

TAX INFORMATION

Bulletin

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YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents. Because we are keen to produce items that accurately and fairly reflect taxation legislation and are useful in practical situations, your input into the process, as a user of that legislation, is highly valued.

A list of the items we are currently inviting submissions on can be found at www.ird.govt.nz. On the homepage, click on "Public consultation" in the right-hand navigation. Here you will find drafts we are currently consulting on as well as a list of expired items. You can email your submissions to us at public.consultation@ird.govt.nz or post them to:

Public Consultation
Office of the Chief Tax Counsel
Inland Revenue
PO Box 2198
Wellington 6140

You can also subscribe to receive regular email updates when we publish new draft items for comment.

IN SUMMARY

Legislation and determinations

Livestock values – 2011 national standard costs for specified livestock

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This determination sets the national standard costs for specified livestock for the 2010–2011 income year.

Standard practice statements

SPS 11/01: Instalment arrangements for payment of tax

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This standard practice statement sets out Inland Revenue's practice when considering applications for financial relief by way of an instalment arrangement under section 177 of the Tax Administration Act 1994.

SPS 11/02: Child Support Debt – Requesting an instalment arrangement

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This standard practice statement sets out Inland Revenue's practice for providing relief when the immediate payment of an overdue child support obligation is not possible.

SPS 11/03: Student Loans – Relief from repayment obligations

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This standard practice statement sets out Inland Revenue's practice for providing relief from payment of student loan repayment obligations.

Legal decisions – case notes

High Court declines to add new defendants to tax litigation

31

The taxpayer sought to add more parties to long-running litigation on the basis that the Commissioner had not correctly identified a tax avoidance arrangement and that without the other parties no one was capable of paying the taxes if the Commissioner was ultimately successful. The application was declined by the High Court.

Indemnity costs awarded

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The Commissioner was awarded indemnity costs following an unsuccessful judicial review application by the taxpayer.

Successful strike-out of a judicial review

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The Court decided in the Commissioner's favour, striking out Mr Hardie's application for judicial review as an abuse of process.

Representation of a company by the director

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The High Court considered that exceptional circumstances existed to permit the Court to exercise its discretion to allow representation of the company by the director.

LEGISLATION AND DETERMINATIONS

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

LIVESTOCK VALUES – 2011 NATIONAL STANDARD COSTS FOR SPECIFIED LIVESTOCK

The Commissioner of Inland Revenue has released a determination, reproduced below, setting the national standard costs for specified livestock for the 2010–2011 income year.

These costs are used by livestock owners as part of the calculation of the value of livestock on hand at the end of the income year, where they have adopted the national standard costs scheme to value any class of specified livestock.

Farmers using the scheme apply the one-year national standard cost (“NSC”) to stock bred on the farm each year, and add the rising two-year NSC to the value of the opening young stock available to come through into the mature inventory group at year-end. Livestock purchases are also factored into the valuation of the immature and mature groupings at year-end, so as to arrive at a valuation reflecting the enterprise’s own balance of farm bred and externally purchased animals.

NSCs are developed from the national average costs of production for each type of livestock farming based on independent survey data. Only direct costs of breeding and rearing rising one-year and two-year livestock are taken into account. These exclude all costs of owning (leasing) and operating the farm business, overheads, costs of operating non-livestock enterprises (such as cropping) and costs associated with producing and harvesting dual products (wool, fibre, milk and velvet).

For bobby calves, information from spring 2010 is used while other dairy NSCs are based on survey data for the year ended 30 June 2010. For sheep, beef cattle, deer and goats, NSCs are based on survey data for the year ended 30 June 2009 which is the most recent available for those livestock types at the time the NSCs are calculated in December 2010.

For the 2010–2011 income year there has been an increase in the NSC for sheep and beef cattle. This increase reflects the increase, in real expenditure, of costs incurred per livestock unit, together with lower lambing and calving percentages over the previous year.

The NSCs for rising one-year and rising two-year dairy cattle have decreased slightly. These decreases have come about largely because of a slightly lower proportion of rising one-year dairy cattle relative to the cows in milk. The NSC for purchased bobby calves has increased slightly as a result of costs increases, especially for feed.

The NSCs for deer, and fibre- and meat-producing goats have increased because of an increase in real expenditure incurred per livestock unit. An increase in the NSC of dairy goats has been driven by an increase in real expenditure per livestock unit. A decrease in feed cost has driven the decrease in the NSC for pigs.

The NSCs calculated each year only apply to that year’s immature and maturing livestock. Mature livestock valued under this scheme effectively retain their historic NSCs until they are sold or otherwise disposed of, albeit through a FIFO or inventory averaging system as opposed to individual livestock tracing. It should be noted that the NSCs reflect the average costs of breeding and raising immature livestock and will not necessarily bear any relationship to the market values (at balance date) of these livestock classes. In particular, some livestock types, such as dairy cattle, may not obtain a market value in excess of the NSC until they reach the mature age grouping.

One-off movements in expenditure items are effectively smoothed within the mature inventory grouping, by the averaging of that year’s intake value with the carried forward values of the surviving livestock in that grouping. For the farm-bred component of the immature inventory group, the NSC values will appropriately reflect changes in the costs of those livestock in that particular year.

The NSC scheme is only one option under the current livestock valuation regime. The other options are market value, the herd scheme and the self-assessed cost scheme (“SAC”) option. SAC is calculated on the same basis as the NSC but uses a farmer’s own costs rather than the national average costs. There are restrictions in changing from one scheme to another and before considering such a change livestock owners may wish to discuss the issue with their accountant or other adviser.

NATIONAL STANDARD COSTS FOR SPECIFIED LIVESTOCK DETERMINATION 2011

This determination may be cited as “The National Standard Costs for Specified Livestock Determination 2011”.

This determination is made in terms of section EC 23 of the Income Tax Act 2007. It shall apply to any specified livestock on hand at the end of the 2010–2011 income year

where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

For the purposes of section EC 23 of the Income Tax Act 2007 the national standard costs for specified livestock for the 2010–2011 income year are as set out in the following table.

National standard costs for 2010–2011 income year

Kind of livestock	Category of livestock	National standard cost
Sheep	Rising 1 year	\$28.20
	Rising 2 year	\$18.40
Dairy cattle	Purchased bobby calves	\$168.70
	Rising 1 year	\$394.40
	Rising 2 year	\$85.20
Beef cattle	Rising 1 year	\$282.90
	Rising 2 year	\$155.00
	Rising 3 year male non-breeding cattle (all breeds)	\$155.00
Deer	Rising 1 year	\$94.40
	Rising 2 year	\$48.00
Goats (meat and fibre)	Rising 1 year	\$21.60
	Rising 2 year	\$14.80
Goats (dairy)	Rising 1 year	\$132.60
	Rising 2 year	\$21.20
Pigs	Weaners to 10 weeks of age	\$90.40
	Growing pigs 10 to 17 weeks of age	\$74.90

This determination is signed by me on the 28th day of January 2011.

Rob Wells

LTS Manager, Technical Standards

STANDARD PRACTICE STATEMENTS

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

SPS 11/01: INSTALMENT ARRANGEMENTS FOR PAYMENT OF TAX

Introduction

1. This Standard Practice Statement (SPS) sets out Inland Revenue's practice when considering applications for financial relief by way of an instalment arrangement under section 177 of the Tax Administration Act 1994 ("TAA").
2. An instalment arrangement may include one or more payments and the payment amounts may vary to reflect the taxpayer's changing cashflow or circumstances. See paragraphs 74 to 79 for more information on payments.
3. For child support debt or student loan repayment arrears, refer to SPS 11/02 (*Child Support Debt – Requesting an instalment arrangement*) or SPS 11/03 (*Student Loans – Relief from repayment obligations*).
4. SPS 06/02 – *Writing off outstanding tax*, published in April 2006, provides details on Inland Revenue's practice on writing off outstanding tax.

Application

5. This SPS applies to applications for relief by way of instalment arrangements made on or after 16 February 2011. It replaces SPS 05/11 – *Instalment arrangements for payment of tax debt* published in *Tax Information Bulletin* Vol 17, No 10 (December 2005).
6. There are separate SPSs setting out Inland Revenue's practice in considering requests for financial relief for student loan repayment debt and child support arrears as these are not covered by the financial relief or serious hardship provisions in the TAA.
7. Unless specified otherwise, all legislative references in this SPS refer to the TAA.

Summary

8. Taxpayers are encouraged to contact Inland Revenue at the earliest opportunity if they think that they may have trouble paying their tax in full by the due date so that options for payment, which may include an instalment arrangement, can be discussed.
9. Early contact may also minimise the imposition of late payment penalties as some penalties are not imposed when an application seeking financial relief is being considered.

10. Section 177 allows a taxpayer to apply for financial relief by requesting to enter into an instalment arrangement. These applications may be made by telephone, in writing, or by electronic means.
11. The Commissioner will negotiate with the taxpayer to determine what method of payment best suits the taxpayer's financial circumstances. However, section 177B provides that the Commissioner must not enter into an instalment arrangement with a taxpayer (being a natural person) to the extent that the instalment arrangement would place that person in serious hardship.
12. "Serious hardship" is defined under section 177A and means significant financial difficulties that arise because of:
 - the taxpayer's inability to meet minimum living expenses according to normal community standards; or
 - the cost of medical treatment for an illness or injury of the taxpayer or the taxpayer's dependant(s); or
 - a serious illness suffered by the taxpayer or the taxpayer's dependant(s); or
 - the cost of education for the taxpayer's dependant(s).
13. The outstanding tax covered by an instalment arrangement request needs to be quantified through a return or an assessment for the penalty suppression under section 139BA to apply, and to enable the Commissioner to commence negotiation.
14. However, in cases where the relevant returns have not been filed, negotiation of an instalment arrangement for the affected return periods will generally not commence until the outstanding returns have been received by Inland Revenue. In the interim taxpayers will be encouraged to make voluntary payments towards their anticipated tax liability. Late payment penalties will accrue (unless the Commissioner has made an assessment) until such time returns are filed and negotiation on payment options can commence.
15. The Commissioner will require relevant information to be provided in support of the application. This will

- include financial information and will also generally require the filing of any related outstanding returns. If this information is not contained in the taxpayer's initial application, the Commissioner may ask for further information.
16. Upon receipt of a taxpayer's application for an instalment arrangement the Commissioner has four options. He may accept the request, seek further information from the taxpayer, make a counter offer, or decline the request.
 17. The Commissioner's authority to enter into instalment arrangements for the payment of tax debt under section 177 is further qualified by the requirement to maximise the recovery of tax debt from a taxpayer, but not if:
 - recovery would represent an inefficient use of the Commissioner's resources; or
 - the instalment arrangement would place the taxpayer, who is a natural person, in serious hardship.
 18. Where the Commissioner is likely to recover more through an instalment arrangement than from bankruptcy or liquidation action, an instalment arrangement will generally be entered into.
 19. In *Raynel v CIR*¹ it was noted that the obligation to maximise recovery of outstanding debt from a taxpayer is not an absolute obligation. Rather the Commissioner's duty is to be approached on "a pragmatic basis with proper regard to the likely benefits and the costs of achieving them". It was also considered that this obligation does not relieve Inland Revenue officers from their duty under section 6(1) to use their best endeavours to protect the integrity of the tax system. It was further noted the Commissioner is required under section 6A(3)(b) to have regard to the importance of promoting voluntary compliance by all taxpayers with the Inland Revenue Acts. Taxpayers can expect that appropriate and firm action will be taken against non-complying taxpayers and that this principle may override any proposed instalment arrangement.
 20. Under section 139B, the initial late payment penalty is applied in two steps. There is an initial late payment penalty of 1% on the unpaid tax which is applied on the day after the due date. A further late payment penalty of 4% is added at the end of the sixth day after the due date on any tax that remains unpaid at that date.
 21. The two-step penalty provides an incentive for taxpayers to contact Inland Revenue at the earliest opportunity to discuss payment options when they may have problems with making full payment of taxes by the due date.
 22. Monthly incremental penalties will not be charged while a debt is under an instalment arrangement, provided that the taxpayer complies with the terms of that instalment arrangement. This applies from the date on which the taxpayer contacts Inland Revenue seeking an instalment arrangement for outstanding tax following the filing of their return or an assessment being made.
 23. Use-of-money interest will continue to accrue during the term of an instalment arrangement. It provides an incentive for the taxpayer to repay the debt as quickly as possible.
 24. When the Commissioner enters into an instalment arrangement, the terms will be confirmed with the taxpayer to ensure that both parties clearly understand their obligations. Confirmation will usually be made using the same method of communication that the taxpayer used for their application. However, for more complex cases, it will be preferable to issue a letter which sets out the obligations and agreed terms for future reference by the taxpayer.
 25. The taxpayer may renegotiate an instalment arrangement at any time. However, the Commissioner may only do so after two years have elapsed from the date the instalment arrangement was entered into.
 26. The Commissioner may cancel an instalment arrangement if the taxpayer has provided false or misleading information, or if the taxpayer is not meeting their obligations under the instalment arrangement. When an instalment arrangement is cancelled because the taxpayer provided false or misleading information, monthly incremental penalties will be imposed retrospectively as if the instalment arrangement had not been entered into.

