly, fortnightly, monthly, quarterly, or even annually. Periodicals also include publications that provide an updating service. These publications may be paid by annual subscription that covers the updating service and an annual consolidated version of the publication. In other cases the periodic updates may be charged for separately. The annual consolidated version should be treated as coming under the asset class "Books, editions of which are published annually or more frequently" and depreciated accordingly. Payments for the periodic updates can be written off as costs of periodicals.

General Depreciation Determination DEP32

This determination may be cited as "Determination DEP32: Tax Depreciation Rates General Determination Number 32".

1. Application

This determination applies to taxpayers who own the asset classes listed below.

This determination applies to "depreciable property" other than "excluded depreciable property" for the 1997-98 and subsequent income years.

2. Determination

Pursuant to section EG 4 of the Income Tax Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rate General Determination Number 1 (as previously amended) by:

- Deleting from the "Books, Music and Manuscripts" asset category, the general asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below:

Books, Music and Manuscripts	Estimated useful life (years)	DV banded dep'n rate (%)	SL equivalent banded dep'n rate (%)
Library books, and periodicals (if to be bound) (lending) (not specified)	8	22	15.5
Library books, and periodicals (if to be bound) (in-house)	20	9.5	6.5
Library books, and periodicals (if to be bound) (law)	20	9.5	6.5
Library books, and periodicals (if to be bound) (public)	8	22	15.5
Library books, and periodicals (if to be bound) (school)	8	22	15.5
Library books, and periodicals (if to be bound) (scientific)	20	9.5	6.5
Library books, and periodicals (if to be bound) (university)	8	22	15.5
Newspapers and periodicals (if not to be held)		expense	expense
Newspapers and periodicals (if to be held)	2	63.5	63.5
Periodicals (if to be held but not to be bound)	2	63.5	63.5

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- Inserting into the "Books, Music and Manuscripts" asset category, the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below:

Books, Music and Manuscripts	Estimated useful life (years)	DV banded dep'n rate (%)	SL equivalent banded dep'n rate (%)
Books, editions of which are published annually or more frequently	2	63.5	63.5
Other books	10	18	12.5
Newspapers and periodicals		expense	expense

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 1994.

This determination is signed by me on the 20th day of February 1998.

Jeff Tyler
Assistant General Manager (Adjudication & Rulings)

Delimbers, self-propelled, mobile

Draft general depreciation determination

We have been advised that there is currently no suitable general depreciation rate for self-propelled delimbers, used in the Timber industry to shear limbs from trees. A depreciation rate is set for "Delimbers, Static", under the "Timber and Joinery Industries" industry category, but that rate is not appropriate for self-propelled, mobile delimbers.

The Commissioner proposes to issue a general depreciation determination which will insert a new asset class "Delimbers, self-propelled, mobile" into the "Timber and Joinery Industries" industry category, with a depreciation rate of 22% (D.V.) (15.5% S.L.), based on an estimated useful life of 8 years.

The draft determination is reproduced below. The proposed new depreciation rate is based on the estimated useful life set out in the determination and a residual value of 13.5%.

General Depreciation Determination DEP[X]

This determination may be cited as "Determination DEP[x]: Tax Depreciation Rates General Determination Number [x]".

1. Application

This determination applies to taxpayers who own the asset classes listed below.

This determination applies to "depreciable property" other than "excluded depreciable property" for the 1995/96 and subsequent income years.

2. Determination

Pursuant to section EG 4 of the Income Tax Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by:

- Inserting into the "Timber and Joinery Industries " industry category the general asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below:

Timber and Joinery Industries	Estimated useful life (years)	DV banded dep'n rate (%)	SL equivalent banded dep'n rate (%)
Delimber, self-propelled, mobile	8	22	15.5

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 1994.

If you wish to make a submission on the proposed changes, please write to:

Assistant General Manager (Adjudication & Rulings)
Adjudication & Rulings
National Office
Inland Revenue Department
P O Box 2198
WELLINGTON

We need to receive your submission by 30 April 1998 if we are to take it into account in finalising the determination.

Depreciation – bedding (medical and medical laboratories)

Correction to Depreciation Determination DEP30

We have been alerted to an error in the above General Depreciation Determination, which was published in Tax Information Bulletin Volume Nine, No.11 (November 1997). The last item in that determination inserts the asset class of "Bedding" into the "Medical and Medical Laboratory Equipment" asset category. There is no such asset category: the determination should have inserted the asset class into the "Medical and Medical Laboratory Equipment" industry category.

A new determination is reproduced below which will delete the "Bedding" asset class from the "Medical and Medical Laboratory Equipment" **asset** category and insert it into the "Medical and Medical Laboratory Equipment" **industry** category.

General Depreciation Determination DEP30a

This determination may be cited as "Determination DEP30a: Tax Depreciation Rates General Determination Number 30a".

1. Application

This determination applies to taxpayers who own the asset classes listed below.

This determination applies to "depreciable property" other than "excluded depreciable property" for the 1997/98 and subsequent income years.

2. Determination

Pursuant to section EG 4 of the Income Tax Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by:

- Deleting from the "Medical and Medical Laboratory Equipment" asset category the general asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below:

Medical and Medical Laboratory Equipment	Estimated useful life (years)	DV banded dep'n rate (%)	SL equivalent banded dep'n rate (%)
Bedding	3	50	40

- Inserting into the "Medical and Medical Laboratory Equipment" industry category the general asset class, estimated useful life and diminishing value and straight-line depreciation rates listed below:

Medical and Medical Laboratory Equipment	Estimated useful life (years)	DV banded dep'n rate (%)	SL equivalent banded dep'n rate (%)
Bedding	3	50	40

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 1994.

This determination is signed by me on the 10th day of March 1998.

Jeff Tyler
Assistant General Manager (Adjudication & Rulings)

Motor vehicles rented for short-term periods of 1 month or less

Draft general depreciation determination

We have had a number of requests for depreciation rates to cover rental vehicles when used for short-term hire, including light trucks (gross vehicle mass not exceeding 3.5 tonnes), so we have decided to review the depreciation rates for all classes of vehicles likely to be used in this manner.

The Commissioner proposes to issue a general depreciation determination which will insert a number of new asset classes into both the "Transportation" and "Hire Equipment (Where on short-term hire of 1 month or less only)" asset categories, as similar assets are already found in both categories.

The draft determination is reproduced below. The proposed new depreciation rates are based on the estimated useful lives set out in the draft determination and a residual value of 13.5%.

General Depreciation Determination DEP[X]

This determination may be cited as "Determination DEP[x]: Tax Depreciation Rates General Determination Number [x]".

1. Application

This determination applies to taxpayers who own the asset classes listed below.

This determination applies to "depreciable property" other than "excluded depreciable property" for the 1997/98 and subsequent income years.

2. Determination

Pursuant to section EG 4 of the Income Tax Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by:

- Inserting into the "Transportation" asset category the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below:

Transportation	Estimated useful life (years)	DV banded dep'n rate (%)	SL equivalent banded dep'n rate (%)
Motor vehicles - Class NA (for transporting light goods, that have a gross vehicle mass not exceeding 3.5 tonnes and used for short-term hire).	6.66	26	18
Motor vehicles - Class NB (for transporting medium goods, that have a gross vehicle mass exceeding 3.5 tonnes but not exceeding 12 tonnes and used for short-term hire).	8	22	15.5
Motor vehicles - Class NC (for transporting heavy goods, that have a gross vehicle mass exceeding 12 tonnes and used for short-term hire).	6.66	26	18
Trailers - Class TC (for transporting medium goods that have a gross vehicle mass exceeding 3.5 tonnes but not exceeding 10 tonnes and used for short-term hire).	12.5	15	10
Trailers - Class TD (for transporting heavy goods, that have a gross vehicle mass exceeding 10 tonnes and used for short-term hire).	10	18	12.5
Trailers - Class TA and TB (for transporting very light and light goods that have a gross vehicle mass not exceeding 3.5 tonnes and used for short-term hire) excluding domestic trailers.	10	18	12.5
Trailers – domestic. Not exceeding 1 tonne. Used for short-term hire.	6.66	26	18

- Inserting into the "Hire Equipment (Where on short-term hire of 1 month or less only)" asset category the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below:

Hire Equipment (Where on short-term hire of 1 month or less only)	Estimated useful life (years)	DV banded dep'n rate (%)	SL equivalent banded dep'n rate (%)
Fork lift trucks - under 8 tonnes.	6.66	26	18
Fork lift trucks - 8 tonnes and over.	8	22	15.5
Motor vehicles (for transporting people, up to and including 12 seats).	4	40	30
Motor vehicles - Class NA (for transporting light goods, that have a gross vehicle mass not exceeding 3.5 tonnes and used for short-term hire).	6.66	26	18
Motor vehicles - Class NB (for transporting medium goods, that have a gross vehicle mass exceeding 3.5 tonnes but not exceeding 12 tonnes and used for short-term hire).	8	22	15.5
Motor vehicles - Class NC (for transporting heavy goods, that have a gross vehicle mass exceeding 12 tonnes and used for short-term hire).	6.66	26	18
Trailers - Class TC (for transporting medium goods that have a gross vehicle mass exceeding 3.5 tonnes but not exceeding 10 tonnes and used for short-term hire).	12.5	15	10
Trailers - Class TD (for transporting heavy goods, that have a gross vehicle mass exceeding 10 tonnes and used for short-term hire).	10	18	12.5
Trailers - Class TA and TB (for transporting very light and light goods that have a gross vehicle mass not exceeding 3.5 tonnes and used for short-term hire) excluding domestic trailers.	10	18	12.5
Trailers – domestic. Not exceeding 1 tonne. Used for short-term hire.	6.66	26	18

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 1994.

If you wish to make a submission on these proposed changes, please write to:

Assistant General Manager (Adjudication & Rulings)
National Office
Inland Revenue Department
P O Box 2198
WELLINGTON

We need to receive your submission by 30 April 1998 if we are to take it into account in finalising the determination.

Interpretation statements

This section of the TIB contains interpretation statements issued by the Commissioner of Inland Revenue. These statements set out the Commissioner's view on how the law applies to a particular set of circumstances when it is either not possible or not appropriate to issue a binding public ruling.

In most cases Inland Revenue will assess taxpayers in line with the following interpretation statements. However, our statutory duty is to make correct assessments, so we may not necessarily assess taxpayers on the basis of earlier advice if at the time of the assessment we consider that the earlier advice is not consistent with the law.

Salespersons on commission plus retainer

Notice of withdrawal of item in Public Information Bulletin 178

In Public Information Bulletin 178 (February 1989) at pages 6-7, in an item entitled "Commission Agents – Expense Claims", the Commissioner ruled on the treatment of commission earnings for PAYE purposes. In particular, this item stated that if a taxpayer received a salary or retainer or other fixed remuneration in addition to a commission, an employer/employee relationship existed and the total remuneration was to be taxed as "salary and wages". Conversely, the item stated that if a taxpayer received commission remuneration only, this generally indicated that an employer/employee relationship did not exist.

The correctness of this item has now been questioned.

Since PIB 178 was published, the Court of Appeal in *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42 at page 70 has established that the question of whether remuneration is "salary and wages" will depend on the nature of the relationship in the contract of employment. It turns on whether the taxpayer is employed under a "contract of service" or a "contract for services". The Court of Appeal in cases such as *Challenge* and *TNT Worldwide Express v Cunningham* [1993] 3 NZLR 681 has developed several tests for determining the nature of a contract of employment, and has stated that it will be a question of fact in each case and not merely a question of the type of remuneration involved.

Inland Revenue published an article in Tax Information Bulletin Volume Four, No.7 (March 1993) at pages 2-4 entitled "Employee or Independent Contractor?" summarising these tests and identifying various questions that might be relevant in the context of applying them. The article states that "the results of the various tests must be weighed to find the predominant factors which will determine the relationship". This approach is consistent with that of the courts.

The Commissioner advises that the item in PIB 178 is not consistent with current employment law principles, and taxpayers and agents should not rely upon it. Instead they should refer to the above-mentioned TIB item to assist them in answering questions concerning the nature of employment relationships.

Standard practice statements

These statements describe how the Commissioner will, in practice, exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

Shortfall penalties – not taking reasonable care

Standard Practice Statement INV-200

Introduction

A shortfall penalty is a penalty imposed as a percentage of a tax shortfall, or deficit or understatement of tax, which results from certain actions on the part of a taxpayer. The law divides these actions into five categories of fault, or breach, with a specified penalty rate for each category as listed below:

Not taking reasonable care	20%
Unacceptable interpretation	20%
Gross carelessness	40%
Abusive tax position	100%
Evasion or similar offence	150%

These penalty rates are non-negotiable and where a default occurs the applicable penalty must be imposed. A taxpayer does however have the right to challenge the decision to impose a shortfall penalty but not the amount of penalty.

This statement deals with defaults that breach the standard of "reasonable care".

Application

The penalties apply to obligations relating to the 1997/98 and subsequent income tax years and to taxable or dutiable periods commencing on or after 1 April 1997.

Shortfall penalties apply when there is a deficit or understatement of tax, or where a refund or loss is reduced. Defaults in employers' obligations are also considered under shortfall penalties.

The penalty provision is generic in application. This means that it applies to all Inland Revenue Acts (but for Child Support and Student Loans, it applies only to employer obligations).

Purpose

The purpose of the not taking reasonable care shortfall penalty is to increase voluntary compliance with the system. The standard is the cornerstone of the penalties regime which requires all taxpayers to act reasonably in the conduct of their tax affairs. It is a fluid concept which recognises the distinct characteristics of particular obligations and the different burdens placed on various taxpayers.

The standard recognises taxpayers' varying abilities and reflects a balance between the need for returns to be correct and the recognition of the difficulties that taxpayers may face in ensuring that they are correct.

Legislation

Section 141A of the Tax Administration Act 1994:

Not taking reasonable care -

(1) A taxpayer is liable to pay a shortfall penalty if the taxpayer does not take reasonable care in taking a taxpayer's tax position (referred to as "not taking reasonable care") and the taking of that tax position by that taxpayer results in a tax shortfall.

(2) The penalty payable for not taking reasonable care is 20% of the resulting tax shortfall.

(3) A taxpayer who, in taking a taxpayer's tax position, has used an acceptable interpretation of the tax law is also a taxpayer who has taken reasonable care in taking the taxpayer's tax position.

Test of reasonable care

The test of reasonable care is whether a taxpayer of ordinary skill and prudence would have foreseen as a reasonable probability or likelihood the prospect that an act (or failure to act) would cause a tax shortfall, having regard to all the circumstances.

Whether the taxpayer acted intentionally is not a consideration. It is not a question of whether the taxpayer actually foresaw the probability that the act or failure to act would cause a tax shortfall, but whether a reasonable person in the circumstances of the taxpayer, would have seen the tax shortfall as a reasonable probability. It equates with the concept of negligence in the civil law of Torts, and the jurisprudence is well established. "Negligence is to be measured objectively by ascertaining what in the circumstances would be done or omitted by the reasonable man" *(Meulan's Hair Stylists Ltd v CIR* [1963] NZLR 797).

In the tax context, reasonable care includes exercising reasonable diligence to determine the correctness of a return position. It also includes the keeping of adequate books and records or to substantiate items properly, and generally making a reasonable attempt to comply with the tax law.

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Appropriate to category of taxpayer

The reasonable care test is not intended to be overly onerous and does not mean perfection. The effort required of the taxpayer is commensurate with the reasonable person in the taxpayer's circumstances. Ordinarily what is expected is the achievement of a standard appropriate to the category of taxpayer, rather than that of the individual taxpayer involved.

The category of taxpayer will affect what constitutes reasonable care in each particular case. The standard required of a salary and wage earner will differ from that required of a business taxpayer. For most salary and wage earners, an earnest effort to follow the Tax Pack instructions will be sufficient to pass the reasonable care test.

Business taxpayers must meet the standard of the "reasonable business taxpayer". The business taxpayer may be required to do more than the "reasonable wage earner". For example, the amount of tax involved, and the complexity of the business taxpayer's affairs may require them to seek professional assistance in meeting their tax obligations.

Objective v subjective

Reasonable care is an objective test, however, it brings in subjective elements. What is meant by subjective is that when considering whether the taxpayer has taken reasonable care, the circumstances of the particular taxpayer need to be considered "objectively" by looking at what a reasonable person would have done in those circumstances.

Factors to consider

Circumstances that may be taken into account when determining whether reasonable care has been exercised include:

- the complexity of the law and the transaction (the difficulty in interpreting complex legislation);
- the materiality of the shortfall (the gravity of the consequence and the size of the risk);
- the difficulty and expense of taking the precaution;
- the taxpayer's age, health and background.

In addition, for a business, reasonable care may also take into account:

- the size and nature of the business;
- the internal controls in place;
- the business record keeping practices;
- system failures (Year 2000 failure would not generally be considered to be an acceptable reason).

Interpretations

On questions of interpretation, reasonable care will depend on:

- what efforts the taxpayer had taken to resolve the issue;
- the types of advice received;
- the certainty of the law.

Reasonable care requires a taxpayer to come to the same conclusions that a reasonable person would come to in the circumstances of that taxpayer.

The standard of reasonable care in interpreting the law applies to all matters, regardless of the amount of tax.

Amount of shortfall – materiality

Materiality is implicit in the standard of reasonable care. In considering whether a taxpayer has taken reasonable care, consideration will be given not only to the nature of the shortfall, but also to the size of the shortfall in relation to the taxpayer.

If the amount is large, relative to the total overall tax liability, then, the taxpayer should have been aware that something was amiss. For example, if a taxpayer with a returned income of $50,000, omitted income of $10,000 (which was clearly "income") from his or her return, it would be fair to say that the taxpayer should have been aware, regardless of the fact that the agent had completed the return, that not all of the income had been returned.

Contrast the above situation, to that of a large corporate taxpayer whose returned income for the year was $50,000,000. An omission of income of $10,000 would more than likely not have been material enough to put the taxpayer on notice. Therefore, depending on any other circumstances, this taxpayer may well have taken reasonable care to ensure that the return was correct.

Tax agents and advisers

A taxpayer who has relied on the advice of a tax adviser will usually be considered to have exercised reasonable care.