Legislation

27. The relevant legislative provisions are sections 139B, 139BA, 177, 177A and 177B of the TAA:

139B Late payment penalty

- (1) This section applies to a taxpayer if and to the extent that the taxpayer does not pay by the due date (the **default date**) an amount of tax (the **unpaid tax**), calculated by the taxpayer as payable or for which the taxpayer is assessed, and—
 - (a) the unpaid tax is provisional tax or a penalty relating to a failure to pay provisional tax;
 - (b) ignoring any failure to pay for which a penalty or interest is remitted under section 183AA, the taxpayer has failed to pay on time an amount of tax due for payment in the period—

¹ *Raynel v CIR* (2004) 21 NZTC 18,583

- (i) beginning with the later of 1 April 2008 and the day 2 years before the default date; and
- (ii) ending before the default date:
- (c) ignoring any failure to pay for which a penalty or interest is remitted under section 183AA, the taxpayer has paid on time all amounts of tax due for payment in the period referred to in paragraph (b) and—
 - (i) the Commissioner gives the taxpayer a notice setting a further date for payment of the unpaid tax; and
 - (ii) the taxpayer does not pay the unpaid tax before the date that is the earlier of the further date and the date that is 1 month after the date of the notice.
- (2) The taxpayer is liable to pay a late payment penalty consisting of—
 - (a) an initial late payment penalty equal to the total of—
 - (i) 1% of the unpaid tax; and
 - (ii) 4% of the amount of tax to pay at the end of the sixth day after the day on which a penalty under subparagraph (i) is imposed; and
 - (b) an incremental late payment penalty equal to 1% of the amount of tax to pay determined on each day that falls 1 month after a day on which a penalty is imposed under—
 - (i) this subsection:
 - (ii) subsection (2A)(a) or (2B) as they were before the enactment of section 243 of the Taxation (Business Taxation and Remedial Matters) Act 2007.
- (2A) *Repealed.*
- (2B) *Repealed.*
- (3) An initial late payment penalty is added to the unpaid tax to which it relates—
 - (a) on the day after the default date for the unpaid tax, if it is imposed under subsection (2)(a)(i):
 - (b) at the end of the sixth day after the day referred to in paragraph (a), if it is imposed under subsection (2)(a)(ii).
- (3A) *Repealed.*
- (3B) The part of an initial late payment penalty imposed under subsection (2)(a)(ii) is not to be added if the Commissioner has exercised powers available under section 157 of this Act or section 43 of the Goods and Services Tax Act 1985 or any similar tax law before the end of the 6th day after the day on which an initial late payment penalty is imposed under subsection (2)(a)(i) and has received the tax withheld or deducted in accordance with the requirements of a notice issued as a result of the Commissioner exercising those powers.
- (4) An incremental late payment penalty is to be added to the tax to pay to which it relates on the day after the last day of successive monthly intervals during which the tax to pay remains unpaid.
- (5) If an incremental late payment penalty would, apart from this subsection, be added to any tax to pay on a date that does not exist in a month, the penalty is to be added to the tax to pay on the last day of the month.
- (5A) An incremental late payment penalty is not to be added if, for a month during which the tax to pay remains unpaid, the Commissioner has exercised powers available under section 157 of this Act or section 43 of the Goods and Services Tax Act 1985 or any similar tax law and has received the tax withheld or deducted in accordance with the requirements for the month of a notice issued as a result of the Commissioner exercising those powers.
- (5B) A taxpayer is liable to pay a late payment penalty under subsection (2) in relation to a default date if—
 - (a) the Commissioner has given the taxpayer a notice of a further date for the payment of unpaid tax under subsection (1)(c)(i); and
 - (b) after giving the notice, the Commissioner becomes aware of a default by the taxpayer that arose before the date of the notice; and
 - (c) the further date for payment referred to in paragraph (a)—
 - (i) falls outside the period referred to in subsection (1)(b); and
 - (ii) should have been given in relation to the default referred to in paragraph (b).
- (5C) If the taxpayer enters into an instalment arrangement for the default under section 177B and a late payment penalty is imposed under section 139BA(1), the taxpayer is treated for the purposes of this section as paying on time, to the extent of the default, the amount of tax due for payment.
- (6) In this section and section 139BA—
 - (a) The term **tax to pay** means, at any time, an amount equal to the unpaid tax together with any late payment penalty that has been imposed in whole or in part in respect of the unpaid tax, to the extent that at that time the amount remains unpaid:
 - (b) The unpaid tax is deemed to be the last part of any tax to pay, that a taxpayer pays:
 - (c) The term **unpaid tax** includes an amount of tax that must be withheld or deducted and paid to the Commissioner under a tax law but does not include a late payment penalty or a shortfall penalty imposed under section 141ED.

139BA Imposition of late payment penalties when financial relief sought

- (1) If a taxpayer has outstanding tax and contacts the Commissioner seeking financial relief before the due date, the Commissioner must impose the late payment penalty under section 139B(2)(a)(i) on unpaid tax but must not impose the late payment penalty under section 139B(2)(a)(ii).
- (2) If a taxpayer has outstanding tax and contacts the Commissioner seeking financial relief on or after the due date, the Commissioner must not impose an incremental late payment penalty on unpaid tax on and after the date of the request.
- (3) Subsections (1) and (2) apply until the earlier of—
 - (a) the date that the Commissioner makes a decision not to give financial relief; and
 - (b) the last day of the response period allowed by section 177(4) if the taxpayer does not provide the information sought or respond to a counter offer.
- (4) If an instalment arrangement is entered into, an incremental late payment penalty is not to be added if, for a month during which the tax to pay remains unpaid, the taxpayer complies with all of their obligations under the arrangement.
- (5) If an instalment arrangement is cancelled on the basis of false or misleading information provided by the taxpayer, the Commissioner must impose those late payment penalties not imposed as if the instalment arrangement had not been entered into.
- (6) If financial relief is not given, the Commissioner must impose those late payment penalties not imposed as if the request for financial relief had not been made.

177 Taxpayer may apply for financial relief

- (1) A taxpayer, or a person on a taxpayer's behalf, applies for financial relief by either—
 - (a) making a claim stating why recovery of outstanding tax would place the taxpayer in serious hardship; or
 - (b) requesting to enter into an instalment arrangement with the Commissioner by telephone or in writing.
- (2) The Commissioner may require a taxpayer, or a person on a taxpayer's behalf, to apply for financial relief under subsection (1)(a) by notice.
- (3) Upon receiving a request, the Commissioner may—
 - (a) accept the taxpayer's request; or
 - (b) seek further information from the taxpayer; or
 - (c) make a counter offer; or
 - (d) decline the taxpayer's request.
- (4) A taxpayer has 20 working days, or a longer period allowed by the Commissioner, to provide the information sought or to respond to a counter offer.

- (5) If the Commissioner receives information or a response from a taxpayer outside the time period allowed under subsection (4), the receipt of the information or the response will be treated as a new request for financial relief.

177A Definition of serious hardship

- (1) In this section and sections 176, 177, 177B and 177C, serious hardship, in relation to a taxpayer, being a natural person,—
 - (a) includes significant financial difficulties that arise because of—
 - (i) the taxpayer's inability to meet minimum living expenses according to normal community standards; or
 - (ii) the cost of medical treatment for an illness or injury of the taxpayer or the taxpayer's dependant; or
 - (iii) a serious illness suffered by the taxpayer or the taxpayer's dependant; or
 - (iv) the cost of education for the taxpayer's dependant; and
 - (b) does not include significant financial difficulties that arise because—
 - (i) the taxpayer is obligated to pay tax; or
 - (ii) the taxpayer may become bankrupt; or
 - (iii) the taxpayer's, or the taxpayer's dependant's, social activities and entertainment may be limited; or
 - (iv) the taxpayer is unable to afford goods or services that are expensive or of a high quality or standard according to normal community standards.
- (2) The Commissioner may take into account whether the recovery of outstanding tax would place—
 - (a) a shareholder who owns, or 2 shareholders who jointly own, 50% or more of the shares in a company in serious hardship; or
 - (b) a shareholder-employee of a close company in serious hardship.
- (3) For the purpose of subsection (2), **close company** means a company that satisfies paragraphs (a) and (c) of the definition of "close company" in section YA 1 of the Income Tax Act 2007.

177B Instalment arrangements

- (1) The Commissioner must not enter into an instalment arrangement with a taxpayer to the extent that the arrangement would place the taxpayer in serious hardship.
- (2) The Commissioner may decline to enter into an instalment arrangement if—
 - (a) to do so would not maximise the recovery of outstanding tax from the taxpayer; or

- (b) the Commissioner considers that the taxpayer is in a position to pay all of the outstanding tax immediately; or
 - (c) the taxpayer is being frivolous or vexatious; or
 - (d) the taxpayer has not met their obligations under a previous instalment arrangement.
- (3) A taxpayer may renegotiate an instalment arrangement at any time.
 - (4) The Commissioner may renegotiate an instalment arrangement at any time after the end of 2 years from the date on which the instalment arrangement was entered.
 - (5) The renegotiation of an instalment arrangement is treated as if it were a new request for financial relief.
 - (6) The Commissioner may cancel an instalment arrangement if—
 - (a) it was entered into on the basis of false or misleading information provided by the taxpayer; or
 - (b) the taxpayer is not meeting their obligations under the arrangement.s
 - (7) Despite sections LA 6(2) and LH 2(6) of the Income Tax Act 2007, a taxpayer with an instalment arrangement who is meeting their obligations under it may choose to have an amount of refundable tax credit remaining for a tax year paid to them rather than used under the ordering rules set out in those sections.

Discussion

Making requests to the Commissioner

28. A taxpayer may apply for financial relief under section 177. The relief may be in the form of a request for an instalment arrangement and/or a request to write-off of all or part of a tax debt. See SPS 06/02 – *Writing off outstanding tax* (or any subsequent replacement) for details on Inland Revenue’s practice on writing off tax debt.
29. Under section 177B, the Commissioner must not enter into an instalment arrangement if the recovery of the tax debt from a taxpayer would place that person in serious hardship. This can only apply to a taxpayer who is natural person because “serious hardship” is defined in section 177A and that definition only applies to natural persons.
30. Generally, taxpayers may apply for an instalment arrangement by telephone, in writing, or by the Inland Revenue website on-line service. In some cases, however, the Commissioner may require taxpayers to apply in writing.
31. The tax payable needs to be quantified before the Commissioner can consider an application for an instalment arrangement. Taxpayers with outstanding returns and no assessment for the related debt will need to file the outstanding returns before any instalment arrangements can be agreed to.
32. Taxpayers are required to provide supporting financial information. The information can be supplied either orally or in writing subject to the Commissioner’s discretion on how the information should be presented for consideration. An IR 40 form, available on the Inland Revenue website at www.ird.govt.nz/forms-guides provides a guide to the information the Commissioner will generally require. The Commissioner may also obtain information from other sources to enable consideration of a taxpayer’s wider financial situation. In some cases, Inland Revenue may already hold adequate financial information about the taxpayer and further financial information may not be required.
33. Taxpayers requesting an instalment arrangement for outstanding tax that has not been quantified by filing a return with Inland Revenue (as part of the self-assessment process or for which an assessment has not been made), will be encouraged to make voluntary payments towards their anticipated tax liability. Once the relevant returns are received or assessments are made, negotiation can be commenced to consider an instalment arrangement. Late payment penalties will continue to accrue until the outstanding returns are received by Inland Revenue and the negotiation period can commence.
34. A negotiation period follows receipt of a taxpayer’s request for an instalment arrangement and the period when the Commissioner considers their request, up to an agreement being reached or the request being declined. A negotiation period can also lapse when a taxpayer fails to provide the information requested, or does not respond to a counter offer, within 20 working days (or a longer period allowed by the Commissioner).
35. Business taxpayers may be required to provide cash flow forecasts and budgets to support the proposed instalment arrangement.
36. The Commissioner will also take into consideration the taxpayer’s compliance history for payments and returns. Other factors which will be taken into consideration include the taxpayer’s historical and prospective income, payments to other creditors and the industry in which they are working.

Considering an application for an instalment arrangement

37. Upon receipt of an application for an instalment arrangement, the Commissioner has four options:

(a) *Accept the taxpayer's request*

When an instalment arrangement is accepted, details will be confirmed with the taxpayer or their agent. This will include:

- the agreed repayment amount and frequency; and
- the commencement date of the instalment arrangement; and
- any other terms and conditions under the instalment arrangement negotiated between Inland Revenue and the taxpayer.

If the taxpayer or their agent disagrees with any of the terms and conditions, they should discuss those concerns promptly with the Inland Revenue officer handling the request.

(b) *Seek further information from the taxpayer*

If the Commissioner requires additional information it must be provided within 20 working days of the Commissioner asking for the information—although a longer period may be agreed if circumstances require it.

If information is received outside the time period allowed, the late response is likely to be treated as a new request.

(c) *Make a counter offer*

The Commissioner may make a counter offer to the taxpayer where:

- the Commissioner considers that the taxpayer's financial circumstances disclose that the taxpayer can make instalments at a higher amount than proposed by the taxpayer in the application; or
- the Commissioner considers that the taxpayer's financial circumstances disclose that the taxpayer may be over-extending themselves and reduces the proposed instalments to a lesser amount than proposed by the taxpayer in the application; or
- the Commissioner considers that to accept instalments based on the amount the taxpayer offers to pay would place the taxpayer (being a natural person) in serious hardship. In which case the Commissioner may make a counter offer to accept instalments of a lesser amount.