However they may still be exposed to a penalty for lack of reasonable care should they:

- fail to provide adequate information when seeking advice;
- fail to provide reasonable instructions to a tax adviser; or
- unreasonably rely on a tax adviser or on advice (when they have reason to believe that the advice is not correct),

A taxpayer does not satisfy the obligation to take reasonable care simply by using the services of a tax agent or tax adviser. It remains the taxpayer's responsibility to properly record matters relating to his or her tax affairs during the year, and to draw all the relevant facts to the attention of the agent or adviser, in order to meet the reasonable care test.

Previous audits

There may be cases where a taxpayer has been previously audited, a particular matter found to be in default but in a subsequent return prepared by an agent, the same matter results in a shortfall. Depending on the exact circumstances, even though the agent prepared the return, the fact that the taxpayer had been alerted by the previous audit may indicate a lack of reasonable care on the part of the taxpayer on the second omission for not

ensuring that the return was correct in that particular regard.

Complexity of the law

Reliance on an agent must be weighed against the complexity of the law relating to the matters at issue. If a taxpayer seeks advice on a matter on which the tax law is extremely complex, they are more likely to rely on that advice without question. A taxpayer would be required to support the argument that they accepted the agent's advice as correct. The matter to be considered is whether a reasonable person in the taxpayer's circumstances would have been put on notice of agent error.

Agent fault

Agents have a responsibility to obtain relevant information about their clients. Matters to be considered would include:

- Whether or not a questionnaire was completed.
- Was the information compiled accurately?
- Was the questionnaire discussed with the client?

The taxpayer has a responsibility to advise the agent of matters affecting his or her income. For example, advising the agent of all of their investments, bank accounts, second jobs, perk jobs, cash taken for drawings, etc.

Taxpayers have a responsibility to fully and comprehensively advise their tax agents of their tax affairs.

Language difficulties

There is a responsibility on both the agent and the taxpayer to ensure as far as is practicable, both parties have all the relevant information to ensure that the tax return is compiled as accurately as possible. This means ensuring that any potential language problems are addressed where it is practical to do so.

Inland Revenue advice

Publications

It is unlikely that taxpayers will be considered to have breached the reasonable care standard if Inland Revenue has failed to provide adequate information in its guides on which the taxpayer has relied.

Where there is no apparent reason for a taxpayer to question information provided, the taxpayer will generally have taken reasonable care.

Advice provided to individual taxpayers

Where a tax shortfall arises and the taxpayer states that they were relying on advice from Inland Revenue the following general rule will apply:

Where the taxpayer has sought Inland Revenue advice and this can be verified then a penalty for not taking reasonable care will generally not be imposed. Verification may take the form of a letter from Inland Revenue or the taxpayer being able to provide details of when and from whom the advice was sought.

This rule is however subject to the full circumstances and facts of the case.

Arithmetical error

Arithmetical errors may indicate a failure to take reasonable care but are not conclusive. The decision will depend on the procedures in place to detect such errors, the size, nature and frequency of the error, or the circumstances in which the taxpayer made the error.

Defence to lack of reasonable care

In large adjustment cases when the matter turns on a matter of interpretation, the acceptable interpretation standard must be satisfied. A taxpayer who can demonstrate that the position taken is an acceptable interpretation is deemed to have satisfied the reasonable care standard.

Burden and standard of proof

A taxpayer has the right to challenge the decision to impose a shortfall penalty through the disputes process. If the issue can not be resolved through the disputes process the taxpayer has the normal rights of review through the courts.

The burden of proof in civil proceedings relating to the imposition of penalties rests with the taxpayer. They must show that on the "balance of probabilities" they have taken reasonable care. Accordingly, if the taxpayer can show that it is probable that they took reasonable care, they will have satisfied the standard.

Standard rate of penalty

The standard rate of penalty payable for not taking reasonable care is 20% of the resulting tax shortfall.

This rate may be adjusted by varying rates in the following circumstances:

- voluntary disclosure before or during an audit
- voluntary disclosure at the time of return filing
- temporary tax shortfalls
- obstruction

Other reference

An explanation and examples of shortfall penalties and other offences and penalties can be found in Tax Information Bulletin Volume Eight, No.7 (October 1996).

Summary

Section 141A of the Tax Administration Act 1994 provides that a taxpayer who does not take reasonable care in taking a tax position is liable to pay a shortfall penalty of 20% of the resulting shortfall.

The test of reasonable care is whether a person of ordinary skill and prudence would have foreseen as a reasonable probability or likelihood the prospect that an act (or failure to act) would cause a tax shortfall, having regard to all the circumstances.

Tony Bouzaid
National Manager, Operations Policy

Shortfall penalties - unacceptable interpretation

Standard Practice Statement INV-205

Introduction

A shortfall penalty is a penalty imposed as a percentage of a tax shortfall, or deficit or understatement of tax, which results from certain actions on the part of a taxpayer. The law divides these actions into five categories of fault, or breach, with a specified penalty rate for each category as listed below:

Not taking reasonable care	20%
Unacceptable interpretation	20%
Gross carelessness	40%
Abusive tax position	100%
Evasion or similar offence	150%

These penalty rates are non-negotiable and where a default occurs the applicable penalty must be imposed. A taxpayer does however have the right to challenge the decision to impose a shortfall penalty but not the amount of penalty.

This statement deals with defaults that fall within the shortfall penalty category of "unacceptable interpretation".

Application

The penalties apply to obligations relating to the 1997/98 and subsequent income tax years and to taxable or dutiable periods commencing on or after 1 April 1997.

Shortfall penalties apply when there is a deficit or understatement of tax, or where a refund or loss is reduced. Defaults in employers' obligations are also considered under shortfall penalties.

The penalty provision is generic in application. This means that it applies to all Inland Revenue Acts (but for Child Support and Student Loans, it applies only to employer obligations).

Purpose

The purpose of the unacceptable interpretation shortfall penalty is to ensure that in a self assessment environment taxpayers who take a position which has significant tax consequences take extra care. It ensures that the conclusions they reach on their tax liability are sound.

Legislation

Section 141B of Tax Administration Act 1994:

Unacceptable Interpretation -

(1) In relation to a tax position taken by a taxpayer, an unacceptable interpretation -

(a) Is an interpretation or an interpretation of an application of a tax law; and

(b) Viewed objectively, that interpretation or application fails to meet the standard of being about as likely as not to be correct.

(2) A taxpayer is liable to pay a shortfall penalty if -

(a) The taxpayer's tax position involves an unacceptable interpretation of a tax law; and

(b) The tax shortfall arising from the taxpayer's tax position exceeds both -

(i) $10,000; and

(ii) The lesser of $200,000 and one percent of the taxpayer's total tax figure for the relevant return period.

(3) For the purposes of this section, a taxpayer's total tax figure is -

(a) The amount of tax paid or payable by the taxpayer in respect of the return period for which the taxpayer takes the taxpayer's tax position before, in the case of income tax, any group offset election or subvention payment; or

(b) Where the taxpayer has no tax to pay in respect of the return period -

(i) Except in the case of GST, an amount equal to the product of -

(A) The net loss of a taxpayer in respect of the return period, ascertained in accordance with the provisions of the Income Tax Act 1994, are to be used in this subsection as if they had a positive value; and

(B) The basic rate of income tax for companies in the relevant return; or

(ii) In the case of GST, the refund of tax to which the taxpayer is entitled for the return period, -

that is shown as tax paid or payable, or as net losses of the taxpayer, or as a refund to which the taxpayer is entitled, in a tax return provided by the taxpayer for the return period.

(4) Where subsection (2) applies, the shortfall penalty is 20% of the resulting tax shortfall.

(5) For the purposes of this section, the question whether any interpretation of a tax law is acceptable or unacceptable shall be determined as at the time at which the taxpayer takes the taxpayer's tax position.

(6) For tax positions involving an interpretation of a tax law or laws that have been taken into account in a tax return, the time the taxpayer takes the taxpayer's tax position is when the taxpayer provides the return containing the taxpayer's tax position. If the taxpayer does not provide a tax return for a return period, the taxpayer takes the taxpayer's tax position on the due date for providing the tax return.

(7) The matters that must be considered in determining whether the tax position taken by a taxpayer involves an unacceptable interpretation of a tax law include -

(a) The actual or potential application to the tax position of all the tax laws that are relevant (including specific or general anti-avoidance provisions); and

(b) Decisions of a court or Taxation Review Authority on the interpretation of tax laws that are relevant (unless the decision was issued up to one month before the taxpayer takes the taxpayer's tax position).

(8) For the purpose of determining whether the resulting tax shortfall is in excess of the amounts specified in subsection (2)(b), -

(a) A tax return provided by -

(i) A partnership; or

(ii) Any other group of persons that derive or incur amounts jointly or are assessed together, -

is to be treated as if it were a tax return of every taxpayer who is a partner in the partnership or person in such group; and

(b) The tax rate in a return period applying to a partnership is deemed to be the same as the basic rate of income tax for companies for the relevant period.

(9) The amounts or the percentage specified in subsection (2) may be varied from time to time by the Governor-General by Order in Council.

Threshold

A taxpayer is liable to pay a shortfall penalty if the tax shortfall arising from the taxpayer's tax position exceeds both $10,000, and the lesser of $200,000 and 1% of the taxpayer's total tax figure for the relevant return period.

Interpretation or application of a tax law

The unacceptable interpretation test applies only to tax shortfalls caused by a taxpayer treating a tax law as applying in a particular way.

A taxpayer treats the tax law as applying in a particular way where he or she concludes that, on the basis of the facts and the way the law applies to those facts, a particular consequence follows. For example, an amount of expenditure is deductible. In some cases a taxpayer's tax position may not represent conclusions of the taxpayer, but instead reflect calculation or transposition errors.

As a broad rule, where a tax shortfall was caused by an error in calculation or a transposition error, section 141B will not apply, since the taxpayer will not have treated a tax law as applying in relation to a matter in a particular way. However, in such a case consideration would need to be given to the reasonable care standard.

Non-application of a tax law

There may be instances where a taxpayer argues that he or she did not apply a section of the Act, therefore, did not interpret the particular section as applying. Accordingly, the taxpayer contends that the unacceptable interpretation standard does not apply. The non-application of a tax law will in all cases be considered to be applying the tax law.

What is an unacceptable interpretation?

Level of standard

The taxpayer's case does not have to be so balanced with the Commissioner's that no real preference can be given to one over the other. The test is not **more** likely than not, nor is it **as** likely as not; such wording would imply a 50 percent or better chance of success. Rather the standard is **about** as likely as not correct. In addition, the word "likely" implies a degree of latitude.

The upper boundary of probability for a position to be an acceptable interpretation is a 50/50 likelihood of success; but the lower boundary is not quite so clear. However, guidance can be obtained from establishing where the interface with the standard sufficient for the exercise of reasonable care lies.

Accordingly, the standard is less stringent than that of "more likely than not", but is more stringent than the "reasonable care standard".

Significant emphasis should be given to the word "about". The standard is not intended to remove the right of a taxpayer to take up issues with the Commissioner, rather, it must be a position to which a court would give serious consideration, but not necessarily agree with. This means that the prospect of the taxpayer's interpretation being upheld by the court must be substantial, although not necessarily 50 percent. The taxpayer's argument should be sufficient to support a reasonable expectation that the taxpayer could succeed in court.

An example would be where a taxpayer's position was upheld in the TRA, however, later lost in the High Court. In such a situation it would be considered that the taxpayer clearly had an acceptable interpretation. However, in saying this, a taxpayer is not required to take a case to the courts to determine that they had an acceptable interpretation.

If a taxpayer adopts one of several equally likely interpretations this will generally satisfy the standard, as each position is about as likely as any other position to be the correct tax position.

The level is more easily reached if there is no case law on the area and the statute law is ambiguous or unclear.

Taxpayer effort

The unacceptable interpretation standard is an objective test involving an analysis of the law to the relevant facts. This means that it is not relevant that a taxpayer believes that the position taken was an acceptable interpretation.

The unacceptable interpretation standard does not take into account taxpayers' efforts in resolving unclear issues. The standard is intended to focus on the merits of an argument in support of a particular position, rather than the taxpayer's effort in resolving issues. The strength of the argument is weighed by considering the existence and reasoning of relevant authorities. Relevant authorities have not been defined in the legislation, however some matters that must be considered are listed.

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Matters which must be considered

Section 141B(7) provides that the matters that must be considered in determining whether the tax position involves an unacceptable interpretation of a tax law include -

- The actual or potential application to the tax position of all the tax laws that are relevant (including specific or general anti-avoidance provisions); and
- Decisions of a court or a Taxation Review Authority on the interpretation of tax laws that are relevant (unless the decision was issued up to one month before the taxpayer takes the taxpayer's tax position – see "Timing").

Relevant tax laws

Tax law is defined in section 3(1) of the Tax Administration Act 1994 as:

(a) A provision of the Inland Revenue Acts or an Act that an Inland Revenue Act replaces:

(b) An Order in Council or a regulation made under another tax law:

(c) A non-disputable decision:

(d) In relation to an obligation to provide a tax return or a tax form, also includes a provision of the Accident Rehabilitation and Compensation Insurance Act 1992 or a regulation made under that Act:

Section 141B(7)(a) makes specific reference to the anti-avoidance provisions. This ensures that it cannot be argued that a tax position or interpretation is an acceptable interpretation in terms of a particular legislative provision irrespective of the operation of other provisions such as general anti-avoidance provisions.

In trying to discern the scheme and purpose of the legislation, primary regard must be had to the words of the legislation. It is Parliamentary intent, as expressed in the statute, which is crucial. The increased complexity of tax legislation has resulted in some ambiguity, leading to confusion as to the meaning of particular provisions which makes the ascertainment of the true Parliamentary intent difficult. The Government's consultative documents, the various consultative committee reports, Parliamentary discussion and debate, and Departmental interpretative guidelines may provide assistance in interpreting the legislation under review.

Relevant court decisions

Factors that affect the weight of an authority:

Publication – The decision must have been published or referred to in a reported commentary.

Source – This refers to the court or tribunal which made the decision on which the taxpayer relies. The higher the source of a decision in the judicial hierarchy, the more precedential the decision.

Jurisdiction – Decisions by the New Zealand judiciary, will usually be given more weight than extra-territorial decisions of other countries.

Relevance - Authorities that have similar factual circumstances to the case asserted by a taxpayer are more relevant than those authorities which can be materially distinguished on the facts.

However, if a taxpayer has no authorities to support a case there may still exist an acceptable interpretation. In such cases, a taxpayer needs a well-reasoned construction of the statutory provision which is about as likely as not to be correct.

Opinions expressed by tax professionals

Information which supports a reasonable argument may include such items as the contents of tax opinions, legal articles and related material. However, the mere existence of an opinion from an adviser would not on its own indicate that an acceptable interpretation exists. It is the content of the opinion and strength of the alternative views, not the fact of seeking advice, which will be relevant.

Other matters

Other matters which may be considered in particular circumstances include:

- binding public rulings on analogous issues and other published Inland Revenue statements,
- legal articles and related material and references made to statutes other than the Revenue Acts.
- statute other than tax law
- dictionary meaning or a definition in another statute.
- generally accepted accounting practice and commercial practice.

These matters carry more significance in areas where the law is unclear and there is no relevant case law available.

Timing

To determine whether an acceptable interpretation exists, consideration will be given to the authorities available at the time the taxpayer took the tax position. This will generally be when the taxpayer files the tax return. In addition, subsequent clarification or development of case law or public rulings in a particular area may confirm that a position taken is acceptable. However, subsequent developments will not be used to argue that a position was an unacceptable interpretation.

The legislation does not require the taxpayer to document an acceptable interpretation at the time of taking the tax position. Taxpayers will be able to substantiate their arguments when a dispute arises, after filing their returns. However, in most cases taxpayers will need to consider the validity of an interpretation relating to a sizeable transaction when they take the position in their returns or earlier.

In addition, decisions of a court or the Taxation Review Authority which are issued up to one month before the taxpayer takes the tax position will not be used to argue

that the taxpayer's position is an unacceptable interpretation. For the purposes of this provision "issued" is considered to mean when the decision is published.

Binding rulings and the acceptable interpretation standard

The fact that a taxpayer adopts an interpretation that differs from that of a ruling or published Inland Revenue statements will not necessarily mean that the taxpayer has an unacceptable interpretation. However, if there is a binding ruling supporting the taxpayer's position, there will be no tax shortfall. A shortfall penalty cannot therefore be considered.

Relationship to the reasonable care standard

The aim of the acceptable interpretation standard is to ensure that taxpayers take care in considering their position. This is required by the reasonable care standard, however, the acceptable interpretation standard takes away some of the so called "subjective elements" i.e. taxpayer effort, when there is a significant amount of tax at stake.

A taxpayer who satisfies the acceptable interpretation standard is deemed to have satisfied the reasonable care standard.

Standard rate of penalty

The standard rate of penalty payable for gross carelessness is 20% of the resulting tax shortfall.

This rate may be adjusted by varying rates in the following circumstances:

- voluntary disclosure before or during an audit
- voluntary disclosure at the time of return filing
- temporary tax shortfalls
- obstruction

Other reference

An explanation and examples of shortfall penalties and other offences and penalties can be found in Tax Information Bulletin Volume Eight, No.7 (October 1996).

Summary

Section 141B of Tax Administration Act 1994 provides for a penalty for taking an unacceptable interpretation, at the rate of 20%.

A penalty is charged where all of the following conditions are met:

- The shortfall was caused by a tax position involving an interpretation or application of a tax law.
- The tax shortfall exceeded both $10,000, and the lesser of $200,000 and 1% of the taxpayer's total tax figure for the relevant return period.
- The tax position taken fails to meet the standard of being, viewed objectively, about as likely as not to be correct.

Tony Bouzaid
National Manager, Operations Policy

Shortfall penalties – gross carelessness

Standard Practice Statement INV-210

Introduction

A shortfall penalty is a penalty imposed as a percentage of a tax shortfall, or deficit or understatement of tax, which results from certain actions on the part of a taxpayer. The law divides these actions into five categories of fault, or breach, with a specified penalty rate for each category as listed below:

Not taking reasonable care	20%
Unacceptable interpretation	20%
Gross carelessness	40%
Abusive tax position	100%
Evasion or similar offence	150%

These penalty rates are non-negotiable and where a default occurs the applicable penalty must be imposed. A taxpayer does however have the right to challenge the decision to impose a shortfall penalty but not the amount of penalty.