(d) *Decline the request*

The Commissioner must not enter into an instalment arrangement if doing so would place a taxpayer, being a natural person, in serious hardship. However an exception arises where the taxpayer is liable to pay, in relation to a tax debt, a shortfall penalty for either an abusive tax position under section 141D(2), or evasion or a similar act under section 141E(1). In these circumstances, the Commissioner will have regard to his greater duty to protect the integrity of the tax system. Recovery action to collect the shortfall penalty, late payment penalties, use-of-money interest and the underlying tax will continue even if recovery would place a taxpayer in serious hardship.

Further, the Commissioner is unlikely to enter into an instalment arrangement where:

- the outstanding tax has not been quantified (for the period an instalment arrangement has been sought) by the filing of the relevant return or issue of an assessment; or
- recovery would represent an inefficient use of the Commissioner's resources; or
- it is considered that the taxpayer is able to pay the debt in full. For example, a taxpayer has term deposits or other investments or the ability to borrow sufficient funds to pay the tax debt immediately, or the taxpayer has assets which can be sold and the funds used to pay the outstanding tax; or
- the Commissioner considers that more can be recovered by commencing bankruptcy or liquidation proceedings; or
- the taxpayer has not met their obligations under a previous instalment arrangement and/or the Commissioner is not satisfied a proposed instalment arrangement is their best effort to pay the tax debt.

If the Commissioner declines a request for an instalment arrangement the taxpayer will be advised of the reasons for the decision. Although the TAA does not confer any right to a taxpayer to challenge this decision, where a taxpayer is concerned that their circumstances have not been given proper consideration they should raise their concern with the officer handling their request or by telephoning Inland Revenue.

Timeframe for responding

38. If the Commissioner is unable to make a decision on granting relief immediately or requires further information, or makes a counter offer, the taxpayer will be advised accordingly.
39. Generally, the taxpayer must provide any information requested or respond to Inland Revenue's counter offer within 20 working days. However, the Commissioner may allow a longer period to respond if circumstances require it. For example, where a taxpayer is having difficulties in obtaining the required information. Where further time is necessary, the taxpayer should contact Inland Revenue before the 20 working day period expires to request an extension of the response period. Inland Revenue will consider such a request on its own merits, taking into account the reason for the taxpayer's difficulty in providing the information or responding to the counter offer and whether it is reasonable for the request to be granted.
40. Incremental late payment penalties and in some cases, part of the initial late payment penalties will not be imposed during the response period. However, use-of-money interest will continue to accrue on a daily basis.
41. If the information or response to the Commissioner's counter offer is not provided within the negotiated timeframe, late payment penalties will be imposed as though no application had been made.
42. If the information is provided outside the response period, the Commissioner is likely to treat this as a new request, unless there is good reason why the taxpayer has been unable to provide the information, or has not responded to the Commissioner's counter offer, within the timeframe. Possible reasons could include illness, or involvement in an accident or an adverse event which prevented the taxpayer from contacting Inland Revenue to request further time to provide the information.
43. If the Commissioner, upon receipt of the information requested, declines to enter into an instalment arrangement, any late payment penalties not imposed during the negotiation period will be imposed as though no application for financial relief had been made.
44. The Commissioner will not commence recovery action for the outstanding tax during a negotiation period. However, if recovery action had already commenced prior to the application, the Commissioner will advise the taxpayer whether this recovery action will continue during the negotiation period.
45. For example, a taxpayer may already be paying a tax debt by way of an instalment arrangement and may contact the Commissioner to discuss a reduction in the instalment amount. In this instance, the Commissioner will discuss with the taxpayer whether the current instalment arrangement is to continue until such time as a new instalment arrangement is successfully negotiated.
46. If the taxpayer incurs further debt during the negotiation period, the additional tax debt may be added to the total tax debt under negotiation provided the relevant returns are filed or assessments have been made.
47. When considering a request for an instalment arrangement, Inland Revenue will take into account the following factors

Whether the proposal will place the taxpayer, being a natural person, in serious hardship

 48. The Commissioner must take the taxpayer's circumstances into account, and cannot enter into an instalment arrangement with a taxpayer who is a natural person, to the extent that the instalment arrangement would place that taxpayer in serious hardship.
 49. "Serious hardship" is defined under section 177A and means significant financial difficulties that arise because of:
 - the taxpayer's inability to meet minimum living expenses according to normal community standards; or
 - the cost of medical treatment for an illness or injury of the taxpayer or the taxpayer's dependant(s); or
 - a serious illness suffered by the taxpayer or the taxpayer's dependant(s); or
 - the cost of education for the taxpayer's dependant(s).
 50. Serious hardship does not include financial difficulties that arise because:
 - the taxpayer is obligated to pay tax; or
 - the taxpayer may become bankrupt; or
 - the taxpayer's, or the taxpayer's dependant's social activities and entertainment may be limited; or
 - the taxpayer is unable to afford goods or services that are expensive or of a high quality or standard according to normal community standards.
 51. Whether a person is a taxpayer's "dependant" will be determined on a case-by-case basis. In determining dependency issues, the Commissioner will consider:

- whether the person is dependent on the taxpayer for financial support; and
 - what degree of financial support is provided by the taxpayer; and
 - to what extent providing financial support impacts on the taxpayer's ability to meet minimum living expenses according to normal community standards.
52. The Commissioner may take into account whether the recovery of a tax debt would place a shareholder in serious hardship. For the purpose of this part, a shareholder is a person who owns, or two persons who jointly own, 50% or more of the shares in a company, or a shareholder-employee of a close company. A "close company" for these purposes means a company which has five or fewer natural persons whose voting interests or market value interests in the company exceed 50% and are not a special corporate entity.
53. For further discussion on consideration of serious hardship, see the separate SPS 06/02 – *Writing off outstanding tax* (or any replacement).

Whether the instalment arrangement would maximise the recovery of tax debt from the taxpayer

54. Inland Revenue has a duty to maximise the recovery of tax debt from a taxpayer. The Commissioner is therefore obliged to compare the likely recovery from entering into an instalment arrangement with any other viable options for recovery. In some cases, it is clear which option will maximise recovery. In other cases there may be options that could yield similar returns. Accordingly it is necessary to determine which option will maximise recovery.
55. The Commissioner will look at all options available for payment of tax debt when considering a request for an instalment arrangement and may, for example, make a counter offer suggesting that the person sells property or arranges other finance, to pay their tax debt more promptly. In addition, the Commissioner will not be confined by requests to consider hardship situations with the benefit of hindsight and ignore a person's current circumstances or opportunities to make payment.
56. Whilst it is not necessary in most circumstances, one method of distinguishing between alternative repayment options is to apply a net present value calculation. The calculation looks at the time value of money and the probability of payment (risk) when considering how much tax debt the taxpayer is able to pay and the length of time required to repay the tax debt.²

57. The legislation imposes no time limit on when an instalment arrangement must be completed. However, Inland Revenue considers that instalment arrangements should be for as short a period of time as possible. This is because the longer the term of the instalment arrangement, the greater the risk of non-payment. Also the taxpayer pays less use-of-money-interest when an instalment arrangement is for a shorter time.
58. The Commissioner will also consider whether the proposed instalment arrangement would lead to a monetary return to Inland Revenue greater than any amount likely to be received if legal proceedings were initiated. In situations where taxpayers have a poor compliance history and/or more debt can be collected from a bankruptcy or liquidation, legal proceedings will be a consideration.

Whether the taxpayer is in a position to pay all of the tax debt immediately

59. The Commissioner will not enter into an instalment arrangement where it is apparent the taxpayer is able to pay the outstanding tax immediately. A decision on this factor will be based on the financial information provided by the taxpayer and any further enquiries the Commissioner considers necessary.

Whether the taxpayer is being frivolous or vexatious

60. This includes situations the Commissioner may decline to enter into an instalment arrangement, where:
- Inland Revenue considers the taxpayer is not seriously contemplating entering into and/or complying with an instalment arrangement; or
 - previous requests for instalment arrangements have been declined and the taxpayer provides the same information when requesting a further instalment arrangement.

Whether the taxpayer has met their obligations under a previous instalment arrangement

61. Where a taxpayer has previously entered into an instalment arrangement and has not met their obligations under that instalment arrangement, the Commissioner may decline to enter into a further instalment arrangement.
62. In reaching this decision, Inland Revenue will also take into account:
- the length of time since the previous instalment arrangement;
 - whether the previous instalment arrangement was realistic;

² The methodologies for determining the discount rate, probability of payment and net present value are outlined in the appendix to *Tax Information Bulletin* Vol 6, No 14 (June 1995), Appendix, Addendum C.

- any changes in the taxpayer's position over that time;
- whether there are any other factors likely to indicate that the taxpayer is more likely to meet their obligations if an instalment arrangement is agreed to this time.

63. See paragraphs 114 to 116 for further discussion on default on instalment arrangements.

Whether the taxpayer's proposal is realistic

64. A decision on this factor will be made based upon the financial information provided by the taxpayer and any further information the Commissioner considers necessary. The Commissioner will consider whether the taxpayer can reasonably afford to repay the outstanding tax debt at the rate detailed in the taxpayer's application.

65. The Commissioner must, under section 6(1), have regard to protecting the integrity of the tax system and will be conscious of the possibility of taxpayers re-ordering their tax affairs by reducing personal assets or deliberately concealing assets overseas, or by some other method to prevent recovery of tax debt and to achieve a settlement with the Commissioner. For example, access to investment funds, beneficial interests, shareholder current accounts or trusts.

Whether the taxpayer is likely to comply with their current/future tax obligations

66. An important feature of acceptance of any instalment arrangement by the Commissioner is that the taxpayer will still be able to meet their current and future tax obligations. The Commissioner is unlikely to agree to an instalment arrangement that would mean the taxpayer would incur further tax debts with Inland Revenue. For example, if a taxpayer is continuing in business, whether the instalment arrangement would allow the taxpayer to meet their ongoing income tax, and GST obligations as they arise?

Whether the taxpayer has filed all required returns

67. In order to ascertain the taxpayer's full tax debt Inland Revenue will require any outstanding returns to be filed. This will occur if the outstanding tax debt relates to assessments made by the Commissioner in the absence of returns having been filed or when a taxpayer requests an instalment arrangement but the related returns have not been filed and no assessment has been made to enable the tax debt to be quantified.

Other relevant factors that the Commissioner may consider appropriate in considering an application for an instalment arrangement

68. In *Clarke & Money v Commissioner of Inland Revenue*³ it was considered the following factors are relevant to the exercise of the discretion under section 177:

- the circumstances which led to the taxpayer's tax debts;
- the nature and extent of the taxpayer's cooperation and negotiating stance;
- the speed with which the taxpayer has provided requested information, and the extent of that information; and
- the taxpayer's degree of compliance in providing information.

69. In *Raynel v Commissioner of Inland Revenue*⁴, it was noted that where there has been a flagrant and ongoing failure to comply with the taxpayer's obligations and where recovery is dubious or is likely to result only in a relatively minor proportion of the overall debt being recovered, the Commissioner may be justified in initiating or continuing enforcement proceedings to secure the wider interests identified by the legislation.

70. In *Rogerson v Commissioner of Inland Revenue*⁵, it was also considered the taxpayer's compliance history was a factor relevant to the Commissioner's exercise of the discretion to grant financial relief.

Cancellation of an instalment arrangement

71. Under section 177B(6), the Commissioner may cancel an instalment arrangement where:

- the instalment arrangement was entered into on the basis of false or misleading information provided by the taxpayer.
For example, where a taxpayer has deliberately overstated outgoings or understated income; or where a taxpayer has omitted certain relevant information, for example, a vested right to income or assets of a trust, and this was not disclosed to the Commissioner.
- the taxpayer is not meeting their obligations under the instalment arrangement.

72. If an instalment arrangement is cancelled because false or misleading information was provided, any late payment penalties not imposed under the instalment arrangement will be reinstated in full.

³ In *Clarke & Money v Commissioner of Inland Revenue* (2005) 22 NZTC 19,165

⁴ *Raynel v CIR* (2004) 21 NZTC 18,583

⁵ *Rogerson v Commissioner of Inland Revenue* (2005) 22 NZTC 19,260

73. If an instalment arrangement is cancelled due to the terms not being met, incremental late payment penalties will be imposed (on a monthly basis) from the date the taxpayer ceased to meet their repayment obligations. Late payment penalties not charged while the instalment arrangement was being complied with will not be reinstated.

Payments

74. Inland Revenue will negotiate with the taxpayer to determine the frequency and method of payment. These will be set taking into account both the taxpayer's financial circumstances and a rate which maximises the recovery of the tax debt from the taxpayer.
75. Instalment amounts may be set to reflect a taxpayer's cashflow and do not need to be equal amounts. An instalment arrangement can include a lump sum payment to settle tax debt at an agreed future date.
76. There is no set time frame for an instalment arrangement other than to collect the tax debt as soon as possible with regard to a taxpayer's financial circumstances.
77. Inland Revenue will apply credits that subsequently arise in a taxpayer's account to the tax debt under an instalment arrangement unless the taxpayer, requests to have the amount paid to them.
78. A taxpayer may start making voluntary payments at any time, without contacting the Commissioner to request an instalment arrangement. However, in these situations the taxpayer will not be eligible for any relief from late payment penalties.
79. If after commencing voluntary payments, the taxpayer subsequently contacts Inland Revenue to request an instalment arrangement, if the request is granted, the non-imposition of penalties will apply from the date the taxpayer contacted Inland Revenue requesting an instalment arrangement.