This statement deals with defaults that fall within the shortfall penalty category of "gross carelessness".

Application

The penalties apply to obligations relating to the 1997/98 and subsequent income tax years and to taxable or dutiable periods commencing on or after 1 April 1997.

Shortfall penalties apply when there is a deficit or understatement of tax, or where a refund or loss is reduced. Defaults in employers' obligations are also considered under shortfall penalties.

The penalty provision is generic in application. This means that it applies to all Inland Revenue Acts (but for Child Support and Student Loans, it applies only to employer obligations).

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Purpose

The purpose of the gross carelessness shortfall penalty is to cater for breaches that fall just short of the evasion category but beyond a lack of reasonable care. The old regime of penal and additional tax failed to cater for these situations.

Legislation

Section 141C of Tax Administration Act 1994:

Gross Carelessness –

(1) A taxpayer is liable to pay a shortfall penalty if the taxpayer is grossly careless in taking a taxpayer's tax position (referred to as "gross carelessness").

(2) The penalty payable for gross carelessness is 40% of the resulting tax shortfall.

(3) For the purposes of this Part, gross carelessness means doing or not doing something in a way that, in all the circumstances, suggests or implies complete or a high level of disregard for the consequences.

(4) A taxpayer who, in taking a taxpayer's tax position, has used an acceptable interpretation of tax law is also a taxpayer who has not been grossly careless in taking the taxpayer's tax position.

Gross carelessness similar to recklessness

Gross carelessness is similar to recklessness. In fact it is identical to the objective test for recklessness as discussed by the House of Lords in *R v Caldwell* [1982] AC 341, [1981] 1 All ER 961. In this case the House of Lords found that the test of recklessness was objective and may be found to exist where a person whose behaviour is in question fails to give any thought to the consequences of his behaviour.

However, the New Zealand Courts seem to support that the statutory forms of recklessness ought to be given a subjective meaning. This is supported in *Case P29* (1992) 14 NZTC where his Honour stated:

"Where recklessness is alleged the Commissioner must prove … that the facts which were actually known to the taxpayer were such that they must have put him on enquiry that the income returned for tax purposes was understated. Faced with those facts the Commissioner must then show that the taxpayer made the conscious decision to ignore them and to return the understated income without making any further enquiry."

It was considered that as the category was within the civil penalties it was appropriate that the test be objective rather than subjective, with the fixed penalty rate being set to reflect this. It was for this reason that the new term of gross carelessness was used rather than recklessness. This was also consistent with the aim of the penalty, being to cater for breaches that fell just short of the evasion category (because of lack of proof of intent) but well beyond not taking reasonable care.

Boundary between gross carelessness and other shortfall penalties

The definition for gross carelessness is more akin to evasion than not taking reasonable care. The only essential element keeping them apart is that, for evasion it must be shown that the taxpayer had the necessary "mens rea" (intent) to evade tax. This is not a necessary element in determining whether a taxpayer has been grossly careless.

Therefore, to determine whether a tax shortfall is the result of gross carelessness consideration should be given to the boundary between evasion and gross carelessness, not failing to take reasonable care.

It is at this end of the spectrum that the distinction becomes clearer, due to the fact that there is a change between the two categories, moving from an objective test (for gross carelessness) to a subjective test (for evasion). Further to this there is a change in the onus of proof, moving from the taxpayer to the Commissioner, in the case of evasion.

General rules

Lack of reasonable care or gross carelessness

If it is uncertain whether the tax shortfall is the result of not taking reasonable care or gross carelessness, generally the penalty will default to the not taking reasonable care category. This is because gross carelessness occurs only where a taxpayer's behaviour displays a high degree of carelessness and disregard for the consequences.

Gross carelessness or evasion

In determining whether to impose a penalty for gross carelessness or evasion the decision will generally rely on the evidence available and whether it is sufficient to discharge the Commissioner's onus of proof for evasion. If the evidence is insufficient the penalty will default to the gross carelessness category.

Burden and standard of proof

A taxpayer has the right to challenge the decision to impose a shortfall penalty through the disputes process. If the issue can not be resolved through the disputes process the taxpayer has the normal rights of review through the courts.

The burden of proof, in civil proceedings relating to the imposition of shortfall penalties, rests with the taxpayer. They must show that on the "balance of probabilities" they have not been grossly careless.

Standard rate of penalty

The standard rate of penalty payable for gross carelessness is 40% of the resulting tax shortfall.

This rate may be adjusted by varying rates in the following circumstances:

- voluntary disclosure before or during an audit
- voluntary disclosure at the time of return filing
- temporary tax shortfalls
- obstruction

Other reference

An explanation and examples of shortfall penalties and other offences and penalties can be found in Tax Information Bulletin Volume Eight, No.7 (October 1996).

Summary

Section 141C of Tax Administration Act 1994 provides for a penalty of gross carelessness, at the rate of 40%, where a default falls just short of the evasion category but well beyond not taking reasonable care.

The definition for gross carelessness is more akin to evasion than not taking reasonable care. The only essential element keeping them apart is that, for evasion, it must be shown that the taxpayer had the necessary "mens rea" (intent) to evade tax.

Typically, a high level of carelessness will be characterised by conduct which creates a high risk of a tax shortfall occurring where this risk and its consequences would have been foreseen by a reasonable person in the circumstances.

The penalty is non-negotiable and where a default meets the considerations for gross carelessness the penalty must be imposed.

Tony Bouzaid
National Manager, Operations Policy

Shortfall penalties – abusive tax position

Standard Practice Statement INV-215

Introduction

A shortfall penalty is a penalty imposed as a percentage of a tax shortfall, or deficit or understatement of tax, which results from certain actions on the part of a taxpayer. The law divides these actions into five categories of fault, or breach, with a specified penalty rate for each category as listed below:

Not taking reasonable care	20%
Unacceptable interpretation	20%
Gross carelessness	40%
Abusive tax position	100%
Evasion or similar offence	150%

These penalty rates are non-negotiable and where a default occurs the applicable penalty must be imposed. A taxpayer does however have the right to challenge the decision to impose a shortfall penalty but not the amount of penalty.

This statement deals with defaults that fall within the shortfall penalty category of "abusive tax position".

Application

The penalties apply to obligations relating to the 1997/98 and subsequent income tax years and to taxable or dutiable periods commencing on or after 1 April 1997.

Shortfall penalties apply when there is a deficit or understatement of tax, or where a refund or loss is reduced. Defaults in employers' obligations are also considered under shortfall penalties.

The penalty provision is generic in application. This means that it applies to all Inland Revenue Acts (but for Child Support and Student Loans, it applies only to employer obligations).

Purpose

The purpose of the abusive tax position shortfall penalty is to penalise those taxpayers who apply an unacceptable interpretation to a tax law that either results in, or would result in, reducing or removing tax liabilities, or gives tax benefits. The unacceptable interpretation may be the result of either entering into or acting on an arrangement or simply the interpretation or application of tax laws. The arrangement or interpretation must have a dominant purpose of taking, or of supporting the taking of, the resulting tax position/s.

It is intended that the provision will apply not only to situations where an anti-avoidance provision is invoked, but also where other provisions have been applied. This is important to ensure that identical conduct is not penalised differently solely because taxpayers are of different levels of sophistication or because Inland Revenue is not required to resort to an anti-avoidance provision.

Legislation

Section 141D of the Tax Administration Act 1994:

Abusive tax position –

(1) The purpose of this section is to penalise those taxpayers who, having applied an unacceptable interpretation to a tax law, have entered into or acted in respect of arrangements or interpreted or applied tax laws with a dominant purpose of taking, or of supporting the taking of, tax positions that reduce or remove tax liabilities or give tax benefits.

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(2) A taxpayer is liable to pay a shortfall penalty if the taxpayer takes an abusive tax position (referred to as an "abusive tax position").

(3) The penalty payable for taking an abusive tax position is 100% of the resulting tax shortfall.

(4) This section applies to a taxpayer only if –

(a) The taxpayer's tax position involves an unacceptable interpretation of a tax law; and

(b) The tax shortfall arising from the taxpayer's tax position exceeds $10,000.

(5) Section 141B (6) applies for determining the time when a taxpayer takes an abusive tax position.

(6) A taxpayer's tax position may be an abusive tax position if the tax position is an incorrect tax position under, or as a result of, either or both of –

(a) A general tax law; or

(b) A specific or general anti-avoidance tax law.

(7) For the purposes of this Part, an "abusive tax position" means a tax position that, –

(a) At the time at which the taxpayer's tax position is taken, involves the taking of an unacceptable interpretation of a tax law; and

(b) Viewed objectively, the taxpayer takes –

(i) In respect, or as a consequence, of an arrangement that is entered into with a dominant purpose of avoiding tax, whether directly or indirectly; or

(ii) Where the tax position does not relate to an arrangement described in subparagraph (i), with a dominant purpose of avoiding tax, whether directly or indirectly.

Criteria to be met

Before a penalty for an abusive tax position can be imposed, three criteria must be met:

- The position taken must be an unacceptable interpretation; and
- It must involve over $10,000 tax; and
- There must be a dominant purpose of avoiding tax.

Unacceptable interpretation standard

The unacceptable interpretation standard will first be applied to determine if a penalty is warranted. This test recognises that there are many uncertainties in law and that more than one valid interpretation of that law is sometimes possible. It is unreasonable and unfair to penalise a person for an interpretation if there is a reasonable argument that the interpretation is correct.

Threshold

The $10,000 threshold differs from the threshold for an unacceptable interpretation. The provisions in section 141B(2) relate solely to whether or not a shortfall penalty is charged. The 1% materiality threshold which applies to the "unacceptable interpretation" penalty therefore does not apply to the "abusive tax position" penalty.

Dominant purpose of avoiding tax

Dominant purpose

Where there is more than one purpose for entering into the relevant scheme, then section 141D(7)(b) requires that the particular purpose is the dominant purpose.

The Australian High Court decision in *FC of T v Spotless Services Ltd* (unrep, HC Australia, M32–33, 3 December 1996) examined the expression "dominant purpose" and equated the term with "most influential and prevailing or ruling purpose". Accordingly, if there are three purposes in entering into the arrangement or transaction and one of those purposes is to obtain a tax benefit, then if that purpose (obtaining a tax benefit) is the "most influential" of the three purposes, the dominant purpose test would have arguably been met.

The legislation relating to the shortfall penalty refers to a dominant "purpose". This differs from section BG 1 – core provisions – (formerly section BB 9) of the Income Tax Act 1994, which refers to "Its purpose or effect is tax avoidance".

It is considered that nothing turns on the distinction between "purpose or effect" and "purpose". In the context of section BG 1 case law certainly supports this view (*Tayles v Commissioner of Inland Revenue* [1982] 2 NZLR 726,734).

It could be considered that the term "purpose" is more of a "subjective" term than that of "effect", which is an objective term. However, the new provision is explicit that the test of whether an arrangement has the dominant purpose of avoiding tax is an objective one. It is also firmly established in case law that the purpose of an arrangement is to be argued objectively for section BG 1.

In short, the word "purpose" means, not motive, but the effect which is sought to achieve – the end in view.

The section is not concerned with the motives of taxpayers or the desire to avoid tax. It is only concerned with the means employed to avoid tax (i.e., the arrangement).

Avoiding tax

The concept of "avoiding tax" encompasses the deferral of tax and the claiming of tax credits. It is considered that "avoiding tax" would incorporate "tax avoidance" as defined in section OB 1 of the Income Tax Act 1994.

However, is the term "avoiding tax" wider than the term "tax avoidance"?

The term "avoiding tax" is likely to be read in the light of the other provisions of the relevant tax law which refer to tax avoidance, but will not require them to be applied. The penalty will also apply to arrangements which fail under a technical provision rather than a general or specific anti-avoidance provision.

The penalty does not explicitly require an anti-avoidance provision to have been applied:

- The penalty applies only when the taxpayer's tax position involves an unacceptable interpretation. This test applies when the taxpayer fails to correctly apply or interpret any provision of tax law. It is not restricted to anti-avoidance provisions;
- The penalty applies where the dominant "purpose" is tax avoidance; not when the tax has in fact been avoided;
- The abusive tax position penalty applies, both to arrangements which are reconstituted under an anti-avoidance provision and to arrangements which are caught by another provision but would otherwise have been subject to an anti-avoidance provision.

In addition, the fact that section 141D(7)(b)(ii) specifically provides for situations where there is no arrangement clarifies that the penalty is not restricted to situations involving the application of an anti-avoidance provision. Therefore, the abusive tax position penalty can apply when there is not an arrangement, but the tax position taken has a dominant purpose of avoiding tax.

Factors to consider

The following are an indication of the some of the factors that must be taken into account when considering whether there is a dominant purpose of avoiding tax.

Artificiality and contrivance

Have the transactions been designed to appear to comply with the legislation? The legal form may not reflect the substance (even though the legal form is effective).

Consideration will be given to the commercial reality of the arrangement. Are the arrangements or schemes "self-cancelling" (i.e., neutral commercial consequences, leaving only tax effects)?

The importance of the commercial purpose of the transaction as compared to the tax benefit that the relevant taxpayer obtained must be examined.

Circularity of funding

Funding going around in a circle, usually through a tax haven, resulting in income being tax exempt and the related expenditure tax deductible may be considered as an indicator of a tax avoiding arrangement.

Concealment of information and non-availability of evidence

This may occur through the use of a tax haven. By going through a tax haven disclosure protection may result due to the particular tax haven's secrecy laws. These laws usually do not allow information to be released to tax authorities, thereby providing an obstacle to the gathering of information to establish whether the transaction or arrangement is artificial or contrived.

Spurious interpretations

Spurious interpretation covers situations where a tax position taken has no or very little basis at law or the interpretation made or position taken is frivolous. If there is a reasonable basis then it will not be considered spurious (even though this would not be sufficient for the acceptable interpretation standard).

What happens when a Revenue Act has no anti-avoidance provision

As mentioned previously section 141D(6) states that an incorrect tax position may result from either a general tax law or a specific or general anti-avoidance tax law.

The fact that a particular Revenue Act does not have an anti-avoidance provision does not mean that the penalty cannot be imposed. What is required is that the tax position taken is incorrect under a general tax law and has as its dominant purpose the avoidance of tax. There must however be a tax shortfall.

If the position involves an arrangement which has the effect of ensuring that the treatment is within the interpretation of the law then there would not be a tax shortfall. The reason being, that the anti-avoidance provisions work by deeming the arrangement to be null and void, thereby allowing the substantive provisions to be applied as intended. The anti-avoidance provisions are not an assessing provision in themselves; they are a reconstruction provision. It is the substantive provisions which result in the reassessment.

Publication of name

Section 146(1)(a) of the Tax Administration Act 1994 requires that the name of anyone liable to pay a shortfall penalty for taking an abusive tax position will be published in the Gazette.

This will not occur however in the case of a voluntary disclosure prior to an investigation commencing.

Burden and standard of proof

A taxpayer has the right to challenge the decision to impose a shortfall penalty through the disputes process. If the issue can not be resolved through the disputes process the taxpayer has the normal rights of review through the courts.

The burden of proof, in civil proceedings relating to the imposition of shortfall penalties, rests with the taxpayer. They must show that on the "balance of probabilities" they have not taken an abusive tax position.

Standard rate of penalty

The standard rate of penalty payable for taking an abusive tax position is 100% of the resulting tax shortfall.

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This rate may be adjusted by varying rates in the following circumstances:

- voluntary disclosure before or during an audit
- voluntary disclosure at the time of return filing
- temporary tax shortfalls
- obstruction

Other reference

An explanation and examples of shortfall penalties and other offences and penalties can be found in Tax Information Bulletin Volume Eight, No.7 (October 1996).

Summary

Section 141D of Tax Administration Act 1994 provides for a penalty for taking an abusive tax position, at the rate of 100%.

The objective of an avoidance penalty is to deter taxpayers from entering into arrangements which have as their dominant purpose the avoiding of tax.

Before a penalty for an abusive tax position can be imposed, three criteria must be met:

- the position taken must be an unacceptable interpretation; and
- it must involve over $10,000 tax; and
- there must be a dominant purpose of avoiding tax.

Tony Bouzaid
National Manager, Operations Policy

Shortfall penalties – evasion or similar act

Standard Practice Statement INV-220

Introduction

A shortfall penalty is a penalty imposed as a percentage of a tax shortfall, or deficit or understatement of tax, which results from certain actions on the part of a taxpayer. The law divides these actions into five categories of fault, or breach, with a specified penalty rate for each category as listed below:

Not taking reasonable care	20%
Unacceptable interpretation	20%
Gross carelessness	40%
Abusive tax position	100%
Evasion or similar offence	150%

These penalty rates are non-negotiable and where a default occurs the applicable penalty must be imposed. A taxpayer does however have the right to challenge the decision to impose a shortfall penalty but not the amount of penalty.

This statement deals with defaults that fall within the shortfall penalty category of "evasion or similar act".

Application

The penalties apply to obligations relating to the 1997/98 and subsequent income tax years and to taxable or dutiable periods commencing on or after 1 April 1997.

Shortfall penalties apply when there is a deficit or understatement of tax, or where a refund or loss is reduced. Defaults in employers' obligations are also considered under shortfall penalties.

The penalty provision is generic in application. This means that it applies to all Inland Revenue Acts (but for Child Support and Student Loans, it applies only to employer obligations).

Purpose

The purpose of the evasion or similar offence shortfall penalty is to provide a penalty for taxpayers who evade the assessment or payment of tax for themselves or others, or who knowingly misapply a deduction or withholding tax, or who knowingly do not make tax deductions, or who obtain a refund or assist others to obtain a refund to which they know they are not entitled.

Legislation

Section 141E of the Tax Administration Act 1994:

Evasion or similar act –

(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 on their own behalf or on behalf of any another person; or

(b) knowingly applies or permits someone else to apply a deduction or withholding of tax which they were required to make to the Commissioner; or

(c) knowingly does not make a deduction or withholding of tax which they are required to make; or

(d) obtains a refund or payment of tax knowing that they are not lawfully entitled to the refund or payment; or

(e) enables another person to obtain a refund or payment of tax, knowing that the other person is not entitled to the refund or payment.

(2) No person shall be chargeable with a shortfall penalty under subsection (1)(b) if that person satisfies the Commissioner that the amount of the deduction has been accounted for, and that the person's failure to account for it within the prescribed time was due to illness, accident, or some other cause beyond the person's control.

(3) If a taxpayer 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, the taxpayer is liable to pay to the Commissioner an amount equal to the shortfall penalty that would have been imposed if the other person's tax position had been the taxpayer's tax position.

(4) The penalty payable for evasion or a similar act described in subsection (1) is 150% of the resulting tax shortfall.

Discussion

At the top end of the scale of non-compliance is a wilful or knowing breach of an obligation. The civil penalty for tax evasion applies to all tax types.

Tax evasion involves a deliberate attempt to cheat the revenue. This may include a taxpayer obtaining refunds (tax credits, rebates) knowing that he or she is not lawfully entitled to them or knowingly not accounting for tax deductions to the Commissioner.

Generally speaking there are two categories of behaviour that are subject to the shortfall penalty under the provisions of section 141E. Subsections (1)(b) to (e) require only knowledge of the breach, whereas breaches within subsection (1)(a) require the knowledge and intent to evade.

Taxpayer enables another to obtain a refund

Section 141E(1)(e) provides that a shortfall penalty is payable if the taxpayer "enables another person to obtain a refund or payment of tax, knowing that the other person is not entitled to the refund or payment".

However, because the shortfall penalty is a fixed percentage of the taxpayer's tax shortfall, no penalty would normally be able to be imposed, as it is the recipient of the refund or payment who has incurred a tax shortfall, not the taxpayer. Subsection (3) overcomes this problem by deeming that "the taxpayer is liable to pay to the Commissioner an amount equal to the shortfall penalty that would have been imposed if the other person's tax position had been the taxpayer's tax position."

Prosecution

Section 149(5) states that if a shortfall penalty has been imposed on a taxpayer for taking an incorrect tax position, the Commissioner may not subsequently prosecute the taxpayer for taking the incorrect tax position.

Prosecution does not preclude the Commissioner from imposing the civil penalty for evasion. It is not necessary for a taxpayer to be prosecuted before a shortfall penalty is imposed as the standards of proof are different.

Consideration of shortfall penalty after unsuccessful prosecution

Section 149(4) states that a shortfall penalty may be imposed after a prosecution, whether or not the prosecution is successful.

If prosecution action for evasion is unsuccessful, a shortfall penalty can still be imposed for evasion or similar act, because the standard of proof is the balance of probabilities, even though the onus of proof is still on the Commissioner.

However, the reason why the prosecution was not successful will be considered. If it was dismissed on technical grounds (for example some procedural matters in the prosecution not complied with), clearly a shortfall penalty can be imposed. If the evidence available to the court was clearly inadequate, then a shortfall penalty will not be able to be imposed.

If it is intended to prosecute a taxpayer and later impose a shortfall penalty, the taxpayer will be advised that after the prosecution, whether or not the prosecution is successful, the imposition of a shortfall penalty will be considered.

Tax deduction offences

Under section 141E, a shortfall penalty for evasion includes tax deduction offences (including Child Support and Student Loan deductions). This is both knowingly not deducting tax and knowingly not accounting for tax deducted. Taxpayers can also be prosecuted for a knowledge offence under section 143A for either of the above (knowingly not deducting tax and knowingly not accounting for tax deductions) or under section 143B for evasion for not deducting tax.

Statutory defence

Section 141E(2) provides that a shortfall penalty is not chargeable for failure to account for deductions to the Commissioner if the taxpayer is able to prove that:

- the amount of the tax deduction has been accounted for, and
- the taxpayer's failure to account for the tax within the prescribed time was due to illness, accident or other cause beyond the person's control

These points have to be met for the taxpayer to be excused from any liability.

Beyond the person's control

Beyond control does not include such circumstances as financial reasons, or the actions of staff. It may however include such circumstances as hospitalisation, accidents, illness, and other such causes.

Circumstances beyond one's control cannot be a continuing defence, i.e., it cannot be used as a defence month after month.

Factors to consider

Some of the factors that may be considered are:

- Length of time deducting and awareness of obligation to make payments by the due date
- Who is responsible for drawing up deduction details and forwarding payment by the due date

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- Reason/s why the deductions were not paid by the due date
- Was the taxpayer aware that payment had not been made by the due date and that an offence was being committed?
- When did they become aware that payment had not been made and what steps were taken to rectify the situation?
- For what purpose(s) were the deductions used when not paid by the due date?

Publication of name

Section 146(1)(b) of the Tax Administration Act 1994 requires that the name of anyone liable to pay a shortfall penalty for evasion will be published in the Gazette.

This will not occur however in the case of a voluntary disclosure prior to an investigation commencing.

Burden and standard of proof

A taxpayer has the right to challenge the decision to impose a shortfall penalty through the disputes process. If the issue can not be resolved through the disputes process the taxpayer has the normal rights of review through the courts.

The burden of proof, in civil proceedings relating to the imposition of the evasion or similar act shortfall penalty, rests with the Commissioner. The standard of proof for imposition of a shortfall penalty for evasion is the "balance of probabilities".

Standard rate of penalty

The standard rate of penalty payable for evasion or a similar act is 150% of the resulting tax shortfall.

This rate may be adjusted by varying rates in the following circumstances:

- voluntary disclosure before or during an audit
- voluntary disclosure at the time of return filing
- temporary tax shortfalls
- obstruction

Other reference

An explanation and examples of shortfall penalties and other offences and penalties can be found in Tax Information Bulletin Volume Eight, No.7 (October 1996).

Summary

Section 141E of the Tax Administration Act 1994 provides that a taxpayer who evades or enables another person to evade the payment of tax is liable to pay a shortfall penalty of 150% of the resulting shortfall.

Situations where a refund or payment of tax is unlawfully received are also covered.

A shortfall penalty is not chargeable if the taxpayer is able to prove to the satisfaction of the Commissioner that:

- the amount of the tax deduction has been accounted for, and
- the taxpayer's failure to account for the tax within the prescribed time was due to illness, accident or other cause beyond the person's control.

Where the taxpayer enables another person to obtain a refund or payment of tax, knowing that the other person is not entitled to the refund or payment, the taxpayer is liable to pay to the Commissioner an amount equal to the shortfall penalty that would have been imposed if the other person's tax position had been the taxpayer's tax position.

Tony Bouzaid
National Manager, Operations Policy

Criminal offence – evasion or similar offences

Standard Practice Statement INV-225

Introduction

Criminal penalties fall within three categories:

- Absolute liability offences
- Knowledge offences
- Evasion or similar offences

There are also penalties for obstruction and aiding and abetting.

This statement deals with prosecutions by the Commissioner for defaults that fall within the criminal offence category of "evasion or similar offences".

Application

The penalties apply to obligations relating to the 1997/98 and subsequent income tax years and to taxable or dutiable periods commencing on or after 1 April 1997.

Shortfall penalties apply when there is a deficit or understatement of tax, or where a refund or loss is reduced. Defaults in employers' obligations are also considered under shortfall penalties.

The penalty provision is generic in application. This means that it applies to all Inland Revenue Acts (but for Child Support and Student Loans, it applies only to employer obligations).

Purpose

The purpose is to provide a penalty for taxpayers who evade or enable another person to evade the payment of tax. It also covers situations where a refund or payment of tax is unlawfully received.

The penalty provision is generic in application. This means that it applies to all Inland Revenue Acts except Child Support and Student Loans.

Legislation

Section 143B of the Tax Administration Act 1994:

Evasion or similar offence –

(1) A person commits an offence against this Act if the person –

(a) Knowingly does not keep the books and documents required to be kept by a tax law; or

(b) Knowingly does not provide information (including tax returns and forms) to the Commissioner or any other person when required to do so by a tax law; or

(c) Knowingly provides altered, false, incomplete, or misleading information (including tax returns and forms) to the Commissioner or any other person in respect of a tax law or a matter or thing relating to a tax law; or

(d) Knowingly does not make a deduction or withholding of tax required to be made by a tax law; or

(e) Pretends to be another person for any purpose or reason relating to a tax law, –

and does so –

(f) Intending to evade the assessment or payment of tax by the person or any other person under a tax law; or

(g) To obtain a refund or payment of tax in the knowledge that the person is not lawfully entitled to the refund or payment under a tax law; or

(h) To enable another person to obtain a refund or payment of tax in the knowledge that the other person is not lawfully entitled to the refund or payment under a tax law.

(2) A person who evades or attempts to evade the assessment or payment of tax by the person or another person under a tax law commits an offence against this Act.

(3) A company does not commit an offence under subsection (1)(d) for knowingly not making a deduction of dividend withholding payment in respect of a dividend derived, if –

(a) The company deducted an estimate of the amount of dividend withholding payment payable; and

(b) The Commissioner is satisfied that –

(i) The company's failure was because it was not practicable for the company to calculate with accuracy, at the time of derivation, under section LF 2 of the Income Tax Act 1994, the amount of underlying foreign tax credit arising with respect to the dividend; and

(ii) The estimate is a reasonable one.

(4) A person who is convicted of an offence against subsection (1) or subsection (2) is liable to –

(a) Imprisonment for a term not exceeding 5 years; or

(b) A fine not exceeding $50,000; or

(c) Both.

What is meant by "Evasion or similar" offences?

All offences in this category require the person to have both the knowledge and the necessary "intent" to commit the offence.

Intent is critical to the offence. There must be sufficient evidence to prove "beyond reasonable doubt" that the person not only committed the offence but committed it:

- intending to evade the assessment or payment of the tax by the person or any other person; or
- to obtain a refund or payment of tax in the knowledge that the person was not lawfully entitled to the refund or payment; or
- to enable another person to obtain a refund or payment of tax in the knowledge that the other person was not lawfully entitled to the refund or payment.

Before a person can be prosecuted for an offence under section 143B(1) they must meet two criteria. Firstly, the person must have committed an act which comes within subparagraphs (a) to (e) and secondly, the person must have committed the act with necessary intent, as required in subparagraphs (f) to (h).

Offence

Section 143B(2) provides that a person who evades or attempts to evade the assessment or payment of tax for themselves or another person under a tax law commits an offence against this Act.

Essentially, if a person evades or attempts to evade the assessment or payment of tax and the act or failure to act does not come within the offences listed in subparagraphs (a) to (e) of section 143B(1) then prosecution action can be taken under subsection 143B(2).

Prosecution

Section 149(5), states that if a shortfall penalty has been imposed on a taxpayer for taking an incorrect tax position, the Commissioner may not subsequently prosecute the taxpayer for taking the incorrect tax position.

Prosecution does not preclude the Commissioner from imposing the civil penalty for evasion. It is not necessary for a taxpayer to be prosecuted before a shortfall penalty is imposed. As the standards of proof are different.

Taxpayer to be advised of intention

If a prosecution is to be considered, the taxpayer will be advised by letter at the time the Notice of Proposed

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Adjustment is issued for the tax shortfall that prosecution action is being recommended.

If it is intended to prosecute and later impose a shortfall penalty, the taxpayer will be advised that after the prosecution, whether or not the prosecution is successful, the imposition of a shortfall penalty will be considered.

Consideration of shortfall penalty after unsuccessful prosecution

Section 149(4) states that a shortfall penalty may be imposed after a prosecution, whether or not the prosecution is successful.

If prosecution action for evasion is unsuccessful, a shortfall penalty can still be imposed for evasion or similar act, because the standard of proof is the balance of probabilities, even though the onus of proof is still the Commissioner.

However, the reason why the prosecution was not successful will be considered. If it was dismissed on technical grounds (for example some procedural matters in the prosecution were not complied with), clearly a shortfall penalty can be imposed. If the evidence available to the court was clearly inadequate, then a shortfall penalty will not be able to be imposed.

Statutory defence – companies and dividend withholding payments

A company can not be convicted of an offence for knowingly not making a deduction of a dividend withholding payment in respect of a dividend derived if it satisfies the criteria set out in section 143E(3). Whether a company satisfies this criteria will be a matter of fact.

Publication of name

Pursuant to section 146(1)(d) of the Tax Administration Act 1994 the name of anyone convicted of evasion will be published in the Gazette.

Voluntary disclosures

Where a taxpayer makes a voluntary disclosure prior to an investigation commencing no prosecution action will be taken and there will be no publication of name in the Gazette.

Burden and standard of proof

The burden of proof rests with the Commissioner. The standard of proof for prosecution is the criminal standard of beyond reasonable doubt.

If there is insufficient proof is held to support a prosecution, consideration will still be given to the imposition of shortfall penalties in its place. The reason being that the standard of proof for shortfall penalties is the civil standard of balance of probabilities.

Penalty

Persons convicted of an offence are liable to:-

- imprisonment for a term not exceeding 5 years; or
- a fine not exceeding $50,000; or
- both.

Other reference

An explanation and examples of criminal penalties and other offences and penalties can be found in Tax Information Bulletin Volume Eight, No.7 (October 1996).

Summary

Section 143B of the Tax Administration Act 1994 provides for a criminal offence of evasion or similar offence. Evasion involves a deliberate actions to cheat the revenue. This may include a taxpayer obtaining refunds (tax credits, rebates) knowing that he or she is not lawfully entitled to them and knowingly not accounting for tax deductions to the Commissioner.

Tony Bouzaid
National Manager, Operations Policy

Payment of shortfall penalty using losses

Standard Practice Statement INV-245

Introduction

This statement deals with the situation where a taxpayer in a loss situation can elect to use losses to pay shortfall penalties. The losses may be either:

- current year losses
- losses carried forward from previous periods.

Application

The penalties apply to obligations relating to the 1997/98 and subsequent income tax years. There is however no requirement that the losses utilised are incurred in these years.

Legislation

Section IG 10 of the Income Tax Act 1994:

Losses may be used to pay penalties –

(1) A taxpayer may elect to use a net loss of the taxpayer to pay a shortfall penalty assessed in respect of an income tax liability, if –

(a) The net loss available to be offset against net income of the taxpayer in the income year of the shortfall penalty; and

(b) The taxpayer notifies the Commissioner of the election within the due date period for the payment of the shortfall penalty.

(1A) A wholly-owned group of companies may elect, in the manner provided in subsection (1), to apply a loss incurred by a company in the wholly-owned group in payment of a shortfall penalty imposed on any company in that group.

(2) If a taxpayer makes an election under subsection (1) in relation to current year losses and the Commissioner subsequently issues a determination of net loss confirming that the net losses are available to be offset in the current year, the time that the net losses are offset will be the time of the election.

(3) Each dollar of net loss that is used to pay a shortfall penalty –

(a) Counts as an amount equal to one dollar multiplied by the tax rate; and

(b) Will, from the date the loss is used, no longer be available for use by a person.

(4) For the purposes of subsection (3), the term 'tax rate' means the rate of tax or lowest marginal rate of tax that would apply to the taxpayer during the return period to which the relevant tax shortfall relates, if the taxpayer had tax to pay.

(5) In this section, 'income year' includes any part of a year that, by virtue of section IF 1 or section IG 2, may be taken into account for loss continuity or group purposes.

Current year losses

A taxpayer who has no losses carried forward from prior years, or has insufficient losses to eliminate both tax and penalty, but who expects to have losses in the current year, can elect to use those losses, even though the final loss for that current year has not been established.

Section IG 9A(2) provides that if the taxpayer does incur sufficient losses for that current income tax year, then the shortfall penalties will be deemed to have been paid by the due date. However, if at the end of the income year the taxpayer does not incur sufficient losses, late payment penalties and interest will be imposed on the tax shortfall penalty that should have been absorbed by the losses.

Notification to the Commissioner

If a taxpayer wishes to use losses to offset income tax shortfall penalties they must notify the Commissioner of this intention prior to the due date of the shortfall penalty.

Notification may be in either written or verbal form.

Only available for income tax shortfall penalties

Losses can be used only to offset against shortfall penalties on income tax shortfalls. They are not available to be offset for example, against shortfall penalties on PAYE as this is not income tax to the employer.

Losses can only be used to offset income tax penalties as losses are, as defined in the Income Tax Act 1994, "available to be offset against assessable income". Therefore, as penalties which relate to anything other than income tax are not assessable income items, the losses cannot be offset against them.

Wholly-owned companies

Section IG 10(1A) provides that a company in a wholly-owned group of companies may apply a loss in payment of a shortfall penalty imposed on any company in that group.

Loss must be available in year penalty imposed

It should be noted that losses must be available in the year in which the shortfall penalty is imposed. For example, if adjustments are made to the 1998 return and penalties imposed in 2000, losses must be available in 2000.

Loss conversion

Individuals

When dealing with an individual the lowest marginal tax rate applying to the taxpayer in the year in which the shortfall penalty exists is the rate used to calculate the offset value of the losses.

Other entities

When dealing with a company or other taxable entity the tax rate applying to the taxpayer in the year in which the shortfall penalty exists is the rate used to calculate the offset value of the losses.

Loss not available for future offset

Section IG 10(3)(b) provides that if losses are used in this way, they are not available to be offset against future income.

Summary

Under Section IG 10 of the Income Tax Act 1994 a taxpayer in a loss situation can elect to use losses to pay shortfall penalties. Losses can be used only to offset against shortfall penalties on income tax shortfalls.

Tony Bouzaid
National Manager, Operations Policy

Voluntary disclosures

Standard Practice Statement INV-250

Introduction

The voluntary disclosure system reflects the savings to the Revenue from voluntary admissions of irregularities, and other benefits of taxpayer co-operation with Inland Revenue

There are two general types of voluntary disclosure:

- voluntary disclosure prior to notification of an audit
- voluntary disclosure after notification of an audit

A taxpayer can also make a disclosure of the tax position taken in their tax return at the time of filing.