Reviewing instalment arrangements

80. A taxpayer may renegotiate an instalment arrangement at any time.
81. The Commissioner may only initiate renegotiation of an instalment arrangement after the end of two years from the date on which the instalment arrangement was entered into.
82. Where the Commissioner does initiate a review, the process will consider whether the instalment arrangement is still appropriate to the taxpayer's financial circumstances and may therefore require updated financial information from the taxpayer.

83. The date the instalment arrangement is entered into is the date the instalment arrangement is accepted by the Commissioner or the taxpayer accepted a counter offer from the Commissioner. The details of an instalment arrangement will be confirmed by the Commissioner, including any conditions attached. For example, compliance with current and future tax obligations.
84. Should a taxpayer default with their instalment arrangement, the Commissioner will look to salvage the instalment arrangement whenever possible, provided the taxpayer is making a genuine effort to pay their debt.

Imposition of late payment penalties

85. Late payment penalties imposed under section 139B comprise initial late payment penalties and incremental late payment penalties.
86. The initial late payment penalty is a two-step penalty being:
 - An initial late payment penalty of 1% imposed on the day after the tax is due; and
 - A second initial late payment penalty of 4% imposed seven days after the due date, if the tax debt remains outstanding.
87. An incremental late payment penalty of 1% is imposed on the balance of tax debt each month.
88. Late payment penalties will be imposed by law on tax not paid by the due date. Taxpayers who may have difficulty meeting their obligations should talk to Inland Revenue as early as possible to discuss payment options. This will minimise the imposition of penalties.
89. Relief from late payment penalties does not apply until the outstanding tax for which an instalment arrangement is requested, can be substantiated as a result of a return being filed by a taxpayer or an assessment raised by the Commissioner (as required by law).
90. No incremental late payment penalties are charged once the Commissioner has entered into an instalment arrangement provided the repayment obligations under the instalment arrangement are met.
91. The agreed instalment arrangement amount is the minimum amount that is payable. Extra payments are not used as credits towards future monthly obligations. Instead they are applied to reduce the term of the instalment arrangement and the amount of interest payable.
92. If a taxpayer misses an instalment they face late payment penalties on the entire amount of the debt that remains unpaid—not just the amount of the missed instalment.

93. If taxpayers consider they may not be able to maintain an instalment arrangement due to changed circumstances or unexpected living/business expenses, they should contact Inland Revenue to renegotiate that instalment arrangement. This may prevent penalties being imposed should the taxpayer default on the instalment arrangement.
94. If the Commissioner declines the request for an instalment arrangement, the late payment penalties will be imposed as if the taxpayer had not made the request.

Pre-emptive instalment arrangements

95. For the purpose of this SPS, pre-emptive instalment arrangements are situations where taxpayers seek instalment arrangements before the tax is due.
96. Where the taxpayer contacts the Commissioner seeking an instalment arrangement before the tax is due, the 1% initial late payment penalty must be imposed once the due date for payment of the tax has passed⁶. However, the following 4% initial late payment penalty will not be imposed when negotiation is underway or an instalment arrangement is entered into.

Instalment arrangements for payment of tax where returns are not filed

97. The Commissioner is unlikely to agree to an instalment arrangement in respect of anticipated outstanding tax where the related returns have not been filed and no assessment has been made.
98. Until outstanding taxes are quantified or an assessment is made, a taxpayer requesting an instalment arrangement may make voluntary payments towards their estimated tax liability.
99. Negotiations for an instalment arrangement can only start once a taxpayer is able to quantify their outstanding tax, or where the Commissioner is able to issue an income statement (for example, Working for Families tax credit overpayments) or appropriate assessment.
100. Where a taxpayer's returns are completed but not filed, the Commissioner cannot initiate the negotiation period or suppress penalties until the relevant returns are received by Inland Revenue or an assessment has been made, to quantify the outstanding tax for which an instalment arrangement is requested.

Provisional tax

101. Provisional tax payments are payments made in anticipation of a tax liability for the current year. Provisional tax is generally calculated based on a taxpayer's income tax liability from the previous year, although their actual liability is assessed when returns are filed after the year end.
102. Inland Revenue acknowledges some taxpayers will have cash flow difficulties and there are options available to assist them to spread payments or adjust their liability as appropriate to their changed circumstances.
103. The provisional tax rules allow taxpayers to base their provisional tax payments on a percentage of their GST taxable supplies. Taxpayers may elect to align provisional tax payments with their cash flow and also reduce their exposure to use-of-money interest. Taxpayers with cash-flow problems will be encouraged to consider this method of payment should they have a problem with making standard payments for provisional tax.
104. Taxpayers who have experienced a downturn in business sales, may choose to re-estimate their provisional tax liability to better reflect their likely tax liability for the current year. Care is required when making a re-estimation to ensure that it is fair and reasonable. Taxpayers may be liable to penalties and/or interest if they don't take reasonable care when they estimate their provisional tax.
105. Taxpayers may also make voluntary payments towards their provisional tax liability. Once their return is filed for the income year to establish what residual income tax is payable, they can then request an instalment arrangement should there be further tax to pay. A shortfall in voluntary payments and a taxpayer's provisional tax liability may also incur late payment penalties and interest charges.
106. When taxpayers request a pre-emptive instalment arrangement for the payment of provisional tax instalments, the Commissioner will advise them to consider all options available. It is not appropriate for the Commissioner to introduce a hybrid method of payment via accepting instalment arrangements for provisional tax, which are by nature instalments against a current year tax liability that is not yet assessed.

⁶ Penalty must be imposed under section 139BA

Instalment arrangements entered into after tax is due for payment

107. Where the taxpayer contacts the Commissioner to request an instalment arrangement after the due date for payment, late payment penalties will be imposed up to the date of the taxpayer's request.
108. If all tax obligations under the instalment arrangement are fulfilled, these instalment arrangements will not incur any further late payment penalties following the taxpayer's request.

Instalment arrangements for taxes collected by third parties

109. People who collect taxes on behalf of the Crown (for example, employers deducting tax from wages and GST-registered persons charging GST) have an obligation to pay these taxes to the Commissioner, in full and on time. The implications of not doing so are serious and can be viewed as misappropriation of Crown funds.
110. Anyone in these categories who anticipates problems with payment of the monies collected on behalf of the Crown should contact Inland Revenue as early as possible.
111. The Commissioner will consider the reasons for payment not being made on time and may accept an instalment arrangement for their tax debt where genuine cash flow problems exist.
112. Instalment arrangements will be considered only where the tax debt can be quantified and there is no serious risk to the Crown if recovery action is deferred.
113. An employer may be liable to pay a 10% monthly shortfall penalty, in addition to late payment penalties, when they don't pay the amount calculated on their employer monthly schedule by the due date. When they pay the amount outstanding or enter into an instalment arrangement, the last 10% monthly shortfall penalty imposed will reduce to 5%, and no further shortfall penalty is imposed while an instalment arrangement is being complied with. If an employer defaults on an instalment arrangement, they will be liable to a 10% monthly shortfall penalty from the month they cease to comply with the instalment arrangement.

Default with instalments may not undo an instalment arrangement

114. A taxpayer's circumstances can change for reasons outside their control, for example, an unforeseen household expense or default by debtors can erode their cash flow and ability to maintain an instalment arrangement.

115. In these circumstances taxpayers should contact the Commissioner promptly to discuss an adjustment to their instalment arrangements. So long as the Commissioner is satisfied a taxpayer is making their best effort to meet their tax obligations, further discussion will be encouraged to review options to recover debt.
116. If a taxpayer is not cooperative, the Commissioner may cancel an instalment arrangement and pursue other remedies available to collect the tax debt.

Standard practice

117. Taxpayers should contact the Commissioner at the earliest opportunity if they think they will have trouble paying their tax by the due date. Options for payment can be discussed which may include an instalment arrangement if they are unable to pay their tax in full.
118. Upon receipt of a taxpayer's application for an instalment arrangement, the Commissioner has four options:
 - (a) Accept the taxpayer's request; or
 - (b) Seek further information from the taxpayer; or
 - (c) Make a counter offer; or
 - (d) Decline the request.
119. The Commissioner will take into account the following factors when considering a taxpayer's application for an instalment arrangement:
 - (a) Whether the tax payable can be quantified;
 - (b) Whether the proposal will place the taxpayer, being a natural person, in serious hardship, or cause financial difficulties for other taxpayer entities;
 - (c) Whether the instalment arrangement would maximise the recovery of tax debt from the taxpayer;
 - (d) Whether the taxpayer is in a position to pay all of the tax debt immediately;
 - (e) Whether the taxpayer is being frivolous or vexatious;
 - (f) Whether the taxpayer has met their obligations under a previous instalment arrangement;
 - (g) Whether the taxpayer's proposal is realistic;
 - (h) Whether the taxpayer is likely to comply with their current/future tax obligations;
 - (i) Whether the taxpayer has filed all relevant returns for the period of the instalment arrangement requested; and
 - (j) Other relevant factors that the Commissioner may consider appropriate.

120. When considering a taxpayer's application for an instalment arrangement, if the Commissioner requires further information, the taxpayer has 20 working days (or a longer period where allowed by the Commissioner) to provide the information requested.
121. The taxpayer must provide the information requested within the required timeframe, or request further time from the Commissioner, to preserve the application for an instalment arrangement. Failure to provide the information requested is likely to result in the expiry of the negotiation period and lapse of the application. This means that the initial late payment penalty and the monthly incremental late payment penalty will be imposed on their tax debt.
122. When the Commissioner accepts an instalment arrangement or, the taxpayer accepts a counter offer, the confirmation will include the terms and set out both the taxpayer's and the Commissioner's obligations under the instalment arrangement. Confirmation may be made by telephone or electronic means consistent with the method used by the taxpayer for their application. For a complex instalment arrangement the Commissioner is likely to set out the details of the instalment arrangement in writing.
123. Where the taxpayer applies for an instalment arrangement before the tax is due for payment and the Commissioner accepts the application, the initial late payment penalty of 1% will be imposed on the tax debt.
124. Regardless of the Commissioner accepting an instalment arrangement, use-of-money interest will accrue daily on the tax debt while it remains unpaid.
125. Where the taxpayer applies for an instalment arrangement after the tax is due and the Commissioner accepts the application, the initial late payment penalty of 1% and if applicable the initial 4% will be imposed on the tax debt. In addition, any incremental late payment penalties imposed up to the date of the taxpayer's request are also payable. Use-of-money interest will also accrue daily on the tax debt that remains unpaid.
126. The taxpayer may renegotiate an instalment arrangement at any time. The Commissioner may do so only after the end of two years from the date on which the instalment arrangement was entered into.
127. The Commissioner may cancel an instalment arrangement if it was entered into on the basis of false or misleading information. In these cases, the late payment penalties will be imposed as if the instalment arrangement had not been entered into.
128. Default on payment of an instalment may not undo an overall instalment arrangement. When the Commissioner is satisfied a taxpayer is making their best effort to meet their obligations, the terms of an instalment arrangement may be varied for recovery of the tax debt.

This Standard Practice Statement is signed on 16 February 2011.

Rob Wells
LTS Manager, Technical Standards

SPS 11/02: CHILD SUPPORT DEBT – REQUESTING AN INSTALMENT ARRANGEMENT

Introduction

1. This Standard Practice Statement (SPS) sets out Inland Revenue's practice for providing relief when the immediate payment of an overdue child support obligation is not possible. The relief is provided in the form of an instalment arrangement to pay the debt. However, taxpayers who have a tax debt or Student Loan repayment arrears should refer to SPS 11/01 (*Instalment arrangements for payment of tax*) or SPS 11/03 (*Student Loans – Relief from repayment obligations*).
2. For the purpose of this SPS, the term "instalment arrangement" has been used instead of "payment agreement" which is used in the Child Support Act 1991 ("CSA").
3. A debt owing by a custodian will be collected by the Commissioner in the same manner as if it was financial support owing by a liable person. Reference to "liable person" may include a custodian for the purpose of this SPS.
4. Unless specified otherwise, all legislative references in this SPS refer to the CSA.

Application

5. This SPS applies to the Commissioner's discretion to provide relief when giving consideration to:
 - requests for instalment arrangements to settle child support debt; and
 - write-off of incremental penalty debt when the instalment arrangements are adhered to.

Summary

6. The CSA provides limited discretion where a liable person is unable to pay their child support debt in full and on time. The Commissioner may:
 - agree to an instalment arrangement to pay child support debt; and
 - write-off incremental penalties when instalment arrangements are adhered to.
7. As a result, the Commissioner will look at the circumstances of a case and may agree to an instalment arrangement to pay child support debt.

Legislation

8. The relevant legislative provisions of the CSA:

135G Discretionary relief for residual incremental penalty debt

 - (1) The Commissioner may grant relief to a liable person from the payment of incremental penalties in the manner prescribed by section 135A if—
 - (a) the liable person has paid all of the financial support debt and initial late payment penalties to which the incremental penalties relate; and
 - (b) the Commissioner is satisfied that recovery of the incremental penalties—
 - (i) would involve an inefficient use of the Commissioner's resources; or
 - (ii) would place the liable person in serious hardship.
 - (2) Before making a decision under subsection (1)(b), the Commissioner must have regard to the matters referred to in sections 6 and 6A of the Tax Administration Act 1994.
 - (3) In this section,—

serious hardship, in relation to a liable person,—

 - (a) includes significant financial difficulties that arise because of—
 - (i) the liable person's inability to meet minimum living expenses according to normal community standards; or
 - (ii) the cost of medical treatment for an illness or injury of the liable person or the liable person's dependant; or
 - (iii) a serious illness suffered by the liable person or the liable person's dependant; or
 - (iv) the cost of education for the liable person's dependant;
 - (b) does not include significant financial difficulties that arise because—
 - (i) the liable person is obligated to pay tax or financial support; or
 - (ii) the liable person may become bankrupt; or
 - (iii) the liable person's, or the liable person's dependant's, social activities and entertainment may be limited; or
 - (iv) the liable person is unable to afford goods or services that are expensive or of a high quality or standard according to normal community standards.

135H Relief from initial late payment penalty if payment arrangement

- (1) The Commissioner must write off an initial late payment penalty in relation to a financial support debt if the Commissioner is satisfied that—
 - (a) the initial late payment penalty relates to the first payment of financial support payable by the liable person; and
 - (b) within the 3-month period beginning on the date that the Commissioner issues the assessment under which the first payment is payable, either—
 - (i) the liable person enters into a payment agreement with the Commissioner to pay, in 2 or more instalments,—
 - (A) the first payment; and
 - (B) other payments of financial support that are or will become payable by the liable person; or
 - (ii) the Commissioner gives a person a deduction notice under section 154 in relation to the liable person for the purpose of collecting, in 2 or more deductions and payments,—
 - (A) the first payment; and
 - (B) other payments of financial support that are or will become payable by the liable person; and
 - (c) either,—
 - (i) in the case of paragraph (b)(i), every one of those instalments is paid in full in accordance with that payment agreement; or
 - (ii) in the case of paragraph (b)(ii), every one of those deductions and payments is made in accordance with that notice.
- (2) If an initial late payment penalty is written off under this section, and that penalty has been paid in whole or in part, the Commissioner must refund to the liable person the whole or part of the initial late payment penalty that has been paid.
- (3) For the purposes of this section, **first payment** means the first amount of financial support that is required to be paid by a liable person under an assessment made by the Commissioner under section 24(1)(a).

135J Relief from incremental penalties unpaid before agreement entered into

- (1) For the purposes of this section,—

initial debt, in relation to a payment agreement, means the amount the liable person owes at the time that the agreement is entered into in respect of financial support and related initial late payment penalties

payment agreement means an agreement entered into after the commencement of this section between a liable person and the Commissioner that requires the liable person to pay, in 1 sum or 2 or more instalments of specified amounts,—

- (a) the amount of the initial debt; and
- (b) the amount of financial support (if any) that the person will become liable to pay during the term of the payment agreement

review date means—

- (a) the day that is 26 weeks after the date that the liable person enters into the payment agreement; and
 - (b) each of the days on which there expire periods of 26 weeks that consecutively succeed the first period of 26 weeks described in paragraph (a); and
 - (c) the day on which the payment agreement expires.
- (2) If a liable person has entered into a payment agreement, and the person has complied with the payment agreement up until a particular review date in accordance with subsection (3), the Commissioner must, on that review date,—
 - (a) review the incremental penalties in relation to the initial debt of the liable person that were unpaid at the time the payment agreement was entered into; and
 - (b) write off those penalties proportionally in accordance with subsection (4).
 - (3) For the purposes of subsection (2), a person has complied with the payment agreement up until a particular review date if—
 - (a) the person has paid every instalment in full that has fallen due in accordance with the agreement; or
 - (b) in the case of an agreement to pay 1 sum only, the person has paid that sum in accordance with the agreement.
 - (4) For the purposes of subsection (2), the proportion of incremental penalties that must be written off must be calculated in accordance with the following formula:

$$r = \frac{(a \times c)}{b} - d$$

where—

- r is the amount of incremental penalty that is to be written off
- a is the total amount of the initial debt that has been paid since the payment agreement was entered into
- b is the initial debt

- c is the total amount of incremental penalties related to the initial debt of the liable person that were unpaid at the time that the payment agreement was entered into
 - d is the total amount of incremental penalties related to the initial debt of the liable person that have already been written off in accordance with this section since the payment agreement was entered into.
- (5) If an incremental penalty that is written off under this section has been paid in whole or in part, the Commissioner must refund to the liable person the whole or part of the incremental penalty that has been paid.

135K Relief from incremental penalties in relation to arrangements entered into or made before commencement

- (1) For the purposes of this section,—

initial debt means the amount the liable person owes at the commencement of this section in respect of financial support and related initial late payment penalties

payment agreement means an agreement entered into before the commencement of this section between a liable person and the Commissioner that—

- (a) requires the liable person to pay, in 1 sum or 2 or more instalments of specified amounts,—
 - (i) the amount of the initial debt; and
 - (ii) the amount of financial support (if any) that the person will become liable to pay during the term of the payment agreement; and
- (b) is still in force immediately before this section comes into force

review date means—

- (a) the day that is 26 weeks after the commencement of this section; and
- (b) each of the days on which there expire periods of 26 weeks that consecutively succeed the first period of 26 weeks described in paragraph (a); and
- (c) in relation to—
 - (i) a payment agreement, the day on which the payment agreement expires; and
 - (ii) a specified deduction notice, the day on which the deduction notice is revoked

specified deduction notice means a deduction notice given by the Commissioner under section 154 in relation to a liable person before the commencement of this section—

- (a) for the purpose of collecting, in 1 sum or 2 or more deductions and payments,—
 - (i) the amount of the initial debt; and

- (ii) the amount of financial support (if any) that the liable person will become liable to pay during the period in which the deduction notice is in force; and

- (b) that is still in force immediately before this section comes into force.
- (2) If a liable person has entered into a payment agreement, and the person has complied with the payment agreement up until a particular review date in accordance with subsection (3), the Commissioner must, on that review date,—
- (a) review the incremental penalties in relation to the initial debt of the liable person that were unpaid at the commencement of this section; and
 - (b) write off those penalties proportionally in accordance with subsection (6).
- (3) For the purposes of subsection (2), a person has complied with the payment agreement up until a particular review date if—
- (a) the person has paid every instalment in full that has fallen due in accordance with the agreement; or
 - (b) in the case of an agreement to pay 1 sum only, the person has paid that sum in accordance with that agreement.
- (4) If a specified deduction notice has been given to a person in relation to a liable person, and the person to whom that notice is given has complied with that notice up until a particular review date in accordance with subsection (5), the Commissioner must, on that review date,—
- (a) review the incremental penalties in relation to the initial debt of the liable person that were unpaid at the commencement of this section; and
 - (b) write off those penalties proportionally in accordance with subsection (6).
- (5) For the purposes of subsection (4), a person has complied with a specified deduction notice up until a particular review date if all of the deductions and payments required to be made under the specified deduction notice by that date have been made in accordance with that notice.
- (6) For the purposes of subsections (2) and (4), the proportion of incremental penalties that must be written off must be calculated in accordance with the following formula:

$$r = \frac{(a \times c)}{b} - d$$

where—

- r is the amount of incremental penalty that is to be written off

- a is the total amount of the initial debt that has been paid since the commencement of this section
 - b is the initial debt
 - c is the total amount of incremental penalties in relation to the initial debt of the liable person that were unpaid at the commencement of this section
 - d is the total amount of incremental penalties related to the initial debt of the liable person that have already been written off in accordance with this section.
- (7) If an incremental penalty that is written off under this section has been paid in whole or in part, the Commissioner must refund to the liable person the whole or part of the incremental penalty that has been paid.

135L Writing-off of incremental penalties if non-compliance with arrangement

- (1) Subsection (2) applies if,—
- (a) at the time of a review date in relation to a payment agreement under section 135J or 135K, the liable person has failed to pay any amount in accordance with the agreement; and
 - (b) the Commissioner is satisfied, in respect of each failure to make a payment in accordance with the payment agreement, that the circumstances in relation to the failure would, if they were related to the payment of a debt to which a penalty relates, entitle the Commissioner to grant relief under any of the provisions of sections 135B to 135E.
- (2) The Commissioner may disregard a failure to make a payment for the purpose of applying section 135J or 135K as the case may be.
- (3) Subsection (4) applies if,—
- (a) at the time of a review date in relation to a specified deduction notice under section 135K, there has been a failure to make any deduction and payment in accordance with the specified deduction notice; and
 - (b) the Commissioner is satisfied, in respect of each failure to make a deduction and payment in accordance with the specified deduction notice, that the circumstances in relation to the failure would, if they were related to the payment of a debt to which a penalty relates, entitle the Commissioner to grant relief under section 135B, 135C, or 135E.
- (4) The Commissioner may disregard a failure to make a deduction and payment for the purpose of applying section 135K.

135M Relief from ongoing incremental penalties if payment agreement in force

- (1) This section applies if—
- (a) a person becomes liable for the payment of any incremental penalty; and
 - (b) at the time liability for the incremental penalty arises, the financial support or the initial late payment penalty or the incremental penalty in relation to which the person becomes so liable is financial support or initial late payment penalty or incremental penalty that is payable in 1 sum, or in 2 or more instalments, in accordance with a payment agreement entered into between the person and the Commissioner; and
 - (c) that sum or, as the case may be, every one of those instalments is paid in full in accordance with that payment agreement.
- (2) The Commissioner must grant relief to the liable person—
- (a) by writing off the incremental penalty referred to in subsection (1)(a); or
 - (b) if that incremental penalty has been paid, in whole or in part, by refunding to that person the whole or the part of that incremental penalty that has been paid, with or without writing off any part of that incremental penalty that has not been paid.

151 Overpayments to payees

- (1) Where a payee is paid an amount under any provision of this Part of this Act and—
- (a) the payee was not entitled to be paid the amount; or
 - (b) the amount is, because of a subsequent variation in the liability of the liable person, repayable by the Commissioner to the liable person; or
 - (c) the amount is, because of a subsequent variation in the entitlement of the payee, in excess of the amount properly payable to the payee under this Act,—
- the amount is repayable by the payee to the Commissioner and is a debt due by the payee to the Crown.
- (2) The Commissioner shall, as soon as practicable, assess the amount that is so repayable, and the provisions of this Act shall apply to the amount assessed and to the payee as if that amount was financial support and the payee was a liable person.
- (3) Where, in any case to which subsection (1) of this section applies, the payee is entitled to receive further payments under any provision of this Part of this Act, the amount of the debt due to the Crown by the payee may be recovered by reducing such of those payments by such amount as is determined in writing by the Commissioner.

152 Relief in cases of serious hardship

In any case where—

- (a) a person is required under section 151 of this Act to repay any amount of financial support (including any penalty imposed thereon under this Act) to the Commissioner and the amount is unable to be recovered, either in whole or in part, in the manner prescribed in section 151(3) of this Act; and
- (b) it is shown to the satisfaction of the Commissioner—
 - (i) that the person has suffered such loss or is in such circumstances that the repayment of the amount or part thereof that is unable to be so recovered has entailed or would entail serious hardship; or
 - (ii) that, owing to the death of the person, the dependents of that person are in such circumstances that the repayment of the full amount has entailed or would entail serious hardship,—

the Commissioner may write-off the debt, wholly or in part, and may make such alterations in the assessment as are necessary for that purpose; and may, if the amount unable to be recovered in the manner prescribed in section 151(3) of this Act or any part thereof has been already paid, refund any amount paid in excess of the amount of the assessment as so altered under this section.

Discussion

9. A liable person should contact Inland Revenue at the earliest opportunity if they think they are likely to be unable to pay their child support obligations on time and in full so that options for payment, which may include an instalment arrangement, can be discussed. The Commissioner will consider a request for an instalment arrangement on a case-by-case basis.
10. Early contact may also minimise penalties where an instalment arrangement can be entered into.
11. Applications may be made by telephone, in writing or by electronic means.

Available options for relief

12. The Commissioner may, when satisfied that immediate payment of child support debt is not possible, grant relief to a liable person through the following options:
 - agree to an instalment arrangement;
 - write-off incremental penalties—provided that the instalment arrangement is adhered to.

When will relief be provided?

13. Requests for instalment arrangements will largely rely on the liable person being able to show that they are not able to make immediate payment of their child support debt.
14. The Commissioner will consider all options available for payment and will look to maximise recovery of child support debt (that is, payment of the debt in the shortest possible time) while ensuring the liable person maintains their current child support obligations.

Instalment arrangements

15. An instalment arrangement may consist of one or more payments to settle a child support debt. It may also include any current year child support obligation payable during the term of the instalment arrangement. This is to ensure that the liable person meets their current child support obligations.
16. When an instalment arrangement includes current year child support obligations, it must provide for the minimum annual rate of child support payable for a current year, plus a reasonable amount toward reducing the outstanding debt.
17. Consequently, an instalment arrangement must be for more than the minimum annual amount of child support payable.