Legislation

Section 141G of the Tax Administration Act 1994:

Reduction in penalty for voluntary disclosure –

(1) A shortfall penalty payable by a taxpayer under any of sections 141A to 141E may be reduced if, in the Commissioner's opinion, the taxpayer makes a full voluntary disclosure to the Commissioner of all the details of the tax shortfall, either –

(a) Before the taxpayer is first notified of a pending tax audit or investigation (referred to in this section as "pre-notification disclosure"); or

(b) After the taxpayer is notified of a pending tax audit or investigation, but before the Commissioner starts the audit or investigation (referred to in this section as "post-notification disclosure").

(2) The Commissioner may from time to time –

(a) Specify the information required for a full voluntary disclosure; and

(b) The form in which it must be provided.

(3) The level by which the shortfall penalty is reduced –

(a) For pre-notification disclosure is 75%

(b) For post-notification disclosure is 40%.

(4) The taxpayer is deemed to have been notified of a pending tax audit or investigation, or that the tax audit or investigation has started, if –

(a) The taxpayer; or

(b) An officer of the taxpayer; or

(c) A shareholder of the taxpayer, if the taxpayer is a close company; or

(d) A tax advisor acting for the taxpayer; or

(e) A partner in partnership with the taxpayer; or

(f) A person acting for or on behalf of or as a fiduciary of the taxpayer, –

is notified of the pending tax audit or investigation, or that the tax audit or investigation has started.

(5) An audit or investigation starts at the earlier of –

(a) The end of the first interview an officer of the Department has with the taxpayer or the taxpayer's representative after the taxpayer receives the notice referred to in subsection (4); and

(b) The time when –

(i) An officer of the Department inspects information (including books or records) of the taxpayer after the taxpayer receives the notice referred to in subsection (4); and

(ii) The taxpayer is notified of the inspection.

Voluntary disclosure methods

Taxpayers can make a voluntary disclosure in any one of the following ways:

- by a visit
- by telephone call
- by letter to the Inland Revenue
- during an interview

Visits and telephone calls

If a taxpayer makes a voluntary disclosure by visiting or telephoning Inland Revenue, as much information as possible will need to be provided by the taxpayer.

Any officer is able to record a voluntary disclosure when a taxpayer comes into or contacts Inland Revenue. All verbal disclosures must be followed up in writing and, if possible, signed by the taxpayer.

Written disclosure

If a voluntary disclosure is received in writing between the time of notification and the first interview then it will be referred to the appropriate office for the auditor who is conducting the audit or investigation. The auditor must incorporate this as correspondence relating to the audit or investigation.

Acknowledgement should be made to the taxpayer that the disclosure has been received.

During the first interview

Disclosures made during the first interview will be accepted by the investigator. The investigator must consider whether the disclosure is complete and reveals all the relevant information necessary to ascertain the correct tax position. The disclosure will then be submitted along with the audit report, to the team leader for approval.

Notification

Subsection 141G(4) provides that a taxpayer has been notified of a pending audit or investigation, if any of the following persons have received notification:

- the taxpayer;
- an officer of the taxpayer;
- a shareholder of the taxpayer (for close companies);
- a tax adviser acting for the taxpayer;
- a partner in a partnership;
- a person acting for, or on behalf of, or as a fiduciary of the taxpayer.

An officer includes a director, secretary, receiver or liquidator. It does not include an employee.

Time of notification

Notification will be the earlier of the date of receipt by the taxpayer or agent of the written advice or the time of a telephone call advising the commencement of the audit or investigation.

If the exact time of receipt of the written notice becomes crucial, it will be ascertained from the expected time for the mail to reach its destination as prescribed by section 14(2) of the Tax Administration Act 1994. Any telephone call advising of an audit or investigation will be followed up by written advice as soon as possible, preferably the same day.

Unannounced visits

In the case of Registration Checks and other unannounced visits, the date of first contact with the taxpayer will be the date of notification.

Date an audit or investigation starts

Subsection (5) states that a tax audit or investigation starts at the earlier of:

- the end of the first interview an Inland Revenue officer has with either the taxpayer or the taxpayer's representative, after the taxpayer receives the notice; or
- the time when:
  - an officer of Inland Revenue inspects information (including books or records) of the taxpayer after the taxpayer receives notice, and
  - the time the taxpayer is notified of the inspection.

Taxpayer's representative present at interview

If the taxpayer's representative is present at the first interview, but not the taxpayer, the taxpayer is not later able to claim the benefit of a post-notification disclosure, even if the agent was not given any information by the taxpayer from which to make a disclosure.

Disclosure by a subsidiary of a company

An audit of a parent company, or a subsidiary of that company, may necessitate the audit of other subsidiaries within the group. In such cases, disclosure would depend upon which entity had been notified. If the parent company had received notification that the audit was restricted to that entity, then any disclosure made by the subsidiary is voluntary disclosure prior to notification of an audit.

However, if another company in the group has been notified that the audit is being extended, any disclosure made by that other company would be considered a disclosure after notification of an audit.

When a company has a branch or branches, they are considered to have been notified at the same time as the company, as they are part of the company and not separate entities.

Full disclosure

The disclosure must be full and complete. This does not necessarily mean disclosing the discrepancies to the last dollar but does require the providing of enough information to enable the investigator to make an assessment. Each case will have to be considered on its own merits.

If a taxpayer is not able to make a full disclosure at the first point of contact with Inland Revenue, they may still make the disclosure and advise the Commissioner when the remaining information will be provided. It is considered that where taxpayers require further time to obtain more information, then adequate time should be given.

Minimum details required

To satisfy full and complete disclosure, the following minimum details must be provided:

- taxpayer's details (name, trade name, IRD number, address, date of birth, contact telephone and contact times);
- the nature of the errors or omissions
- an explanation as to why the errors or omissions occurred;
- enough information to enable an assessment to be made;
- a declaration and signature by taxpayer, if possible.

Several tax shortfalls

All tax shortfalls must be considered separately. If there are two tax shortfalls, one being the subject of voluntary disclosure and the other being detected by an audit, then the one detected by the audit will not come within the voluntary disclosure regime. However, the other tax shortfall will still come within the voluntary disclosure regime, assuming full and complete disclosure of that tax shortfall.

If the items are identical or similar they must be treated as one tax shortfall. Therefore, this would result in the taxpayer not satisfying the requirements of a full and complete voluntary disclosure.

Disclosure of another tax type

If an audit is being carried out on one tax type and the taxpayer makes a voluntary disclosure regarding another tax type, and they have not been notified that the other tax type is being audited, then the taxpayer will qualify for voluntary disclosure prior to notification of an audit.

Disclosure of another period

It is common for a notice of intention to carry out an audit to state that a particular year/period is to be audited but previous years/periods may be looked at if necessary. The year/period referred to only is examined in the first instance. If some matter arising from the audit

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means that earlier years/periods are to be examined, the taxpayer is advised by the investigator that this will be done. If the investigator had not advised the taxpayer that an earlier year/period is being examined, then the taxpayer is able to make a pre-notification disclosure for that year/period.

Disclosure forms

The voluntary disclosure form is IR 282A and covers both pre-notification and post-notification disclosures.

Signing of disclosure form

Where possible the taxpayer should sign the disclosure form. However, an unsigned disclosure will still be accepted. Although it is desirable for the protection of both the taxpayer and the department that disclosures be in writing and signed by the taxpayer, if the taxpayer will not do this an unsigned or even a verbal disclosure may be accepted.

Letter sufficient

A letter sent to Inland Revenue will suffice as a declaration without the need for the taxpayer to also complete the form, assuming it covers the required information sufficiently.

Amendments to returns

Section 113 provides the Commissioner with the broad power to amend assessments to "ensure the correctness thereof".

An amendment under this provision is appropriate to assess previously undisclosed income which is advised by a taxpayer. The provision may also be used to reduce an assessment where an error in the assessment is apparent on the face of the claim. For example, arithmetical errors or unclaimed rebates; claims which, had they been made at the appropriate time, would have been accepted without further consideration.

If the disclosed income is non-contentious, an adjustment may be made under section 113 and the disputes resolution process will not apply.

Time bar and reopening assessments

Before assessments are issued following a voluntary disclosure, the effect of section 108 is to be considered.

Section 108 (as amended) provides that where a taxpayer has furnished a tax return and has been assessed for tax, the amount of the assessment may not be increased more than four years from the end of the income year in which the return was furnished.

However, the Commissioner may form an opinion to reopen the assessment outside the time bar if the return either:

- is fraudulent or wilfully misleading; or
- omits all mention of income which is of a particular nature or was derived from a particular source.

Section 108A contains a similar provision relating to GST.

Disclosure at time of filing

A taxpayer can make a disclosure of the tax position taken, in relation to an unacceptable interpretation or abusive tax position, in their tax return at the time of filing. Provided the disclosure is adequate and the position taken is not frivolous, taxpayers will be eligible for a reduced penalty if they are found to have an unacceptable interpretation.

For the disclosure to be effective, the taxpayer must provide full and relevant arguments for the tax position taken.

Disclosure form

Disclosure will be required to be made on a specified form, IR 282B.

Information required

The following information will be required in order to satisfy the requirement of adequate disclosure:

- taxpayer's details (name, trade name, IRD number, address, date of birth, contact telephone and contact times);
- overview of the position taken;
- interpretation of case law on the subject, contents of any tax opinions, legal articles and related material;
- any relevant Inland Revenue public ruling;
- a calculation, where necessary, to show the position and how it was arrived at;
- a declaration and signature by taxpayer.

Filing of disclosure forms

The disclosure form will be required to be filed in conjunction with the return in which the particular tax position has been taken. For E-Filed returns the disclosure form will need to be forwarded separately to Inland Revenue.

Reduction rates

The level by which the shortfall penalty is reduced is:

- for pre-notification disclosure – 75%
- for post-notification disclosure – 40%

The level by which a shortfall penalty is to be reduced for adequate disclosure at the time of filing is 75 percent.

No prosecution or publication of name

If a voluntary disclosure is full and complete:

- there will not be a prosecution, and
- there will be no publication of name for any shortfall penalty for evasion or a similar act or for taking an abusive tax position.

Summary

A taxpayer may make a disclosure either before he or she receives the first notice that an audit or investigation is to be undertaken ("pre-notification disclosure"), after the first notification but before the audit or investigation starts ("post-notification disclosure") or at the time of filing a tax return.

The disclosure will result in a specific reduction in the applicable rate of shortfall penalty.

The Commissioner may at any time specify the information required for a full voluntary disclosure and advise the form in which it must be provided.

Tony Bouzaid
National Manager, Operations Policy

Binding rulings

This section of the TIB contains binding rulings that the Commissioner of Inland Revenue has issued recently.

The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates tax liability based on it.

For full details of how binding rulings work, see our information booklet "Binding Rulings" (IR 115G) or the article on page 1 of TIB Volume Six, No.12 (May 1995) or Volume Seven, No.2 (August 1995). You can order these publications free of charge from any Inland Revenue office.

New Zealand Automobile Association's customer loyalty programme

Product Ruling - BR Prd 98/7

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Taxation Law

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CD 5, CH 3 and CI 1.

The Arrangement to which this Ruling applies

The New Zealand Automobile Association ("NZAA") intends to establish a customer loyalty programme ("the Programme") to benefit its Members and wishes to involve BP Oil NZ Ltd ("BP") in the establishment, operation and management of the Programme which will be known as "AA Rewards".

The Programme will reward individual Members. Members making qualifying purchases from the NZAA, BP, BP-branded sites, AA participants and selected retailers will receive points entitling them to discounts in respect of future purchases. Once a certain level of points has been accumulated, a coupon will be issued enabling that Member to a discount on future purchases. Coupons issued will be non-transferable and unable to be exchanged for cash.

If a Member does not accumulate the required level of points prior to the Member's next AA subscription renewal, that Member may choose to utilise the benefit of those points towards reducing that Member's subscription fee. The points will expire if not utilised after a given period of time.

Other facts of the Arrangement are as set out in the application and accompanying information dated 6 August 1997.

This Ruling applies to the entitlements received by Members under the Programme.

Assumptions made by the Commissioner

This Ruling is based on the following assumptions:

- That all Members receiving benefits under the Programme are New Zealand resident individuals, and that the Arrangement will be implemented in the manner set out in the application.
- The entitlements to Members under the Programme are non-transferable and non-assignable.

- There is no assignment of entitlements by a corporate member to employees.
- For the purposes of FBT:
  - Members are individual AA cardholders. Entitlements received by Members are not through corporate or manufacturing Membership.
  - There is no arrangement between the Member's employer and AA Rewards Operations Ltd ("AAROL") for any benefit to be provided for or granted to that Member.
  - In respect of an AAROL employee, AAROL does not:
    1. impose an obligation on the employee to be an AA Member; and
    2. provide the means to the employee to accumulate points under the Programme (for example by refunding or paying for purchases from which that employee accumulates points) and require the employee to take advantage of this.

How the Taxation Laws apply to the Arrangement

Subject in all respects to the assumptions above, the Taxation Laws apply to the Arrangement as follows:

- No gross income arises under section CD 5 or section CH 3 for Members when they accumulate points or redeem points or coupons for rewards under the Programme.
- Employers of Members are not liable for FBT on any benefits which employees may obtain through the Programme under section CI 1. This extends to benefits obtained by a Member as a result of that Member accumulating points through business expenditure.
- Where a Member's employer pays a Member's membership fee, FBT will apply to the payment of the membership fee but not to any entitlements received by that Member under the Programme.

The period for which this Ruling applies

This Ruling will apply for the period from 2 March 1998 to 28 February 2001.

This Ruling is signed by me on this 2nd day of March 1998.

Martin Smith
General Manager (Adjudication & Rulings)

Payments under the Human Rights Act 1993 for humiliation, loss of dignity, and injury to feelings - assessability

Public Ruling BR Pub 98/2

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Laws

All legislative references are to the Income Tax Act 1994 as amended by the Taxation (Core Provisions) Act 1996 unless otherwise stated.

This Ruling applies in respect of sections CD 5, CH 3, and the definition of "monetary remuneration" in section OB 1.

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The Arrangement to which this Ruling applies

The Arrangement is:

- The payment of an award of damages to a complainant or aggrieved person for humiliation, loss of dignity, and injury to feelings under section 88(1)(c) of the Human Rights Act 1993 for breaches of Part II of that Act by the Complaints Review Tribunal where the complaint involves an employer/employee relationship; or
- The making of a payment to a complainant or aggrieved person for humiliation, loss of dignity, and injury to feelings pursuant to an out of court settlement genuinely based on the complainant's rights to damages under section 88(1)(c) of the Human Rights Act 1993 for breaches of Part II of that Act where the complaint involves an employer/employee relationship.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- Payments for damages awarded for humiliation, loss of dignity, and injury to feelings under section 88(1)(c) of the Human Rights Act 1993 are not "monetary remuneration" in terms of the definition in section OB 1 of the Income Tax Act 1994. Consequently, such payments do not form part of the gross income of the employee under section CH 3.

- Such payments for damages are not gross income under ordinary concepts under section CD 5.

The period for which this Ruling applies

This Ruling will apply to payments received between 1 April 1998 and 31 March 2001.

This Ruling is signed by me on the 10th day of March 1998.

Martin Smith
General Manager (Adjudication & Rulings)

Commentary on Public Ruling BR Pub 98/2

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 98/2 ("the Ruling").

Background

Public Ruling BR Pub 97/3 on compensation payments made under the Employment Contracts Act 1991 for humiliation, loss of dignity and injury to feelings was published in Tax Information Bulletin Volume Nine, No.3 (March 1997). BR Pub 97/3 concluded that such payments did not form part of the gross income of the taxpayer. The Commissioner has been asked to make a ruling on similar payments made under the Human Rights Act 1993.

Under the Human Rights Act 1993 people can make a complaint to the Human Rights Commission ("the Commission") regarding breaches of that Act. If the Commission is unable to settle the complaint, the matter may proceed to the Complaints Review Tribunal ("the Tribunal").

The Human Rights Act provides protection for people in areas of public life against discrimination on the grounds of sex, marital status, religious or ethical belief, race, colour, ethnic or national origins, age, disability, political opinion, employment status, family status, and sexual orientation.

The Tribunal is an independent body that hears and determines complaints that have been made to the Human Rights Commission, the Race Relations Office, the Privacy Commissioner, and the Health and Disability Commissioner which have been unable to be resolved. The Tribunal has the power of a court similar to the District Court, and its decisions can be enforced in the District Court if parties fail to comply with its orders or directions.

Legislation

Section 86(1) and (2) of the Human Rights Act provides a number of remedies for the Tribunal when the Tribunal determines that a breach of any of the provisions of Part II of the Human Rights Act has been committed:

(1) In any proceedings before the Complaints Review Tribunal brought by the Proceedings Commissioner or the complainant or, as the case may be, the aggrieved person, the plaintiff may seek such of the remedies described in subsection (2) of this section, as he or she thinks fit.

(2) If in any such proceedings the Tribunal is satisfied on the balance of probabilities that the defendant has committed a breach of any of the provisions of Part II of this Act, it may grant one or more of the following remedies:

(a) A declaration that the defendant has committed a breach of this Act:

(b) An order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach, or conduct of any similar kind specified in the order:

(c) Damages in accordance with section 88 of this Act:

(d) An order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach:

(e) A declaration that any contract entered into or performed in contravention of any of the provisions of Part II of this Act is an illegal contract:

(f) Relief in accordance with the Illegal Contracts Act 1970 in respect of any such contract to which the defendant and the complainant or, as the case may be, the aggrieved person are parties:

(g) Such other relief as the Tribunal thinks fit.

Section 88(1) of the Human Rights Act provides the circumstances in which damages may be awarded under the Act, including damages' payments for humiliation, loss of dignity, and injury to feelings:

In any proceedings under sections 83(1) or section 83(4) of this Act, the Tribunal may award damages against the defendant for a breach of any of the provisions of Part II of this Act in respect of any one or more of the following:

(a) Pecuniary loss suffered as a result of, and expenses reasonably incurred by the complainant or, as the case may be, the aggrieved person for the purpose of, the transaction of activity out of which the breach arose:

(b) Loss of any benefit, whether or not of a monetary kind, which the complainant or, as the case may be, the aggrieved person might reasonably have been expected to obtain but for the breach:

(c) Humiliation, loss of dignity, and injury to the feelings of the complainant or, as the case may be, the aggrieved person.