Information to support application

18. A decision will be made based on the circumstances of each individual case, with the aim of recovering the child support debt in the shortest possible period. The Commissioner will also consider whether the liable person can reasonably afford to repay their child support debt at the rate detailed in their instalment arrangement application.
19. Information to support a request for an instalment arrangement may be provided by the liable person with their application. Alternatively they may be asked to complete a *Child support – repayment of arrears (IR 130)* form. The information provided will assist the Commissioner when considering the application, including whether other options are available to the liable person to settle their child support debt. The IR 130 form is available on our website at www.ird.govt.nz/forms-guides

Default with instalments may not undo an instalment arrangement

20. It is acknowledged that a liable person's circumstances can change for reasons outside their control. For example, an unforeseen household expense or default by debtors can erode their cash flow and their ability to maintain an instalment arrangement.
21. In these circumstances the liable person should contact Inland Revenue promptly to discuss an adjustment to their instalment arrangement. If the Commissioner is satisfied that the liable person is unable to continue to meet their instalment obligation other options to recover the debt will be considered.
22. If a liable person does not comply with the terms of an instalment arrangement, the Commissioner may cancel the instalment arrangement and pursue other remedies to collect the debt. However, before doing so, the reasons for the default will be considered and the Commissioner will take into account the liable person's overall compliance behaviour including:
 - regularity of payments
 - current financial circumstances
 - the circumstances under which the payments were missed.

Write-off of penalty

23. If child support obligations are not paid in full and on time, an initial 10% late payment penalty will be charged on the unpaid amount and a further 2% incremental penalty will be added each month the debt remains unpaid.
24. When a liable person enters into an instalment arrangement to clear their child support debt (which may include current child support payment obligations), the Commissioner will write-off appropriate incremental penalties when the liable person has completed the agreed payments.
25. Instalment arrangements are reviewed every 26 weeks (from the date of commencement) to confirm that the liable person has made the agreed payments. Where that instalment arrangement has been complied with, a proportion of the incremental penalties relative to the overall debt (under the instalment arrangement) paid during that period will be written-off.
26. Where an instalment arrangement has not been complied with and the Commissioner is satisfied that the default was caused by circumstances beyond the control of the liable person the failure to meet their obligations may be disregarded and the incremental penalties may still be remitted.

27. If the liable person does not comply with their repayment obligations and does not contact Inland Revenue to discuss options it is likely that the instalment arrangement will be cancelled. Should an instalment arrangement be cancelled, incremental penalties will accrue on any unpaid child support debt.
28. After the instalment arrangement has been completed, so that all of the financial support debt and initial late payment penalties have been paid, some incremental penalties may still remain. Further relief may be granted in respect of those further penalties. For that further relief to be granted, the Commissioner must be satisfied that:
 - payment of the remaining incremental penalties would cause serious hardship to the liable person; or
 - recovery of the penalties would involve an inefficient use of the Commissioner's resource when considering the circumstances of each individual case.

Standard practice

29. A liable person should contact the Inland Revenue at the earliest opportunity if they are not going to be able to pay their child support obligations on time and in full. This is to discuss options for payment which may include an instalment arrangement.
30. Although it is best to contact Inland Revenue before a person gets behind with child support payments, it is never too late to make contact to discuss the options available to resolve child support debt and minimise exposure to related penalties.
31. Requests for an instalment arrangement may be made in writing, by telephone, or any other manner acceptable to the Commissioner. For example, the Inland Revenue website's online services.
32. Requests will be considered on a case-by-case basis. A liable person will need to be able to show why they will not be able to make immediate payments towards their child support obligation. They may be asked to supply further information about their financial circumstances in support of their application.
33. When the Commissioner is satisfied that a liable person is not able to make immediate payment an instalment arrangement may be agreed to.
34. Instalment arrangements that include current year child support obligations must include the minimum annual rate of child support payable for a current year, plus a reasonable amount toward reducing the child support debt. Consequently, any instalment arrangement must be for more than the minimum annual amount of child support payable.

35. An instalment arrangement will be structured so that the child support debt will be paid in the shortest possible time.
36. When the Commissioner agrees to an instalment arrangement, the terms will be confirmed in writing. That confirmation will set out both the liable person's and the Commissioner's obligations under the instalment arrangement. Confirmation may be made by electronic means if that was the method used by the liable person when making their request.
37. Liable persons who enter into an instalment arrangement must inform the Commissioner as soon as practicable if there is a change in their circumstances that may impact on an earlier decision to provide financial relief, or their ability to repay their child support debt.
38. The Commissioner will review instalment arrangements every 26 weeks (from the date of commencement) to confirm that the liable person has made the agreed payments. So long as the agreement has been complied with, incremental penalties relative to the debt paid during that period will be written-off.
39. Default on payment of an instalment may not undo the overall instalment arrangement. When the Commissioner is satisfied that a liable person is unable to pay their child support debt under an instalment arrangement, the terms of the instalment arrangement may be varied following discussion with the liable person.
40. However, when an instalment arrangement is cancelled because a liable person does not comply with their repayment obligations, the Commissioner will consider whether other options may be available to collect the child support debt. Penalties will accrue on any unpaid amount.

This Standard Practice Statement is signed on 16 February 2011.

Rob Wells

LTS Manager, Technical Standards

SPS 11/03: STUDENT LOANS – RELIEF FROM REPAYMENT OBLIGATIONS

Introduction

1. This Standard Practice Statement (SPS) sets out Inland Revenue's practice for providing relief from payment of student loan repayment obligations. However, where a student loan borrower has a tax debt or a child support debt, they should refer to SPS 11/01 (*Instalment arrangements for payment of tax*) or SPS 11/02 (*Child Support Debt – Requesting an instalment arrangement*).
2. Unless specified otherwise, all legislative references in this SPS refer to the Student Loan Scheme Act 1992 ("SLSA").

Application

3. This SPS applies to applications for relief from payment of:
 - overdue student loan repayment obligations;
 - student loan repayment obligations not yet due;
 - student loan repayment deductions for the current tax year;
 - penalties imposed on overdue student loan repayment obligations.

Summary

4. The SLSA provides very limited discretion for hardship relief where serious or significant financial hardship is experienced by a student loan borrower although the SLSA provides for hardship relief if there are special reasons which would make it fair and reasonable to grant that relief.
5. Those forms of relief are generally referred to in this SPS as hardship relief. The Commissioner may:
 - refrain from issuing a notice of assessment or collecting and write off any student loan repayment obligation payable by the borrower if the amount in any tax year is \$20 or less;
 - refrain from the collection of any student loan repayment obligation payable by the borrower if the due date for payment has passed and the amount is more than \$20 but less than \$334 (excluding penalties). The amount not collected will be added back to the loan balance.
 - reduce any amount that must be deducted or paid by a borrower, for example, issue a special repayment deduction rate certificate (formerly "Special Tax Code") to vary a deduction for the current or next year in order to change a borrower's student loan repayment obligation. The amount not collected as

a consequence of a reduction will be added back to the loan balance.

- reduce a repayment obligation for the previous tax year. The amount not collected as a consequence of a reduction will be added back to the loan balance.
 - refund any amount that was deducted or paid to meet a student loan repayment obligation in the previous tax year where he is satisfied the repayment has, or would, cause serious hardship to a borrower.
6. A borrower can apply for the remission of late payment penalties imposed on any student loan repayment obligation. The Commissioner will look at the circumstances of each case and if the Commissioner thinks it equitable, may grant relief.

Legislation

7. The relevant legislative provisions of the SLSA are:

51 Power of Commissioner in respect of small amounts

- (1) The Commissioner may refrain from refunding any repayment obligation (or part of a repayment obligation) payable to a borrower, or any repayment deduction (or part of a repayment deduction) payable to an employer or a PAYE intermediary, if—
 - (a) the amount payable to a borrower in any tax year is \$5 or less; or
 - (b) the amount payable to an employer or a PAYE intermediary in any period is \$5 or less.
- (2) The Commissioner may refrain from issuing a notice of assessment or refrain from collecting and write off any repayment obligation (or part of a repayment obligation) payable by a borrower, or any repayment deduction (or part of a repayment deduction) payable by an employer or a PAYE intermediary, if—
 - (a) the amount payable by a borrower in any tax year is \$20 or less; or
 - (b) the amount payable by an employer or a PAYE intermediary in any period is \$20 or less.
- (3) The Commissioner may refrain from collecting payment of a repayment obligation (or part of a repayment obligation) if that repayment obligation (or part of a repayment obligation)—
 - (a) is more than \$20 but less than \$334; and
 - (b) has not been paid by the due date (as that term is defined in section 44).
- (4) Any amount that, under subsection (3), the Commissioner does not collect from a borrower is subject to interest at the total interest rate on the daily amount outstanding (except to the extent that this Act otherwise requires).

- (5) This section applies despite anything in this Act

53 Relief from penalty

- (1) Where any penalty is payable by a person under this Act in relation to any default by that person, on application for relief made by or on behalf of that person, the Commissioner may, having regard to the circumstances of the case and if the Commissioner thinks it equitable to do so, grant relief to the person by remitting such part of the penalty as the Commissioner considers equitable.
- (1A) An application for relief may be made—
- by telephone; or
 - in writing; or
 - in any other manner acceptable to the Commissioner.
- (1B) However, the Commissioner may require an application for relief to be made in writing.
- (2) The payment of the penalty, in whole or in part, shall not preclude the Commissioner from granting relief from that penalty in accordance with subsection (1) of this section.
- (3) If the amount of any penalty is reduced, the Commissioner shall apply any amount overpaid in accordance with section 56 or section 57 of this Act.
- (4) This section applies only to borrowers' obligations under this Act.

54 Borrowers may apply for hardship relief

- (1) A borrower may apply to the Commissioner for 1 or more of the following:
- hardship relief for any tax year prior to the current tax year;
 - hardship relief for the current tax year;
 - hardship relief for the next tax year.
- (2) An application under subsection (1)(c) must be made on or before 31 March in the tax year that immediately precedes the tax year for which relief is sought.
- (3) An application may be made—
- by telephone; or
 - in writing; or
 - in any other manner acceptable to the Commissioner.
- (4) However, the Commissioner may require an application to be made in writing.

55 Hardship relief for any tax year prior to current tax year

- (1) If an application is made under section 54(1)(a), the Commissioner may, for any period the Commissioner considers equitable, retrospectively decrease that borrower's repayment obligation for any tax year prior to the current tax year if the Commissioner—
- is satisfied that payment of that repayment obligation is causing, or would cause, serious hardship to the borrower; or

- considers that there are other special reasons that make it fair and reasonable to do so.

- (2) Except as set out in section 55A, the Commissioner must not refund any amount that was deducted or paid (if any) to meet a repayment obligation for any tax year prior to the current tax year.

55A Hardship relief for tax year immediately prior to current tax year may include refund

- (1) If an application is made under section 54(1)(a), the Commissioner may, for any period the Commissioner considers equitable, refund any amount that was deducted or paid to meet a repayment obligation in the tax year immediately prior to the current tax year if the Commissioner—
- is satisfied that payment of that repayment obligation is causing, or would cause, serious hardship to the borrower; or
 - considers that there are other special reasons that make it fair and reasonable to do so.
- (2) If the Commissioner refunds any amount to a borrower under subsection (1), the Commissioner must—
- retrospectively decrease that borrower's repayment obligation for the relevant tax year; and
 - refund the whole or part of the portion of the repayment obligation that is the difference in assessment amounts.
- (3) A refund that is made under this section must be made in the manner required under section 184A of the Tax Administration Act 1994.

55B Hardship relief for current tax year or next tax year

- (1) If an application is made under section 54(1)(b) or (c), the Commissioner may, for any period the Commissioner considers equitable, reduce any amount that must be deducted or paid in order to meet the repayment obligation assessed or to be assessed for the current tax year or the next tax year if the Commissioner—
- is satisfied that the amount being deducted or paid, or to be deducted or paid, has caused or will cause serious hardship to the borrower; or
 - considers that there are other special reasons that make it fair and reasonable to do so.
- (2) If the Commissioner reduces the amount to be deducted or paid by a borrower under subsection (1), the Commissioner must, as appropriate, do 1 of the following:
- issue to that borrower a special repayment deduction rate certificate that varies the standard deduction rate in accordance with the Commissioner's decision under subsection (1) and, when assessed, reduce that borrower's repayment obligation accordingly; or

- (b) reduce the percentage payable by that borrower under section 27(1) in accordance with the Commissioner's decision under subsection (1) and, when assessed, reduce that borrower's repayment obligation accordingly; or
 - (c) reduce that borrower's repayment obligation under section 34 in accordance with the Commissioner's decision under subsection (1).
- (3) If the Commissioner reduces the amount to be deducted from, or paid by, a borrower to zero, section 18 does not apply to that borrower for the period for which that reduction applies.
 - (4) If a borrower has given his or her employer notice in accordance with section 18 and the Commissioner subsequently reduces the amount to be deducted from, or paid by, a borrower to zero, the borrower must give a copy of the special repayment deduction rate certificate to his or her employer as soon as practicable after it is issued.
 - (5) Section 24F of the Tax Administration Act 1994 applies, with all necessary modifications, to any special repayment deduction rate certificate issued under this section.

55C Effect of Commissioner's decision under section 55, 55A, or 55B

- (1) Any amount that, as a result of a decision under section 55, 55A, or 55B, the Commissioner has refunded to, or not collected from, a borrower is subject to interest at the total interest rate on the daily amount outstanding (except to the extent that this Act otherwise requires).
- (2) Section 56 or 57, as appropriate, applies to a borrower who, as a result of the Commissioner refraining from deducting or collecting any amount from that borrower, or reducing that borrower's repayment obligation, has had deductions made, or has made payments, in excess of that borrower's repayment obligations as set out in section 56(1)(a) to (e) or section 57(1).

55D Borrowers must inform Commissioner of change of circumstances and Commissioner may review

- (1) A borrower who applies for hardship relief under section 54 must inform the Commissioner as soon as practicable if there is a change in the borrower's circumstances that—
 - (a) means that any information supplied to the Commissioner under section 54 is incorrect or inaccurate; or
 - (b) may affect whether or not a borrower would have been, or will continue to be, granted hardship relief under section 55, 55A, or 55B.
- (2) The Commissioner may, at the end of a tax year, review any decision he or she made during that year to grant hardship relief to a borrower.

- (3) If for any reason the Commissioner considers that the circumstances for the grant of that hardship relief have changed, the Commissioner may do either or both of the following:
 - (a) require the borrower to take any action that is required in order to reverse the effects of the hardship relief that was granted to the borrower;
 - (b) reinstate all or part of the repayment deduction or repayment obligation that would have applied to the borrower if hardship relief had not been granted to the borrower, and require payment of any amount that would have been due during the relevant tax year.

56 Excess repayments made by borrowers

- (1) Where for any tax year a borrower has—
 - (a) had repayment deductions made in excess of the repayment obligation for that tax year; or
 - (b) paid interim repayments in excess of the repayment obligation for that tax year; or
 - (c) paid an amount in excess of the amount of any instalment of an interim repayment; or
 - (d) made a voluntary payment in excess of the repayment obligation for that tax year; or
 - (e) paid an amount in excess of the amount of any penalty charged,—
 the Commissioner shall—
 - (f) credit the amount so deducted or paid in excess, so far as it extends, to any repayment obligation or instalment of an interim repayment for any other tax year or any other amount that has become due and payable that the borrower has failed to pay in the order in which that repayment obligation or instalment of an interim repayment obligation or other amount became due and apply any amount not so credited in accordance with either subsection (1A) or (1B)
 - (g) *Repealed.*
- (1A) A borrower may elect that the whole or part of the amount not credited—
 - (a) be refunded; or
 - (b) be applied to the loan balance.
- (1B) Where a borrower does not make an election, the Commissioner must apply the amount not credited to the loan balance.
- (2) Any election under subsection (1A)(b) of this section shall be irrevocable.
- (2A) Where a borrower has not made an election, the borrower may request the Commissioner, within 6 months of the date on which the Commissioner issued the notice of assessment that showed the amount applied to the loan balance, to refund, in whole or in part, the amount so credited.

- (2B) A refund that is made under this section must comply with section 184A of the Tax Administration Act 1994.
- (3) Notwithstanding subsection (1) of this section, no refund shall be made under this section after the expiry of the period of 8 years immediately after the end of the year in which the assessment was made or, in any case where the original assessment has been altered (whether once or more than once) after the end of the year in which the original assessment was made, unless written application for the refund is made by or on behalf of the borrower before the expiry of that period.

57 Election by overseas based borrower to receive refund or to apply overpayment to loan balance

- (1) Where any overseas based borrower has paid an amount in excess of the overseas based repayment obligation for any year, the Commissioner shall—
- credit the amount so paid in excess, so far as it extends, to any repayment obligation for any other tax year or any other amount that has become due and payable that the borrower has failed to pay in the order in which that repayment obligation or other amount became due; and
 - notify the borrower of any amount so paid in excess that is not credited under paragraph (a) of this subsection.
- (2) The borrower may request the Commissioner, within 2 months of the date on which the Commissioner issued the notice, to refund any amount so paid in excess that is not credited under subsection (1)(a) of this section.
- (2A) Unless subsection (4) applies, a refund of an amount paid in excess of a borrower's repayment obligation must be made in the manner required under section 184A of the Tax Administration Act 1994.
- (3) Any such request shall be irrevocable.
- (4) If no such request is made within that time, any amount paid in excess that is not credited under subsection (1)(a) of this section shall be applied in reduction of the loan balance.

57D Commissioner's discretion in cases of significant financial hardship

- On the application of a borrower, the Commissioner may exempt part or all of a relevant refund made to that borrower from section 57C.
- The Commissioner may only exempt a relevant refund if the Commissioner is satisfied that that refund was necessary to alleviate the borrower's significant financial hardship.
- If the Commissioner grants an exemption under subsection (1), the Commissioner must specify the amount of the relevant refund that is exempt from section 57C.

- (4) In this section, **significant financial hardship** includes significant financial difficulties that arise because of—
- a borrower's inability to meet minimum living expenses; or
 - a borrower's inability to carry out his or her usual occupation because of his or her temporary or permanent illness, injury, or disability; or
 - a borrower's inability to meet mortgage repayments on his or her principal family residence resulting in the mortgagee seeking to enforce the mortgage on the residence; or
 - the cost of modifying a residence to meet special needs arising from a disability of a borrower or a borrower's dependant; or
 - the cost of medical treatment for an illness or injury of a borrower or a borrower's dependant; or
 - the cost of palliative care for a borrower or a borrower's dependant; or
 - the cost of a funeral for a borrower's deceased dependant.

Discussion

Application for relief

- A borrower can make an application to Inland Revenue for hardship relief where they believe that payment of their student loan obligation would cause or has caused "serious hardship". A borrower can also apply for hardship relief if they consider that there are "other special reasons" that would justify relief from their repayment obligations. Each application will be considered on its own merits.
- If a borrower anticipates that they will experience serious hardship or serious financial hardship as a consequence of having to meet their student loan repayment obligations for the next year, their application for hardship relief should be sent to Inland Revenue by 31 March of the current tax year. However, the Commissioner will also consider applications on a retrospective basis.
- Applications can be made by telephone, in writing or by electronic means using the Inland Revenue website's online services.

Available options for relief

- Where the Commissioner is satisfied that the repayment of a student loan obligation (and related penalties) will cause the borrower serious hardship or there are other special reasons, the following options are available:
 - refrain to collect a repayment obligation of less than \$334;

- remit a penalty;
- reduce a student loan repayment obligation;
- refund repayments for the tax year immediately prior to the current tax year.

When relief will be provided

12. Although the SLSA does not define the meaning of “serious hardship” or “other special reasons”, section 57D (see above) sets out circumstances that would indicate a borrower is experiencing “significant financial hardship”. This provides a guide to circumstances where the Commissioner will provide relief, although it is not an exhaustive list.
13. Applications for hardship relief are considered on a case-by-case basis. The onus is on the borrower to show that payment of their student loan obligations has or will cause hardship, or that there are special reasons why the Commissioner should not pursue full payment for a period.

Timing of applications for future relief

14. When a borrower anticipates that they will experience financial hardship as a consequence of having to meet their student loan repayment obligations for a future tax year, their application for hardship relief should be sent to Inland Revenue on or before 31 March in the current tax year.

Information to support applications

15. The application for hardship relief should set out the borrower’s circumstances and clearly explain the reason for requesting hardship relief. The Commissioner may require the borrower to provide further information in support of their application.
16. Resident borrowers may use the IR 40 “Statement of financial position” form as a guide for the information required on support of their application for hardship relief.
17. Overseas-based borrowers are required to apply for hardship relief in writing, providing full details of their financial situation, or by completing an IR 219 “Student loan overseas-based repayment application” form.
18. The IR 40 and IR 219 forms are available on our website at www.ird.govt.nz/forms-guides

When relief is provided

Refrain from collection

19. The Commissioner may refrain from issuing a notice of assessment or may write off any student loan repayment obligation payable by the borrower if the amount payable in any tax year is \$20 or less.

20. The Commissioner may refrain from collecting a student loan repayment obligation of more than \$20 and less than \$334 if the due date for payment has passed. When the Commissioner refrains from collecting payment of a loan obligation, the unpaid amount is added back to the loan balance and attracts interest (if applicable).

Remit a penalty

21. Late payment penalties are imposed if a borrower does not meet their student loan repayment obligations in full and on time. Those penalties compound monthly until the arrears are paid.
22. The Commissioner will consider an application for remission of late payment penalties once the initial arrears have been paid or at any time the borrower requests.
23. Late payment penalties may be remitted when a payment default was:
 - beyond the control of the borrower or the borrower’s agent; or
 - the result of a genuine error; or
 - in any other situation in which the Commissioner deems it equitable to do so.
24. When considering an application to remit a late payment penalty the Commissioner will take into account the borrower’s previous compliance record, including whether they have paid their student loan repayment obligations as soon as practicable. The borrower’s overall compliance history; including their other general tax and Child Support obligations (if applicable), will also be a factor in deciding whether or not to remit a late payment penalty.

Reduce a repayment obligation

25. A borrower’s student loan repayment obligation is the amount of their student loan repayable for a particular tax year. That student loan repayment obligation is generally calculated by taking the borrower’s income (that exceeds the repayment threshold) and multiplying by the repayment percentage, to establish the amount of the student loan to be repaid for that tax year.
26. If the Commissioner grants serious hardship relief, or there are other special reasons that would make it fair and reasonable to reduce a borrower’s student loan repayment obligation for a tax year, the following will occur:

- The borrower will be issued with a special repayment deduction rate certificate that varies the deduction rate for a current or future year to reflect a reduced repayment obligation. (The borrower will need to give the certificate to their employer so that the employer can deduct student loan repayment deductions at a reduced rate); or
- the percentage payable by the borrower (receiving income not subject to PAYE) will be reduced.
- The amount not collected, as a consequence of a reduction, will be added back to the loan balance.
- Consideration will be given to a borrower who is overseas to see if they are entitled to a repayment holiday or an opt-out period, from their repayment obligations.

Refund repayments for previous tax year

27. When payments by a borrower exceed their student loan repayment obligations, the overpayment will be offset against any other student loan amounts that are due but remain unpaid. Any remaining overpayment will then be offset against the borrower's loan balance.
28. Resident borrowers can request that an overpayment be refunded directly to them within six months from the date of issue of the Commissioner's notice of assessment advising of the overpayment. Overseas-based borrowers have two months to make a request.

Change of circumstances

29. A borrower is required to advise Inland Revenue of any change to their circumstances that is likely to mean that an earlier decision to provide hardship relief, or their ability to repay their loan obligations, will need to be reviewed.
30. Should a borrower's financial situation improve, they may make voluntary payments in addition to their amended student loan repayment obligation.

Year-end review

31. The Commissioner may review any decision to provide hardship relief at the end of the tax year (31 March). Where the borrower's circumstances have materially changed, the Commissioner may review the hardship relief previously agreed too.

Standard practice

32. A borrower should contact Inland Revenue at the earliest opportunity if they think repayment of their student loan will cause them serious hardship, or if there are other special reasons for making an application for financial relief.
33. Applications are generally not required by any specific time, although an application for anticipated hardship for future year's obligations must be received by Inland Revenue on or before 31 March in the current tax year.
34. An application will be considered on the basis of the borrower's current or future ability to meet their student loan repayment obligation. In considering an application the Commissioner will look at all options available to a borrower to enable them to meet their loan repayment obligations.
35. A resident borrower may make application in writing, by telephone, or other manner acceptable to the Commissioner. An overseas-based borrower is required to apply in writing or complete an IR 219 "Student loan overseas-based repayment application" form.
36. A borrower will need to show why payment of their loan repayment obligation will cause them serious hardship, or show why they think relief should be given for some other special reason.
37. If the Commissioner is satisfied that payment of a repayment obligation will cause serious or significant financial hardship to a borrower, or is satisfied that there are special reasons that make it fair and reasonable to provide relief, the Commissioner may:
 - refund¹ any amount that was deducted or paid that is more than the Commissioner considers a borrower is able to afford to pay without causing hardship; and/or
 - reduce any amount that must be deducted or paid in order for the borrower to meet their adjusted repayment obligation.
38. The unpaid balance of the original student loan repayment obligation not recovered as a result of providing hardship relief, will be added back to the loan balance owing and will incur interest (if applicable).

¹ However, any overpayments of a loan repayment obligation for years prior to the year preceding the current year are not refundable to the borrower and will be offset against the student loan balance [55(2) and 55A(2)].

39. When the Commissioner agrees to provide hardship relief the terms and details of the adjusted student loan repayment obligation and consequential matters (eg, refunds, changed tax code for PAYE purposes) will be confirmed so that the borrower is advised of the impact on their student loan account for the relevant year.
40. A borrower who applies for hardship relief must advise the Commissioner, as soon as practicable, of any change in their circumstances that is likely to impact on information previously relied upon in deciding to grant hardship relief, or may impact on the borrower's ability to pay their student loan obligation.
41. The Commissioner may, at the end of a tax year, review any decision to grant hardship relief. If the Commissioner considers that the circumstances upon which the relief had been agreed to have materially changed, he may reinstate all or part of the repayment deduction or repayment obligation.

This Standard Practice Statement is signed on 16 February 2011.

Rob Wells

LTS Manager, Technical Standards

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, Court of Appeal, Privy Council and the Supreme Court.

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.

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.

HIGH COURT DECLINES TO ADD NEW DEFENDANTS TO TAX LITIGATION

Case	"Y" Limited v Commissioner of Inland Revenue
Decision date	20 December 2010
Act(s)	High Court Rules, Tax Administration Act 1994
Keywords	Joinder of parties

Summary

The taxpayer sought to add more parties to long-running litigation on the basis that the Commissioner had not correctly identified a tax avoidance arrangement and that without the other parties no one was capable of paying the taxes if the Commissioner was ultimately successful. The application was declined by the High Court.