Part II of the Human Rights Act sets out what constitutes "unlawful discrimination" under that Act. Section 21 sets out the general prohibited grounds of discrimination, and sections 22 to 74 go on to deal with discrimination in specific situations.

The Ruling considers whether such payments for humiliation, loss of dignity, and injury to the feelings of the employee are "monetary remuneration". Paragraph (a) of the definition of "monetary remuneration" in section OB 1 states:

"Monetary remuneration" …means any salary, wage, allowance, bonus, gratuity, extra salary, compensation for loss of office or employment, emolument (of whatever kind), or other benefit in money, in respect of or in relation to the employment or service of the taxpayer;…

Section CH 3 states that "all monetary remuneration derived by a person is gross income".

Section CD 5 also states that "the gross income of a person includes any amount that is included in gross income under ordinary concepts".

Application of the legislation

If payments for humiliation, loss of dignity, and injury to feelings, under section 88(1)(c) of the Human Rights Act 1993 were "monetary remuneration", they would be included under section CH 3 as gross income. They would be included in the calculation of "net income" under section BC 6, and would consequently form part of "taxable income" as calculated under section BC 7.

Section OB 1 defines "monetary remuneration" to include any "other benefit in money, in respect of or in relation to the employment or service of the taxpayer…". Payments under section 88(1)(c) of the Human Rights Act 1993 are a benefit in money. The issue is, therefore, whether these payments are made "in respect of or in relation to the employment or service of" the recipient.

While many of the categories of discrimination in Part II may relate, directly or indirectly, to an employer/employee relationship, it is clear that many of them are intended to apply to much wider situations. Consequently, in many instances of complaints under the Human Rights Act, payments awarded will be completely outside any employment relationship and will clearly not be "in respect of or in relation to employment". In such cases payments under section 88(1)(c) will not fall within the definition of "monetary remuneration" and will not be included in the gross income of the taxpayer under section CH 3. The Ruling does not consider such situations.

However, it is likely that complaints heard by the Tribunal under the Human Rights Act often will involve an employee/employer relationship. The question to be answered in the Ruling, therefore, is whether payments under section 88(1)(c) of the Human Rights Act 1993 where the complaint involves an employee/employer relationship are made "in respect of or in relation to the employment or service of the taxpayer".

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The meaning of "in respect of or in relation to"

The Court of Appeal has endorsed a very wide meaning of the phrase "in respect of or in relation to". In *Shell New Zealand Limited v CIR* (1994) 16 NZTC 11,303, where lump sum payments had been made by Shell to employees who transferred at the request of Shell, the Court discussed the relevant part of the definition of "monetary remuneration". McKay J, delivering the judgment of the Court, said at page 11,306:

> The words "in respect of or in relation to" are words of the widest import.

Although McKay J acknowledged that the payments in *Shell* were not made under the contract of employment in that case, this did not mean that the employees received the payment outside the employee relationship. The learned Judge had earlier referred to the fact that the payments were not expressly provided under the employees' written employment contracts, but were made pursuant to Shell's employment policy as a matter of discretion. They were still made "because he or she is an employee".

Other cases have also stressed the width of the words "in respect of or in relation to". In the Queens Bench case of *Paterson v Chadwick* [1974] 2 All ER 772, Boreham J considered the meaning of the phrase "in respect of" in relation to discovery, and adopted the comments of Mann CJ in the Australian case *Trustees, Executors & Agency Co Ltd v Reilly* [1941] VLR 110, where the learned Chief Justice said:

> The words "in respect of" are difficult of definition but they have the widest possible meaning of any expression intended to convey some connection or relation in between the two subject-matters to which the words refer.

Similarly, in *Nowegijick v The Queen* [1983] CTC 20 at page 25, the Supreme Court of Canada described the phrase "in respect of" as "probably the widest of any expression intended to convey some connection between two related subject-matters".

Context may affect the meaning

However, many cases have demonstrated that the meaning to be given to the phrase "in respect of or in relation to" may vary according to the context in which it appears.

In *State Government Insurance Office v Rees* (1979) 144 CLR 549, the High Court of Australia considered the meaning of the phrase "in respect of" in determining whether the debt due to the Government Insurance Office fell within section 292(1)(c) of the Companies Act 1961-1975 (Q.) as "amounts … due in respect of workers' compensation under any law relating to workers' compensation accrued before the relevant date". The Court held that amounts which could be recovered by the Government Insurance Office from an uninsured company pursuant to section 8(5) of the Workers' Compensation Act 1916-1974 (Q.) for money paid to workers employed by the uninsured company were **not** amounts due "in respect of" workers' compensation under the Companies Act.

At page 561 Mason J observed that:

> ... as with other words and expressions, the meaning to be ascribed to "in respect of" depends very much on the context in which it is found.

Stephen J also discussed the meaning of the phrase "in respect of", noting at pages 553-554 that it was capable of describing relationships over a very wide range of proximity, and went on to say:

> Were the phrase devoid of significant context, it could, I think, be taken to be descriptive of the relationship between the present indebtedness owed to the State Government Insurance Office and the subject matter of workers' compensation. However a context does exist which is in my view sufficient to confine the operation of s 292(1)(c) to bounds too narrow to be of service to the appellant.

In *TRA Case R34* (1994) 16 NZTC 6,190, certain payments were made to a New Zealand distributor by its overseas parent in relation to repairs which had to be made to cars sold to the New Zealand subsidiary and then sold to dealers. The issue was whether the payments were zero-rated. The definition of "consideration" in section 2 of the Goods and Services Tax Act 1985 was relevant. Part of the definition of "consideration" states:

> …any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services …

The TRA stated at page 6,200 that:

> A sub-issue is whether the reimbursing payment from the overseas manufacturer (MC) was made "in respect of, in response to, or for the inducement of" the repair work in the sense required by the definition of "consideration" in s 2 of the Act. … Although the definition of consideration creates a very wide potential link between a payment and a particular supply it is, in any case, a matter of degree, commonsense, and commercial reality whether a payment is direct enough to have the necessary nexus with a service, i.e, whether the link is strong enough.

Not all payments to employees that have a connection with their work are within the definition of "monetary remuneration". In *Fraser v CIR* (1995) 17 NZTC 12,356, at page 12,363, Doogue J in the High Court said:

> There is no dispute that the words "emolument (of whatever kind), or other benefit in money, in respect of or in relation to the employment or service of the taxpayer" are words of the widest possible scope: see *Shell New Zealand Ltd v C of IR* (1994) 16 NZTC 11,303 at page 11,306, and *Smith v FC of T* 87 ATC 4883; (1987) 164 CLR 513; (1987) 19 ATR 274. Mr Harley does, however, submit, correctly, that it does not follow that all payments made are necessarily income and refers, for example, to reimbursement payments.

In *FC of T v Rowe* (1995) ATC 4,691 the taxpayer was employed as an engineer for the Livingston Shire Council. As a result of a number of complaints against him he was suspended. An inquiry was commenced, and he incurred legal costs as a result of engaging counsel to

defend himself against dismissal during the course of the inquiry. The taxpayer was cleared of any charges of misconduct but was dismissed a year later. The taxpayer claimed his legal costs as a deduction. Although the Council refused to reimburse the taxpayer for his legal costs, the Queensland government subsequently made an ex gratia payment.

The Full Federal Court considered, amongst other things, whether the ex gratia payment constituted assessable income. By majority, the Court concluded that the payment was not assessable under section 25(1) of the Australian Income Tax Assessment Act 1936 as income in accordance with ordinary concepts, nor was it assessable under section 26(e) of that Act as being compensation "in respect of, or for or in relation directly or indirectly to" any employment. Accordingly, Burchett and Drummond JJ (with Beaumont J dissenting) held that the payment was not assessable. Burchett J held that the payment was **not a reward for the taxpayer's services but was a recognition for the wrong done to him**. The payments were not remuneration but a reparation, and they were not sufficiently related to the performance of income-earning activities. On the same reasoning, it was too remote from the employment to be caught by section 26(e). Further, the payment was not assessable under section 26(e) because the employer/employee relationship between the Council and the taxpayer was **merely part of the background facts** against which the ex gratia payment was made.

In the Australian case of *FCT v Dixon* (1954) 5 AITR 443, the taxpayer received payments from his prior employer topping up his military pay. It would appear from the judgment that the Australian Commissioner argued that even a slight relationship to employment was sufficient to satisfy the test in section 26(e) of the Australian Income Tax Assessment Act 1936 [which made assessable certain sums granted to the taxpayer "in respect of, or for or in relation directly or indirectly to, any employment…".]. This argument was rejected by Dixon CJ and Williams J, who stated at page 446 that:

> We are not prepared to give effect to this view of the operation of s.26(e) …There can, of course, be no doubt that the sum of £104 represented an allowance, gratuity or benefit allowed or given to the taxpayer by Macdonald, Hamilton and Company. Our difficulty is in agreeing with the view that it was allowed or given to him in respect of, or in relation directly or indirectly to, any employment of, or services rendered by him …We are not prepared to give s.26(e) a construction which makes it unnecessary that the allowance, gratuity, compensation, benefit, bonus or premium shall in any sense be a recompense or consequence of the continued or contemporaneous existence of the relation of employer and employee or a reward for services rendered given either during the employment or at or in consequence of its termination.

In the same case, at page 450, McTiernan J stated that:

> The words of paragraph (e) are wide, but, I think, not wide enough to prevent an employer from giving money or money's worth to an employee continuing in his service or leaving it, without incurring liability to tax in respect of the gift. The relationship of employer and employee is a matter of contract. The contractual relations are not so total and all embracing that there cannot be personal or social relations between employer and employee. A payment arising from those relations may have no connexion with the donee's employment.

These principles have also been applied by the courts in cases involving contracts for services. In *Scott v FCT* (1969) 10 AITR 367, Windeyer J in the High Court of Australia considered the meaning of the words "in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by him" in section 26(e) of the Income Tax and Social Services Contribution Assessment Act 1936-1961. The case concerned a solicitor who received a gift of £10,000 from a grateful client. Windeyer J stated at page 374 that the meaning of the words of the legislation "must be sought in the nature of the topic concerning which they are used". Windeyer J at page 376 referred to a passage from the judgment of Kitto J in *Squatting Investment Co Ltd v FCT* (1953) 5 AITR 496, at 524, where Kitto J (speaking of certain English cases) said:

> The distinction these decisions have drawn between taxable and non-taxable gifts is the distinction between, on the one hand, gifts made in relation to some activity or occupation of the donee of an income-producing character … and, on the other hand, gifts referable to the attitude of the donor personally to the donee personally.

Adopting this as a general principle, his Honour held that the £10,000 was not given or received as remuneration for services rendered and it did not form part of the taxpayer's assessable income.

The nature and context of the payments

Under section 88 of the Human Rights Act, damages may be awarded by the Tribunal for a breach of any of the provisions of Part II of that Act. As discussed above, breaches of Part II will not necessarily be in an employee/employer situation. If a claim is brought in the Tribunal which does not involve an employee and employer relationship it is clear that payment under section 88(1)(c) cannot be described as monetary remuneration.

Where the complaint brought before the Tribunal does occur in the context of an employee/employer relationship, the connection of the employment relationship with payments under the Human Rights Act is tenuous. The Human Rights Act is not "employment legislation", although it may often operate in the employment context. Payments under section 88(1)(c) of the Human Rights Act for humiliation, loss of dignity, and injury to feelings are **not** compensation for services rendered or for actions that occur in the normal course of the employment relationship. Rather the payments would be in the nature of reparation for a wrong done to the complainant and so would not be in respect of employment.

Payments of damages awards under section 88(1)(c) of the Human Rights Act 1993 differ markedly from the situation in *Shell v CIR*. In that case at page 11,306, McKay J said:

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It is true …that the payment is not made under the contract of employment.…It is nevertheless paid to an employee only because he or she is an employee, **and** is paid to compensate for the loss incurred in having to change the employee's place of residence in order to take up a new position in the company. (Emphasis added)

Thus, in the *Shell* case, the employees received the payments as employees, **and** in order to compensate for the loss sustained as a result of the employment-related relocation.

The Commissioner considers payments under section 88(1)(c) of the Human Rights Act to be too remote from the employment relationship to be within the definition of monetary remuneration. If a complaint is brought in the Tribunal which involves an employee and an employer, the employment relationship in such instances is merely part of the background facts against which the damages payments are made. The payments are not made "in respect of or in relation to the employment or service of the taxpayer".

Income under ordinary concepts

Payments for damages made under section 88(1)(c) of the Human Rights Act are not "gross income under ordinary concepts" under section CD 5.

Although the legislation does not define "gross income under ordinary concepts", a great number of cases have identified the concept by reference to such characteristics as periodicity, recurrence, and regularity, or by its resulting from business activities, the deliberate seeking of profit, or the performance of services. It is clear that payments under section 88(1)(c) will not generally be made periodically or regularly, or generally recur. Nor as we have seen above, are they compensation for services.

Capital receipts do not form part of "gross income" unless there is a specific legislative provision to the contrary. And by analogy with common law damages, damages payments under section 88(1)(c) of the Human Rights Act are of a capital nature as Barber DJ acknowledged in *Case L92*, where he stated at page 1,536 that:

I appreciate only too well that it is possible to interpret the evidence as showing that the $7,179.30 was formulated as a payment in the nature of common law damages for human hurt and breach and unfairness … I appreciate that the latter concepts are akin more to payments of capital than to wage revenue.

Out of court settlements

The Commission endeavours to settle disputes between parties and sometimes, the parties negotiate a settlement before the dispute is referred to the Tribunal. The settlement agreement may state that the payment is for humiliation, loss of dignity, or injury to feelings. In return for the complainant or aggrieved person surrendering his or her rights under the Human Rights Act, the other party will agree to pay a sum of money. There should be no difference in the tax treatment of the payments dependent on whether or not the parties use the Tribunal. A payment can be for humiliation, loss of dignity, or injury to the feelings of the complainant or aggrieved person whether the Tribunal is involved or not.

Shams

The Ruling will not apply to payments which are akin to sham payments. A sham is a transaction set up to conceal the true intention of the parties and is inherently ineffective. The nature of a sham was discussed by Diplock LJ in *Snook v London and West Riding Investment Ltd* [1967] 1 All ER 518 at 528 where he stated:

I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham", which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

Richardson J, in the New Zealand case of *Mills v Dowdall* [1983] NZLR 154, stated that the "essential genuineness of the transaction is challenged" in a sham situation.

It is noteworthy that, in the recent Taxation Review Authority decision, *Case S96* (1996) 17 NZTC 7,603, Judge Barber stated at page 7,606:

Of course, seemingly excessive allocations to compensation for feelings injury should be reopened by the IRD.

If the parties to an agreement agree to characterise or describe payments as being for humiliation, loss of dignity, or injury to feelings when they are in reality for lost wages, this transaction would be a sham which would be open to challenge by the Commissioner. Further, as provided by section 18 of the Taxation Review Authorities Act 1994 and section 136(16) of the Tax Administration Act 1994, the onus of proof in a hearing regarding the assessability of any such payment would be on the taxpayer.

Prudential Assurance Company NZ Ltd's Income Protection Plan

Product Ruling BR Prd 98/5

Note (not part of ruling): This ruling is essentially the same as product ruling BR Prd 98/4, except that 98/4 has an application period from 11 January 1997 to 30 September 1997.

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Taxation Laws

All legislative references are to the Income Tax Act 1994 as amended by the Taxation (Core Provisions) Act 1996 unless otherwise stated.

This Ruling applies in respect of sections CD 5, BD 2(1)(b), BD 2(2)(b), and CB 5(1)(h).

The Arrangement to which this Ruling applies

The Arrangement is the purchase by an individual of an insurance product known as the Premier Income Protection Plan Policy ("the policy") issued by the Prudential Assurance Company.

The policy is taken out by an individual and it provides disability cover in respect of that individual policy owner only (except for the partner care benefit which also provides cover in respect of the policy owner's partner).

The policy contains the following benefits:

Total disability benefit

This benefit is paid monthly if a person is totally disabled as defined in the policy.

The total disability benefit is the lesser of:

- the maximum percentage (defined in the policy) of the pre-disablement income (highest average monthly earned income that the policy owner earned in any consecutive 12-month period over the three years prior to the sickness or accident which caused the disablement); or
- the monthly benefit stipulated in the policy schedule (determined according to the policy holder's income at the time that the policy is taken out).

This benefit is reduced by continuing earned income (defined in the policy) from certain sources.

Partial disability benefit

This benefit is paid monthly to a person who has been totally disabled for an initial period and partially disabled for the remainder of the relevant period. A partially disabled person is generally a person who can work in a reduced capacity or a reduced number of hours.

This benefit is calculated as follows:

$$\frac{\text{(pre-disablement income} - \text{current income)}}{\text{pre-disablement income}} \times \text{monthly total disability benefit}$$

In this calculation the total disability benefit is not reduced by continuing earned income.

Permanent disability benefit

This is an additional benefit that is paid monthly to a person who is permanently disabled (as defined in the policy).

It is one-third of the monthly total disability benefit.

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Extra cash benefit

This is a benefit paid in addition to the first three months total disability benefit, other than in cases of permanent disablement.

It is one-third of the monthly total disability benefit.

Home care benefit

This is paid monthly for up to six months, in addition to the total disability benefit, where the policy owner requires full-time care at home or in a hospital.

If the care is provided by a person whose profession it is to provide such care, the amount paid is the lesser of $2,500 or the cost of the care. If the care is provided by a family member who has given up work, the amount paid is the lesser of $2,500 or 75 percent of the pre-tax income of that family member.

No part of any premium paid for the policy is referable to this benefit.

Partner care benefit

This benefit is optional under the policy, and where applicable is paid monthly to a policy owner whose non-working partner (as defined in the policy) becomes totally disabled and requires full-time care at home.

If the care is provided by a person whose profession it is to provide such care the amount paid is the lesser of $2,500 or the cost of the care. If the care is provided by a family member who has given up work, the amount paid is the lesser of $2,500 or 75 percent of the pre-tax income of that family member.

If a policy holder chooses to have this benefit, an additional premium is payable in respect of the benefit.

Rehabilitation benefit

This benefit is paid to a person who is either partially or totally disabled and who incurs expenses (as defined in the policy) in attempting to regain the ability to work again.

The benefit is the lesser of the cost of the expenses incurred or 6 times the monthly benefit (reduced by any amounts that are otherwise reimbursable).

No part of any premium paid for the policy is referable to this benefit.

Vocational retraining benefit

This is an extension of the rehabilitation benefit and is paid so that the policy owner can undertake a vocational retraining programme.

The benefit is the lesser of the cost of the vocational retraining programme and 6 times the monthly benefit (reduced by any amounts that are otherwise reimbursable).

No part of any premium paid for the policy is referable to this benefit.

Assumptions made by the Commissioner

There are no assumptions made by the Commissioner.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- The total disability benefit, partial disability benefit, extra cash benefit, and permanent disability benefit are gross income under section CD 5 and are not exempt income under section CB 5(1)(h).

- The home care benefit, optional partner care benefit, rehabilitation benefit, and vocational retraining benefit are not gross income under section CD 5.
- Where the optional partner care benefit has not been effected by the policy owner, then the total premium payable under the policy is deductible under section BD 2(1)(b).
- Where the optional partner care benefit has been effected by the policy owner, then the portion of premium payable in respect of that benefit is not deductible under section BD 2(1)(b), but the remaining portion of the premium is deductible under section BD 2(1)(b).

The period for which this Ruling applies

This Ruling will apply for the period 11 January 1997 to 31 March 2000.

This Ruling is signed by me on the 18th day of February 1998.

Martin Smith
General Manager (Adjudication & Rulings)

Policy statement

The IR 10 and disclosure obligations

Sections 60 and 108 of the Tax Administration Act 1994

Introduction

This article restates Inland Revenue's policy (previously set out in TIB Volume Five, No.3 of September 1993) on filing the IR 10 Accounts Information form instead of financial statements with a tax return and the inter-related arrangements covering disclosure obligations.

Background

The IR 10 is an integral part of Inland Revenue's E-File system. We use it for providing information to the Statistics Department and to build up data for audit case selection.

Accountants and taxpayers who file returns manually (i.e., who don't use E-File) may either send in an IR 10 or a set of financial statements with tax returns. However, we are encouraging accountants to use both the E-File system and the IR 10.

There have been some concerns with the IR 10. Specifically, there is a lack of information disclosure when using an IR 10 compared with the information disclosed in the financial statements. This could affect how section 108 of the Tax Administration Act 1994 applies to reassessments after the four year time limit has passed.

Problem

Income shown in statements, but not in IR 10

A taxpayer who filed an IR 10 instead of financial statements may be disadvantaged if an audit/investigation of back year returns reveals a discrepancy. If such a discrepancy is in an item that is recorded in the financial statements (obtained during the audit/investigation), but which did not need to be recorded on the IR 10, section 108 could be used to reopen the statute-barred assessment with the argument that full disclosure was not given in the return for that particular item.

This problem does not exist when financial statements are filed with the tax return. If a reassessment is not issued for the item before the four year time limit has passed, then Inland Revenue is statute-barred from re-opening that assessment because full disclosure was made to Inland Revenue with the return.

All mention of income omitted

The details of income to be recorded on the IR 10 do not cover all income sources. Two situations can occur where there will be omission of income when filing a return (either manually or through the E-File system) with an IR 10.

- If an item of assessable income did not have to be recorded on the IR 10, but has been recorded in the financial statements.
- The income is omitted completely from the financial statements, and is not included when calculating taxable income.

Policy

Inland Revenue will be applying the following policy when auditing/investigating back year returns which were filed with an IR 10:

If an audit/investigation reveals an item incorrectly recorded in the financial statements which is deemed to be either assessable income or non-deductible expenditure, but which did not have to be so recorded on the IR 10, then –

- If no conclusive evidence is held to prove a fraudulent or wilful misleading by the taxpayer, no statute-barred back year assessment will be re-opened under section 108.
- If there is conclusive evidence that a taxpayer intended to fraudulently or wilfully mislead, then section 108 will be applied to re-open statute-barred assessments.
- If an audit/investigation reveals an omission of income then -
  - If the omission is because disclosure was not required on an IR 10, (but the income was recorded in the financial statements which were not filed with Inland Revenue), then this will not be a reason for re-opening a statute-barred assessment.
  - If the income was omitted from the financial statements then section 108 may be applied to re-open a statute-barred assessment.

In some cases there is no provision on the IR 10 to show an item, but it must still be disclosed in a Disclosure Return (IR 4A) covering "inter-related arrangements" or in a Property Disclosure Return (IR 4T). If the profit on an item has been disclosed in either of these returns, there is not an omission of all mention of the item. This means there will not be reason to reopen an assessment. This is the case whether or not the profit in the disclosure return is recorded in the IR 10.

If a Disclosure Return (IR 4A) or a Property Disclosure Return (IR 4T) has not been furnished, the above policy on income which is not mentioned will apply.

Note: If someone is a party to a financial arrangement which must be disclosed to Inland Revenue under section 60 of the Tax Administration Act 1994, s/he must file a Disclosure Return (IR 4A) or a Property Disclosure Return (IR 4T) as appropriate. However, this return won't have to be filed if there is a reporting exemption for the arrangement.

Questions we've been asked

This section of the TIB sets out the answers to some day-to-day questions that people have asked. We have published these as they may be of general interest to readers.

These items are based on letters we've received. A general similarity to items in this package will not necessarily lead to the same tax result. Each case will depend on its own facts.

Income Tax Act 1994

Application for charitable status by Christian counsellors

Section CB 4 - Non-profit bodies' and charities' exempt income: An organisation is considering applying to Inland Revenue for charitable status. Under its deed, the organisation's central activity is the provision of Christian counselling to its members, their families and friends. Its focus is on giving practical counselling and advice in a Christian manner, rather than on promoting religion as such. A representative of the organisation has asked for Inland Revenue's comments on the likelihood of a request for charitable status being approved.

The approval of an organisation as a charitable organisation confers considerable tax benefits on the organisation and people who donate money to it.

Under section CB 4, all income derived by an organisation carried on for charitable purposes is exempt from tax. When the income of the charitable institution is derived from any business, the exemption applies only to that portion of the income applied for charitable purposes within New Zealand.

To qualify for the exemption, the real or fundamental purpose of the business and any independent purpose must be of a charitable nature. The expression "charitable purpose" includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

The activities of all approved charities must fall within one or more of these classes. In addition, there are three requirements that must be met before charitable status will be granted. The organisation must be:

- For public purposes: its aims must be public rather than private.
- For the public benefit: it must benefit the public or a large part of the community and not just particular individuals.
- Able to be controlled by the court if necessary.

To represent "part of the community" the people who benefit from the charitable purpose cannot be small in number, and the relationship which enables them to benefit from the charity must not be their relationship with a particular person.

In this case, the activities of the organisation do not meet the prescribed criteria.

Religion is not being promoted nor does the provision of Christian counselling benefit the community as a whole, or an appreciable portion of it. The organisation would fail in its formal request for charitable status approval.

Goods and Services Tax Act 1985

GST on beneficiaries' expenses

Section 20(3) - Deductions from output tax: The trustee in a family trust has written to Inland Revenue requesting an adjustment of the trust's GST returns. The trust's taxable activity is farming. The trustee has heard that the trust is able to claim GST input tax deductions in respect of the trust's objects, which include the purchasing of educational services and supplies towards the maintenance and education of the beneficiaries.

Section 20(3) allows a deduction from output tax (GST payable) of amounts paid or invoiced during a taxable period in relation to the supply of goods and services.

In all cases the legislation requires that the goods and services must have been acquired for the principal purpose of making taxable supplies.

The phrase "principal purpose" has been considered in a number of cases. The following definitions have been found to best describe the meaning of these words:

"Principal" means the main or fundamental purpose.

"Purpose" means the object or the end which the person has in mind or view.

When considering whether goods or services are acquired for the principal purpose of making taxable supplies, reference is made to the taxpayer's stated purpose, the actions of the taxpayer, and any other relevant facts.

In *Case P62* (1992) 14 NZTC 4,427 at p 4,446, Willy DJ observed:

"[T]here will conventionally be a mix of evidence relating to the question of principal purpose. Some of that evidence will consist of what the [taxpayer] says was the intention at the relevant time. Some will consist of facts which may be called objective which illustrate how that stated intention was carried into effect".

The trustee of the family trust was told that the evidence produced indicated that the principal purpose of purchasing the educational services and supplies was not for the purpose of making taxable supplies, but a private expense. As such, the trust was unable to claim an input tax deduction in respect of these payments.

Legal decisions - case notes

This section of the TIB sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, the Court of Appeal and the Privy Council.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision. Where possible, we have indicated if an appeal will be forthcoming.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

Motel assets resold – assessability of profits

Case: TRA 96/11, 96/16, 96/22, 96/23, 96/50, 96/62 and 97/7

Decision date: 15 January 1998

Act: Income Tax Act 1976

Keywords: *Profit from sale of motel chattels, bad debts*

Summary: Barber J found that it was not the Objector's dominant purpose to resell the chattels at the time of purchasing the motel and therefore the profits from the resale of the chattels were not assessable.

Facts: The Objectors, a husband and wife, purchased a motel business. Settlement was scheduled for 1 August 1993 and a manager was brought in to run the motel business until then. In July 1993 a real estate firm, which had a potential lessee, approached the Objectors. A 10 year lease was signed by the Objectors and lessee, with the chattels to be sold for $95,000. The Objectors claimed that the reason for the purchase was the motel's excellent site, and that they had had no intention to sell the chattels or lease the motel business.

The Commissioner assessed the profits from the sale of the chattels in the 1987 income year, on the basis that they were purchased with the intention of resale as part of the leasing of the motels.

The Commissioner also disallowed a claim for bad debts. The Objector wife owned another motel business, which was leased to Mr and Mrs F. The Objector husband had advanced the lessees $144,500 when they purchased the motel business. An instrument by way of security secured this over the motel chattels. A further $22,000 was also advanced secured by a mortgage. In June 1990 the lessees vacated the motel premises and had removed some chattels. Because the Objector husband knew the financial circumstances of the lessees, he decided not to sue for the outstanding debt with the advice of his solicitor.

Decision: Barber J followed *CIR v National Distributors Ltd* (1989) 11 NZTC 6,346 in finding that the Objectors did not have sufficient intention of reselling the chattels when they purchased the motel. Accordingly the profits from the resale of the chattels was not assessable.

Turning to the bad debts matter Barber J acknowledged that there was inconsistency in the evidence but found on the balance of probabilities that the bad debts were allowable as deductions as the words "written off" on a ledger card was sufficient to indicate that a debt had been written off as a bad debt. Accordingly the deductions were allowed.

Assignment of joint venture rights – assessability of payment

Case: Renouf Corporation Ltd, Kirkcaldie and Stains Ltd and Renouf Industries Ltd v CIR

Decision date: 24 February 1998

Act: Income Tax Act 1976

Keywords: *Assigning over rights to profits*

Summary: Justice Doogue found that a $2.75 million payment made by Renouf Property Developments Ltd to Renouf Corporation Ltd was not assessable income.

Facts: Renouf Corporation Ltd ("RCL") had a number of subsidiary companies which included Renouf Industries Ltd ('RIL") and Renouf Property Developments Ltd ("RPDL"). RCL was approached by Mainzeal Group Ltd, which was interested in developing a site owned by RCL. The site was transferred to a shelf company, Wellington Tower Ltd ("WTL") with RCL and Mainzeal each taking half of the $1 shares in WTL.

Pursuant to an agreement RCL assigned to RPDL "its rights under the Joint Venture Agreement to fifty percent of the future development profits arising from the development of that site" for the consideration of $2.75 million. The Commissioner included the payment of $2.75 million from RPDL to RCL pursuant to the agreement as assessable income in the hands of RCL. The Commissioner relied alternatively upon the provisions of section 65(2)(a), the third limb of section 65(2)(e), section 65(2)(1) and section 191(4)(A) of the IncomeTax Act 1976 to support his view that the $2.75 million payment was assessable income.

Decision: Justice Doogue took the view that RCL could only benefit from the enterprise by way of its shares, as it had no other right of recompense. Accordingly section 65(2)(a) had no application. He also cited *McCelland v Federal Commissioner of Taxation* [1971] 1 WLR 191 and *Duff v Commissioner of Inland Revenue* [1982] 2 NZLR 710 in relation to section 65(2)(e) third limb. His Honour held that he was satisfied by the Objectors that RCL was not a party to any scheme to develop the Jervois Quay site which could be said to come within the third limb of section 65(2)(e).

Turning to section 65(2)(1) his Honour held that the Commissioner's argument must fail in the same way as they had under section 65(2)(a) and (e).

Justice Doogue held that section 191(4)(A) could have no application to the present case.

Assets of former tax-exempt body sold at loss – apportioning deductibility of loss

Case: New Zealand Apple & Pear Marketing Board v CIR

Decision date: 16 February 1998

Act: Income Tax Act 1976

Keywords: *Depreciation allowance for assets of former exempt body*

Summary: The High Court found that the Commissioner could not make an apportionment under section 108 of the Income Tax Act 1976.

Facts: On 1 April 1998 the taxpayer changed from a tax-exempt statutory producer board to a taxpaying body. As part of this statutory change of status, section 197E(3) gave a method of fixing the opening book value of assets previously used to earn exempt income. Rather than requiring a valuation of the

assets, section 197E(3) directed the Commissioner in applying section 108, to have regard to the cost of the asset and all amounts that he would have allowed as a deduction if the asset had been used to earn assessable income. When the taxpayer sold assets at a loss, the Commissioner applied an apportionment formula to apportion the loss between the period of time it was used to earn exempt income and the period it was used to earn assessable income

Decision: Justice Doogue rejected the application of the formula used by the Commissioner. His Honour found that the statutory calculation of the opening book value was used in substitution to a market valuation of the assets. As this was a statutory calculation to fix value, his Honour concluded it was not open to the Commissioner to go behind it.

Justice Doogue did not accept s.197E(3) was spent once the opening book values were fixed but accepted the taxpayer's substitution that the section continued to have effect on the application of s.108.

Justice Doogue considered the decision in *King Country Electric Power Board v CIR* (1985) 17 NZTC 12,122 where such an apportionment was accepted under s.197C(3). The decision in *King Country* was distinguished on the basis of evidential difference.

Depreciation determinations issued since last update of IR 260 Depreciation booklet

This list shows the contents of all depreciation determinations we've issued since the last update of our Depreciation booklet (IR 260). We've published it so you can quickly check whether you need to review any determinations when calculating depreciation for tax purposes.

Some determinations cover a large number of assets which will concern relatively few taxpayers. For these determinations we've simply listed a cross-reference to the original TIB article rather than reproduce several pages of figures here.

This list is essentially a summary; if you're claiming depreciation on any of these assets we recommend that you refer to the original TIB article to make sure you get the full context of the determination, including the relevant industry categories.

Asset	Estimated useful life (years)	DV banded depreciation rate (%)	SL equivalent banded dep'n rate (%)	Determ-ination number	Appears in TIB
Aquariums	4	40	30	DEP22	9.2:1
Automotive tools *(various – see TIB article)*				DEP30	9.11:2
Bakery utensils (incl. pots and pans)	3	50	40	DEP30	9.11:2
Bedding (Hotels, Motels, etc, and medical/lab)	3	50	40	DEP30	9.11:3,4
Bedding (medical and medical laboratories)	3	50	40	DEP30a	10.3:5
Bin (wool storage, live bottom)	15.5	12	8	DEP11	7.3:20
Books, published annually or more frequently	2	63.5	63.5	DEP32	10.3:3
Books, other	10	18	12.5	DEP32	10.3:3
Bulkheads (insulated, removable)	4	40	30	DEP13	7.10:26
CCH Electronic NZ Essential Tax Package, designed for a specific tax year	1	100	100	PROV4	7.3:19
CCH Electronic NZ Master Tax Guide, designed for a specific tax year	1	100	100	PROV4	7.3:19
Combing machines (wool)	15.5	12	8	DEP11	7.3:20
Containers (insulated, below $8m^3$)	5	33	24	DEP13	7.10:26
Containers (shipping)	20	9.5	6.5	DEP13	7.10:26
Crown Health Enterprise assets *(half a page of various assets - see TIB article)*					6.5:7
Dance floor	20	9.5	6.5	DEP30	9.11:3
Drilling machines (horizontal directional)	6.66	26	18	DEP24	9.3:3
Drilling machine components, underground (horizontal directional)	2	63.5	63.5	DEP24	9.3:3
Electronic article surveillance systems	5	33	24	DEP26	9.6:3
Engineering tools *(various – see TIB article)*				DEP30	9.11:2
Fastening guns (explosive)	3	50	40	DEP20	8.10:1
Firearms (Leisure industry category)	10	18	12.5	DEP20	8.10:1
Gas cylinders – LPG (incl. propane and butane)	8	22	15.5	DEP16	8.1:10
Gas cylinders – other	12.5	15	10	DEP16	8.1:10
Gill machines (wool)	20	9.5	6.5	DEP11	7.3:20
Golf ball placing machine and sensor	3	50	40	DEP10	7.3:18
Golf driving ranges, netting (for golf driving nets)	5	33	24	DEP10	7.3:18
Golf driving ranges, poles (for golf driving nets)	20	9.5	6.5	DEP10	7.3:18
Golf mats (stance and base, at golf driving/practice ranges)	2	63.5	63.5	DEP10	7.3:18
Hand soap dispensers	2	63.5	63.5	DEP7	6.7:16
Ink mixing systems, computerised	3	50	40	DEP27	9.8:2
"Kiwiplus" – kiwifruit packhouse software	1	100	100	PROV6	9.6:8
Lawnmowers (domestic type in use by lawnmowing contractors)	2	63.5	63.5	DEP15	7.13:22
Lawnmowers (non-domestic type in use by lawnmowing contractors	5	33	24	DEP15	7.13:22
Machine centre, CNC (timber/joinery industry)	8	22	15	DEP28	9.9:1