Impact of decision

The decision rebuts any suggestion that liability to taxes should be linked to recovery of the same taxes when a tax challenge is proceeding. The same logic would apply to the disputes process under the Tax Administration Act 1994 ("TAA"). First the liability to pay taxes needs to be established prior to any issue of recovery being addressed.

The decision is clear that argument regarding the scope of the arrangement does not necessitate adding additional parties and such addition would be detrimental to those parties.

Facts

This was an interlocutory application by the taxpayer to add further defendants to the case. This is possible under High Court Rule 4.56(1).

The case was a tax challenge by Y Limited against assessments made by the Commissioner on the basis of tax avoidance by the taxpayer for the income tax years 1996 to 1998 inclusive.

The taxpayer argued that certain banks should be added to the proceedings because the:

1. banks were said to have owed money to Y Limited under the arrangement and without recovery by Y Limited against the banks the Commissioner would not be able to recover any taxes owed from Y Limited
2. Commissioner's identified tax avoidance arrangement was wrong and should include a purported wider tax avoidance arrangement the taxpayer had identified and a resulting advantage to the banks
3. Commissioner had a duty under section 6A (3) of the TAA to collect the highest net revenue, and that implied joining the banks to assure recovery.

The Commissioner opposed the application on the following grounds:

1. The issue of *recovery* was irrelevant to a challenge about the *liability* for the taxes. The two matters were separate issues and could not be run together. This also addressed the section 6A argument advanced by Y Limited.
2. There was no arrangement involving the banks and, if there were, it did not excuse the tax advantage obtained by Y Limited.

Decision

Justice Mackenzie declined to add the banks and dismissed the application. Of each ground the Judge concluded:

The present proceeding is concerned only with the determination of the extent of the plaintiff's tax liability. It is not concerned with recovery by the Commissioner of the amount of that tax liability. That would be a later stage. Only at that later stage of collection of tax could the Commissioner's duty under section 6A (3) of the Tax Administration Act 1994 have any relevance. Further, if it were relevant, it is for the Commissioner, not this Court, to determine how that duty is fulfilled. The Commissioner has a wide managerial discretion as to the best means of obtaining the highest net return. I do not consider that section 6A provides any support for the proposition that, either in the ordinary case which I have described or in this

case, debt recovery proceedings against a third party should be joined with a challenge to the Commissioner's assessment [17].

The Commissioner has not taken any steps against the banks alleging that they are parties to a tax avoidance arrangement so as to affect their tax liability. If the banks were joined as parties, and if the plaintiff were successful in its contention that the banks were involved in a wider tax avoidance arrangement, then the banks would, as parties, be bound, as a matter of *res judicata*, by the Court's findings on that issue. That might expose the banks to subsequent reassessment by the Commissioner, which the banks might not be able to fully defend under the usual processes, by reason of the findings in this litigation [24].

On the other hand, Y [Limited] will not be precluded from making any arguments which it may wish to make as to the extent of any wider tax avoidance arrangement, so far as that may affect the tax liability of Y [Limited], if the banks are not parties. Full details of the arrangement will (subject to the constraints of the Tax Administration Act) be able to be adduced, if the banks are not parties. Any necessary evidence from the banks can be obtained, if the banks are not parties, by the use of the available interlocutory proceedings [25].

INDEMNITY COSTS AWARDED

Case	Accent Management Limited v CIR – Costs judgment
Decision date	23 December 2010
Act(s)	Income Tax Acts, High Court Rules
Keywords	Indemnity costs

Summary

The Commissioner was awarded indemnity costs following an unsuccessful judicial review application by the taxpayer.

Impact of decision

The case illustrates that the Commissioner, when faced with ill-conceived or unmeritorious litigation, may apply and can be successful in seeking indemnity costs.

Facts

After an unsuccessful High Court challenge (*Accent Management Ltd & Ors v Commissioner of Inland Revenue* (2005) 22 NZTC 19,027 (“Trinity”)) of the Commissioner's assessments relating to its 1997 and 1998 income tax years, and subsequent unsuccessful appeals to the Court of Appeal (*Accent Management Ltd & Ors v Commissioner of Inland Revenue* (2007) 23 NZTC 21,323 (CA)) and the Supreme Court (*Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 (SC)), Accent Management Ltd (“Accent”) applied for a judicial review of the validity of those same assessments.

In response, the Commissioner applied for a strike-out of Accent's judicial review proceeding together with an application for an order for indemnity costs.

On 12 March 2010, the High Court (Keane J) struck out Accent's judicial review proceeding on the basis that it was an abuse of process and asked both parties for their submissions on the issue of indemnity costs (*Accent Management Limited v The Commissioner of Inland Revenue* HC AK CIV 2008-404-8649 12 March 2010).

The Commissioner's submissions

The Commissioner submitted that indemnity costs were appropriate because Accent's judicial review proceeding was “manifestly wholly unmeritorious as a matter of law”, and had been pursued with the ulterior motive to frustrate, or at least delay, Accent's tax liability crystallising in accord with *Ben Nevis Forestry Ventures Ltd v CIR*.

Accent's submissions

Accent submitted that indemnity costs were not appropriate because it had not acted vexatiously, frivolously, improperly or unnecessarily; was not culpable of flagrant misconduct; had not acted either badly or very unreasonably, or with an ulterior motive.

It was further submitted that no safe conclusions could be made about Accent's conduct “in the absence of a complete and thorough review of the evidence in the challenge proceedings”.

Decision

Before reaching its conclusion on the indemnity costs issue, the High Court provided an overview of the three types of costs and the circumstances in which they could be awarded.

In relation to indemnity costs, the High Court confirmed that, pursuant to High Court Rules (HCR) 14.6(4)(a), indemnity costs “are to be imposed only, in the main, where a party has acted ‘vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding’”. The High Court went on to say, citing the Court of Appeal's formulation of different cost types in *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 4, that indemnity costs could be ordered where a party “has behaved either badly or very unreasonably”.

To determine whether Accent had acted in a way that warranted an award of indemnity costs, the High Court asked itself two questions. Firstly, whether the case was hopeless from its inception, and secondly whether the party should have known that to be so (*Bradbury v Westpac Banking Corp*).

The High Court concluded, as it had in its earlier strike-out judgment (*Accent Management Limited v The Commissioner of Inland Revenue* HC AK CIV 2008-404-8649 12 March 2010), that Accent’s judicial review proceeding was “wholly unmeritorious and self evidently so from the outset”. This was because Accent was advancing the same argument that had been rejected by the Supreme Court; that argument being radically different from the argument that Accent had advanced in the High Court and Court of Appeal previously.

Furthermore, the High Court decided that Accent could not say that the Commissioner had made his assessments dishonestly or defectively, and that in reality, the judicial review proceeding was a “collateral attack on the assessments and decisions adverse to it” and as such, was an abuse of process.

The High Court chose not to speculate as to Accent’s purpose or whether Accent had an ulterior motive in seeking judicial review because the self-evidently, wholly unmeritorious judicial review proceeding justified indemnity costs in any case.

SUCCESSFUL STRIKE-OUT OF A JUDICIAL REVIEW

Case	JD Hardie v Commissioner of Inland Revenue
Decision date	23 December 2010
Act(s)	Tax Administration Act 1994
Keywords	Judicial review, strike-out, default assessments, challenge proceedings

Summary

The Court decided in the Commissioner’s favour, striking out Mr Hardie’s application for judicial review as an abuse of process.

Impact of decision

This decision applies the decisions of *Westpac Banking Corporation v CIR* [2009] NZCA 24 and *Tannadyce Investments Limited v CIR* [2010] NZCA 233. Judicial review of an assessment is only available in exceptional cases where either there has been no assessment in law or there has been conscious maladministration fatally tainting the assessment.

The Court also found that the issue whether an assessment is so arbitrary that the officer who made it could not honestly believe it to be accurate is to be tested through the challenge procedure and is not capable of being assessed on an application for judicial review.

Facts

Mr Hardie failed to file his income tax returns for the years ended 31 March 1999 to 2005 and goods and services tax (GST) returns for the monthly periods ended 31 March 2003 to 30 April 2006. The Commissioner made default assessments. Mr Hardie did not, and has not, filed returns or issued notices of proposed adjustments.

Mr Hardie commenced then discontinued his first application for judicial review claiming that the Commissioner in making the default assessments was culpable of conscious maladministration. He applied again for judicial review of the default assessments, requesting orders for discovery.

The Commissioner applied to strike out Mr Hardie’s judicial review application on the grounds that it was vexatious and an abuse of process.

Decision

The Court noted that “the statutory objection process [Parts 8 and 8A of the Tax Administration Act 1994 (“TAA”)] has primacy and only exceptionally does judicial review have a place”. The “statutory objection procedure” is not just primary, but is also curative.

The Court referred to the presently definitive decision of the Court of Appeal in *Westpac Banking Corporation v CIR* [2009] NZCA 24 where the:

Court held that judicial review of a tax assessment will only be justified where (i) what purports to be an assessment is not; or (ii) in exceptional cases, such as where there has been conscious maladministration; and that, as the Court said, is ‘a particularly inauspicious statutory context for judicial review’ [15].

The Court also considered the recent (and similar) case of *Tannadyce Investments Limited v CIR* [2010] NZCA 233 where the Court of Appeal was even more emphatic than in *Westpac Banking Corporation v CIR* that an inquiry by discovery could cut across the sections 109 and 114 TAA presumptions.

Mr Hardie contended that the default assessments were arbitrary and that he was precluded from using the statutory disputes and challenge procedures as he is required to furnish returns which he is unable to do as his financial records are neither complete nor accurate.

The Court held at paragraph [34] that:

The issues Mr Hardie raises in his application for review go, I accept, not merely to the accuracy of the default assessments made by the Commissioner but to whether they are arbitrary. That is not enough, however, to warrant his application proceeding. Those issues, could, had Mr Hardie elected, have been readily resolved within the statutory

challenge process, which extends to issues of validity as well as correctness.

The very issue Mr Hardie sought to have tested—that the default assessments are so arbitrary and that the officer who made them could not have honestly believed they could begin to be accurate—would have been tested in the statutory challenge procedure and is not capable of being set aside on judicial review.

The Court struck out Mr Hardie’s application for judicial review because this was not one of those exceptional cases where plainly there is either no assessment or where there had been conscious maladministration tainting the assessment made. Mr Hardie’s application therefore constituted an abuse of process.

REPRESENTATION OF A COMPANY BY THE DIRECTOR

Case	Commissioner of Inland Revenue v Giovanni Holdings Ltd and Ors
Decision date	22 December 2010
Act(s)	N/A
Keywords	Representation, <i>Mannix</i> , jurisdiction

Summary

The High Court considered that exceptional circumstances existed to permit the Court to exercise its discretion to allow representation of the company by the director.

Impact of decision

A company must be represented by a solicitor but the Court may permit representation by any person in exceptional circumstances.

Facts

On 6 September 2010, the Commissioner sought and obtained a freezing order without notice over a property owned by Giovanni Holdings Ltd (“Giovanni”). In October 2010, Giovanni filed an application seeking an order discharging or varying the freezing order.

The Commissioner objected to representation of Giovanni by Ms Hancock, the director of Giovanni.

Decision

Associate Judge Osborne granted Ms Hancock limited leave to represent Giovanni (as long as she remained the sole director) on the interlocutory application for orders discharging or varying the freezing order recognising there were “powerful considerations of access to justice”. The High Court held that leave of the Court would be

required if Giovanni sought lay representation after the determination of the freezing order proceeding but noted that it was unlikely to be granted in a continuing manner as the substantial issues and facts (which were not before the Court at the time) are more complex than that in the interlocutory matter.

Osborne AJ referred to the rule in *Re G J Mannix Ltd* [1984] 1 NZLR 309 which provides that a company must have a solicitor on record to file proceedings but noted that the Court does retain its inherent jurisdiction, in exceptional circumstances, to permit someone other than a solicitor to represent the company. The Court confirmed that the *Mannix* rule continues to bind the Court.

Osborne AJ found that there was a “single, overarching exceptional circumstance” in the present matter in that Giovanni’s assets had been frozen by the freezing order and obtained without notice before Giovanni had an opportunity to take legal advice. The Court accepted that Giovanni had provided prima facie evidence that it is at present without access to resources to fund an application to discharge or vary the freezing order.

The Court then considered whether other factors should mean that despite the exceptional circumstance, representation by Ms Hancock should be refused.

Osborne AJ, while acknowledging the matter was not straightforward, considered that issues would not arise at the interlocutory stage of such a complex nature so as to outweigh the need for representation by Ms Hancock.

Further, despite concerns raised by the Commissioner regarding the evidence (recognising that some aspects of the evidence are “of understandable concern to the Commissioner”) and the independence and objectivity of Ms Hancock, Osborne AJ was not satisfied that Ms Hancock should not represent Giovanni. However, the Court did note that any development in the course of litigation which indicated Ms Hancock was not proceeding with appropriate independence would likely result in a review of his order and noted that both Giovanni and Ms Hancock were on notice that the Court had an interest to ensure Ms Hancock represented Giovanni objectively.

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