Marquees *(half a page of various assets – see TIB article)*				DEP18	8.6:8
Medical and medical laboratory equipment *(3 pages of various assets – see TIB article)*				DEP8	6.7:17
Mulchers (commercial)	4	40	30	DEP25	9.6:6
Newspapers		expense	expense	DEP32	10.3:3
Paintball firearms	2	63.5	63.5	DEP20	8.10:1
Pallet covers (insulated)	2	63.5	63.5	DEP13	7.10:26
Paper towel dispensers	2	63.5	63.5	DEP7	6.7:16
Pistols, Air (Leisure industry category)	10	18	12.5	DEP20	8.10:1
Plant trolleys	5	33	24	DEP23	9.3:2
Psychological testing sets	10	18	12.5	PROV2	6.10:6
Rams (hydraulic or pneumatic)	3	33	24	DEP30	9.11:3
Residential rental property chattels *(various – see TIB article)*				DEP30	9.11:3
Rifles, Air (Leisure industry category)	10	18	12.5	DEP20	8.10:1
Rifles (less than 10,000 rounds per year)	6.66	26	18	DEP20	8.10:1
Rifles (more than 10,000 rounds per year)	2	63.5	63.5	DEP20	8.10:1
Scaffolding (aluminium)	8	22	15.5	DEP19	8.8:3
Scaffolding (other than aluminium)	15.5	12	8	DEP19	8.8:3
Scientific and laboratory equipment (not medical laboratory equipment) *(2 pages of various assets – see TIB article)*				DEP8	6.7:17
Shop utensils (incl pots and pans)	3	50	40	DEP30	9.11:3
Shotguns (less than 50,000 rounds per year)	6.66	26	18	DEP20	8.10:1
Shotguns (more than 50,000 rounds per year)	2	63.5	63.5	DEP20	8.10:1
Skidoo	5	33	24	DEP30	9.11:3
Sound recordings (copyright in)	1	100	100	DEP31	10.3:2
Speed humps (metal)	5	33	24	PROV3	6.13:13
Stage	20	9.5	6.5	DEP30	9.11:3
Static delimbers (timber industry)	5	33	24	DEP9	6.11:16
Tags (security)	3	50	40	DEP21	9.1:1
Toilet roll dispensers	2	63.5	63.5	DEP7	6.7:16
Tomato graders	8	22	15.5	DEP14	7.13:23
Tooling machine, CNC (timber/joinery industry)	8	22	15	DEP28	9.9:1
Trailers (class TD – over 10 tonnes) – when rented for periods of one month or less	10	18	12.5	DEP29	9.11:1
Undersea maintenance equipment *(1 page of various assets – see TIB article)*				DEP17	8.2:9
Wintering pads (rubber)	6.66	26	18	PROV5	8.2:7
Yachts (international ocean-going)	6	15	10	DEP12	7.10:25
Yachts (other than international ocean-going)	15.5	12	8	DEP12	7.10:25

Booklets available from Inland Revenue

This list shows all of Inland Revenue's information booklets as at the date of this Tax Information Bulletin. There is also a brief explanation of what each booklet is about.

Some booklets could fall into more than one category, so you may wish to skim through the entire list and pick out the booklets that you need. To order any of these booklets, call the forms and stationery number listed under "Inland Revenue" in the blue pages at the front of your phone book. This is an automated service, and you'll need to have your IRD number handy when you call.

The TIB is always printed in a multiple of four pages. We will include an update of this list at the back of the TIB whenever we have enough free pages.

General information

Binding rulings (IR 115G) - May 1995: *Explains binding rulings, which commit Inland Revenue to a particular interpretation of the tax law once given.*

Cash assistance for your growing family (FS 4) - Mar 1997: *Information about Family Assistance and how to apply.*

Disputing a notice of proposed adjustment (IR 210K) - Oct 1996: *If we send you a notice to tell you we're going to adjust your tax liability, you can dispute the notice. This booklet explains the process you need to follow.*

Disputing an assessment (IR 210J) - Oct 1996: *Explains the process to follow if you want to dispute our assessment of your tax liability, or some other determination.*

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How to tell if you need a special tax code (IR 23G): *Information about getting a special "flat rate" of tax deducted from your income, if the regular deduction rates don't suit your particular circumstances.*

If you disagree with us (IR 210Z) - Sep 1996: *This leaflet summarises the steps involved in disputing an assessment.*

Income from a Maori Authority (IR 286A) - Feb 1996: *For people who receive income from a Maori authority. Explains which tax return the individual owners or beneficiaries fill in and how to show the income.*

Independent Family Tax Credit (FS 3) - Sep 1996: *Introducing extra help for families, applying from 1 July 1996.*

Inland Revenue audits (IR 297) - May 1995: *For business people and investors. It explains what is involved if you are audited by Inland Revenue; who is likely to be audited; your rights during and after the audit, and what happens once an audit is completed.*

Koha (IR 278) - Aug 1991: *A guide to payments in the Maori community - income tax and GST consequences.*

Maori Community Officer Service (IR 286) - Apr 1996: *An introduction to Inland Revenue's Maori Community Officers and the services they provide.*

New Zealand tax residence (IR 292) - Jun 1997: *An explanation of who is a New Zealand resident for tax purposes.*

Overseas private pensions (IR 258A) - Oct 1996: *Explains the tax obligations for people who have interests in a private superannuation scheme or life insurance annuity policy that is outside New Zealand.*

Overseas social security pensions (IR 258) - Jun 1997: *Explains how to account for income tax in New Zealand if you receive a social security pension from overseas.*

Problem Resolution Service (IR 287) - Nov 1993: *An introduction to Inland Revenue's Problem Resolution Service. You can use this service if you've already used Inland Revenue's usual services to sort out a problem, without success.*

Provisional tax (IR 289) - Jun 1997: *People whose end-of-year tax bill is $2,500 or more must generally pay provisional tax for the following year. This booklet explains what provisional tax is, and how and when it must be paid.*

Putting your tax affairs right (IR 282) - Jun 1997: *Explains the advantages of telling Inland Revenue if your tax affairs are not in order, before we find out in some other way. This book also sets out what will happen if someone knowingly evades tax, and gets caught.*

Rental income (IR 264) - Apr 1995: *An explanation of taxable income and deductible expenses for people who own rental property. This booklet is for people who own one or two rental properties, rather than larger property investors.*

Reordered Tax Acts (IR 299) - Apr 1995: *In 1994 the Income Tax Act 1976 and the Inland Revenue Department Act 1974 were restructured, and became the Income Tax Act 1994, the Tax Administration Act 1994 and the Taxation Review Authorities Act 1994. This leaflet explains the structure of the three new Acts.*

Self-employed or an employee? (IR 186) - Jun 1997: *Sets out Inland Revenue's tests for determining whether a person is a self-employed contractor or an employee. This determines what expenses the person can claim, and whether s/he must pay ACC premiums.*

Stamp duty and gift duty (IR 665) - Feb 1995: *Explains what duty is payable on transfers of real estate and some other transactions, and on gifts. Written for individual people rather than solicitors and legal firms.*

Student Loans - how to get one and how to pay one back (SL 5) - 1998: *We've published this booklet jointly with the Ministry of Education, to tell students everything they need to know about getting a loan and paying it back.*

Superannuitants and surcharge (IR 259) - Jun 1997: *A guide to the surcharge for national superannuitants who also have other income.*

Tax facts for income-tested beneficiaries (IR 40C) - Aug 1997: *Vital information for anyone who receives an income-tested benefit and also has some other income.*

Taxes and duties (IR 295) - May 1995: *A brief introduction to the various taxes and duties payable in New Zealand.*

Taxpayer obligations, interest and penalties (IR 240) - Jan 1997: *A guide to the new laws dealing with interest, offences and penalties applying from 1 April 1997.*

Trusts and estates - (IR 288) - May 1995: *An explanation of how estates and different types of trusts are taxed in New Zealand.*

Visitor's tax guide - (IR 294) - Nov 1995: *A summary of New Zealand's tax laws and an explanation of how they apply to various types of visitors to this country.*

Business and employers

ACC premium rates - Mar 1997: *There are two separate booklets, one for employer premium rates and one for self-employed premium rates. Each booklet covers the year ended 31 March 1997.*

Depreciation (IR 260) - Apr 1994: *Explains how to calculate tax deductions for depreciation on assets used to earn assessable income.*

Direct selling (IR 261) - Aug 1996: *Tax information for people who distribute for direct selling organisations.*

Electronic payments to Inland Revenue (IR 87A) - Sep 1997: *Explains how employers and other people who make frequent payments to Inland Revenue can have these payments automatically deducted from their bank accounts.*

Employer's guide (IR 184) - Feb 1998: *Explains the tax obligations of anyone who is employing staff, and explains how to meet these obligations. Anyone who registers as an employer with Inland Revenue will receive a copy of this booklet.*

Entertainment expenses (IR 268) - May 1995: *When businesses spend money on entertaining clients, they can generally only claim part of this expenditure as a tax deduction. This booklet fully explains the entertainment deduction rules.*

First-time employer's guide (IR 185) - April 1996: *Explains the tax obligations of being an employer. Written for people who are thinking of taking on staff for the first time.*

Fringe benefit tax guide (IR 409) - Jul 1997: *Explains fringe benefit tax obligations of anyone who is employing staff, or companies which have shareholder-employees. Anyone who registers as an employer with Inland Revenue will receive a copy of this booklet.*

GST - do you need to register? (GST 605) - May 1997: *A basic introduction to goods and services tax, which will also tell you if you have to register for GST.*

GST guide (GST 600) - Dec 1997: *An in-depth guide which covers almost every aspect of GST. Everyone who registers for GST gets a copy of this booklet. It is quite expensive for us to print, so we ask that if you are only considering GST registration, you get the booklet "GST - do you need to register?" instead.*

IR 56 taxpayer handbook (IR 56B) - Mar 1998: *A booklet for part-time private domestic workers, embassy staff, nannies, overseas company reps and Deep Freeze base workers who make their own PAYE payments.*

Making payments (IR 87C) - Nov 1996: *How to fill in the various payment forms to make sure payments are processed quickly and accurately.*

PAYE deduction tables - 1999
- Weekly and fortnightly (IR 184X)
- Four-weekly and monthly (IR 184Y)
Tables that tell employers the correct amount of PAYE to deduct from their employees' wages from 1 April 1998.

Retiring allowances and redundancy payments (IR 277) - Aug 1997: *An explanation of the tax treatment of these types of payments.*

Smart Business (IR 120) - Jul 1996: *An introductory guide to tax obligations and record keeping, for businesses and non-profit organisations.*

Taxes and the taxi industry (IR 272) - Feb 1996: *An explanation of how income tax and GST apply to taxi owners, drivers, and owner-operators.*

Resident withholding tax and NRWT

Approved issuer levy (IR 291A) - May 1995: *For taxpayers who pay interest to overseas lenders. Explains how you can pay interest to overseas lenders without having to deduct NRWT.*

Non-resident withholding tax payer's guide (IR 291) - Mar 1995: *A guide for people or institutions who pay interest, dividends or royalties to people who are not resident in New Zealand.*

Resident withholding tax on dividends (IR 284) - Feb 1998: *A guide for companies, telling them how to deduct RWT from the dividends that they pay to their shareholders.*

Resident withholding tax on interest (IR 283) - Jul 1996: *A guide to RWT for people and institutions which pay interest.*

Resident withholding tax on investments (IR 279) - Jun 1996: *An explanation of RWT for people who receive interest or dividends.*

Non-profit bodies

Charitable organisations (IR 255) - May 1993: *Explains what tax exemptions are available to approved charities and donee organisations, and the criteria which an organisation must meet to get an exemption.*

Clubs and societies (IR 254) - Feb 1998: *Explains the tax obligations which a club, society or other non-profit group must meet.*

Education centres (IR 253) - Jun 1994: *Explains the tax obligations of schools and other education centres. Covers everything from kindergartens and kohanga reo to universities and polytechnics.*

Gaming machine duty (IR 680A) - Jun 1997: *An explanation of the duty which must be paid by groups which operate gaming machines.*

Grants and subsidies (IR 249) - Jun 1994: *An guide to the tax obligations of groups which receive a subsidy, either to help pay staff wages, or for some other purpose.*

Company and international issues

Company amalgamations (IR 4AP) - Feb 1995: *Brief guidelines for companies considering amalgamation. Contains an IR 4AM amalgamation declaration form.*

Consolidation (IR 4E) - Mar 1993: *An explanation of the consolidation regime, which allows a group of companies to be treated as a single entity for tax purposes.*

Controlled foreign companies (IR 275) - Nov 1994: *Information for NZ residents with interests in overseas companies. (More for larger investors, rather than those with minimal overseas investments)*

Foreign dividend withholding payments (IR 274A) - Mar 1995: *Information for NZ companies that receive dividends from overseas companies. This booklet also deals with the attributed repatriation and underlying foreign tax credit rules.*

Foreign investment funds (IR 275B) - Oct 1994: *Information for taxpayers who have overseas investments, but who don't have a controlling interest in the overseas entity.*

Imputation (IR 274) - Dec 1997: *A guide to dividend imputation for New Zealand companies.*

Qualifying companies (IR 4PB) Oct 1992: *An explanation of the qualifying company regime, under which a small company with few shareholders can have special tax treatment of dividends, losses and capital gains.*

Child support booklets

A guide for parents who pay child support (CS 71A) - May 1997: *Information for parents who live apart from their children.*

Child support - a guide for custodians (CS 71B) - Nov 1997: *Information for parents who take care of children for whom child support is payable.*

Child support administrative reviews - how to apply (CS 69A) - Feb 1998: *How to apply for a review of the amount of child support you receive or pay, if you have special circumstances.*

Child support administrative reviews - how to respond (CS 69B) - Apr 1997: *Information about the administrative review process, and how to respond if you are named in a review application.*

Child support and the Family Court (CS 51) - Apr 1997: *Explains what steps people need to take if they want to go to the Family Court about their child support .*

Child support - estimating your income (CS 107G) - Aug 1997: *Explains how to estimate your income so your child support liability reflects your current circumstances.*

Child support - how the formula works (CS 68) - Dec 1996: *Explains the components of the formula and gives up-to-date rates.*

Problems with our child support service? (CS 287) - Jul 1997: *Explains how our Problem Resolution Service can help if our normal services haven't resolved your child support problems.*

Due dates reminder

April 1998

5 Large employers: PAYE deductions and deduction schedules for period ended 31 March 1998 due.

7 Provisional tax and/or Student Loan interim repayments: first 1999 instalment due for taxpayers with December balance dates.

Second 1998 instalment due for taxpayers with August balance dates.

Third 1998 instalment due for taxpayers with April balance dates.

20 Large employers: PAYE deductions and deduction schedules for period ended 15 April 1998 due.

Small employers: PAYE deductions and deduction schedules for period ended 31 March 1998 due.

All employers: All IR 12 and IR 13 certificates for year ended 31 March 1998 must be completed, and yellow copies given to workers.

FBT return and payment for quarter ended 31 March 1998 due.

Gaming machine duty return and payment for month ended 31 March 1998 due.

RWT on interest deducted during March 1998 due for monthly payers.

RWT on interest deducted 1 October 1997 to 31 March 1998 due for six-monthly payers.

RWT on dividends deducted during March 1998 due.

Non-resident withholding tax (or approved issuer levy) deducted during March 1998 due.

30 GST return and payment for period ended 31 March 1998 due.

May 1998

5 Large employers: PAYE deductions and deduction schedules for period ended 30 April 1998 due.

7 Provisional tax and/or Student Loan interim repayments: first 1999 instalment due for taxpayers with January balance dates.

Second 1998 instalment due for taxpayers with September balance dates.

Third 1998 instalment due for taxpayers with May balance dates.

20 Large employers: PAYE deductions and deduction schedules for period ended 15 May 1998 due.

Small employers: PAYE deductions and deduction schedules for period ended 30 April 1998 due.

Gaming machine duty return and payment for month ended 30 April 1998 due.

RWT on interest deducted during April 1998 due for monthly payers.

RWT on dividends deducted during April 1998 due.

Non-resident withholding tax (or approved issuer levy) deducted during April 1998 due.

29 GST return and payment for period ended 30 April 1998 due.

31 All employers: 1998 PAYE and ACC reconciliation and calculation sheet (IR 68A and IR 68P) due to be filed, and 1998 ACC employer premium to be paid.

FBT - employers who elected to pay FBT on annual basis: annual liable return (1/4/97-31/3/98) and payment due.

RWT on interest: 1998 reconciliation (IR 15S) to be filed.

RWT on dividends: 1998 specified dividend reconciliation (IR 17S or IR 17SA) to be filed.

Public binding rulings and interpretation statements: your chance to comment before we finalise them

This page shows the draft public binding rulings and interpretation statements that we now have available for your review. You can get a copy and give us your comments in three ways:

By post: Tick the drafts you want below, fill in your name and address, and return this page to the address below. We'll send you the drafts by return post. Please send any comments *in writing, to the address below*. We don't have facilities to deal with your comments by phone or at our local offices.

From our main offices: Pick up a copy from the counter at our office in Takapuna, Manukau, Hamilton, Wellington, Christchurch or Dunedin. You'll need to post your comments back to the address below; we don't have facilities to deal with them by phone or at our local offices.

On the Internet: Visit our web site at http://www.ird.govt.nz/rulings/ Under the "Adjudication & Rulings" heading, click on "Draft Rulings", then under the "Consultation Process" heading, click on the drafts that interest you. You can return your comments via the Internet.

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✓ ***Public binding rulings***	***Comment Deadline***
☐ **0003**: Year 2000 expenditure – income tax deductibility	30 April 1998
☐ **1780**: Domestic air travel – zero-rating for GST purposes	30 April 1998

✓ ***Interpretation statements***	***Comment Deadline***
☐ **3229**: Sponsorship and similar types of promotional expenditure – deductibility under section BD 2(1)(b)	30 April 1998
☐ **3533**: The "incurred test" – Privy Council decision in the *Mitsubishi* case	30 April 1998

We must receive your comments by the deadline shown if we are to take them into account in the finalised item

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Te Tari Taake

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IR 596

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