

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.

You can find a list of the items we are currently inviting submissions on as well as a list of expired items at www.taxtechnical.ird.govt.nz (search keywords: public consultation).

Email your submissions to us at public.consultation@ird.govt.nz or post them to:

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

You can also subscribe at www.taxtechnical.ird.govt.nz/subscribe to receive regular email updates when we publish new draft items for comment.

IN SUMMARY

New legislation

The Privacy (Information Sharing Agreement between Inland Revenue, New Zealand Police, New Zealand Customs Service, and Serious Fraud Office) Order 2020

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This Order approves an information sharing agreement entitled Information Sharing Agreement Between Inland Revenue and New Zealand Police, New Zealand Customs Service and Serious Fraud Office which was entered into under the Privacy Act 1993. This agreement enables the sharing of information to assist the identification, investigation and prosecution of serious crimes.

Determinations

COV 20/11: Variation of section 15D(2) of the Goods and Services Tax Act 1985 for applications to change GST taxable period

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This COVID-19 variation recognises that the impact of COVID-19 means that some taxpayers may now wish to file on a one-monthly basis to provide earlier access to any GST refunds. It allows the change of taxable period to take effect much sooner than would otherwise be the case.

COV 20/12: Variation in relation to the definition of “finance lease” in s YA 1 of the Income Tax Act 2007

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Lessors and lessees may have agreed to extend lease terms (or intend to do so) due to the financial impacts of COVID-19. The time period in the definition of “finance lease” has been extended using s 6I of the Tax Administration Act 1994 to allow certain extended leases to continue to be treated as operating leases.

Standard practice statement

SPS 20/05: Student loan repayment – options for relief

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This standard practice statement updates and replaces SPS 11/03 Student Loans - Relief from repayment obligations. This replacement standard practice statement reflects the Student Loan Scheme Act 2011 and changes introduced by the Inland Revenue transformation programme to encourage borrowers to self-manage student loans via the myIR secure online service..

Legal decisions - case summaries

Vivien Judith Madsen-Reis and Henry David Levin as Liquidators of Debut Homes Limited (in Liquidation) and Debut Homes Limited (in Liquidation) v Leonard Wayne Cooper and Leonard Wayne Cooper and Tracey Cooper as Trustees of the L & T Cooper Family Trust [2020] NZSC 100

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This Judgment sets out the scheme of the Companies Act 1993 and the underlying principles for assessing whether a director has breached their duties under ss 131 (duty to act in the best interests of the company), 135 (reckless trading), 136 (duty not to incur obligations without reasonable grounds to believe the company can meet them when they fall due) and the correct approach to determining the compensation to be ordered under s 301. The Appeal was allowed.

NEW LEGISLATION

This section of the *TIB* covers new legislation, changes to legislation including general and remedial amendments, and Orders in Council.

The Privacy (Information Sharing Agreement between Inland Revenue, New Zealand Police, New Zealand Customs Service, and Serious Fraud Office) Order 2020

Extending the serious crime information sharing agreement

The Privacy (Information Sharing Agreement Between Inland Revenue, New Zealand Police, New Zealand Customs Service, and Serious Fraud Office) Order 2020 came into force on 1 October 2020. The order approves an information sharing agreement entitled *Information Sharing Agreement Between Inland Revenue and New Zealand Police, New Zealand Customs Service and Serious Fraud Office* which was entered into under the Privacy Act 1993. This agreement enables the sharing of information to assist the identification, investigation and prosecution of serious crimes.

Background

An Approved Information Sharing Agreement (AISA) is a legal mechanism under the Privacy Act, which authorises the sharing of personal information between or within agencies for delivering efficient and effective public services. An AISA provides certainty on the purpose of the information sharing, the use of the information, the management of privacy risks, and the information safeguards.

The serious crime AISA was implemented in 2014 to enable Inland Revenue to share information with the New Zealand Police (Police), either on request or proactively, to help reduce the level of serious crime committed in New Zealand. A serious crime is one punishable by a term of imprisonment of four years or more.

Inland Revenue provides information to the Police where it is relevant to the serious offence being investigated and meets the criteria for disclosure. The Police can request a range of information from Inland Revenue, which includes non-individual and individual information about tax returns, debt, audit history, and information about individuals who are linked to those suspected of serious criminal activity. This agreement has proved successful, facilitating the investigation of over 500 cases.

More recently, the New Zealand Customs Service (Customs) and the Serious Fraud Office (SFO) expressed interest in joining the AISA and receiving information from Inland Revenue to assist their identification, investigation and prosecution of serious crimes involving fraud and corruption or cross-border crime punishable by a term of imprisonment of four years or more.

The discussion document (*Targeting Serious Crime: Extending information sharing*) released at the end of 2018 presented the proposals for extending the existing serious crime AISA between Inland Revenue and the Police to include the SFO and Customs. The document outlined that the original serious crime AISA's framework, mechanisms, robust privacy safeguards and the serious crime threshold would also apply to information sharing from Inland Revenue to Customs and the SFO. The parties could share information for the purposes of the prevention, detection, or investigation of a serious crime or that is evidence in the prosecution of a serious crime.

Key features

A new AISA has been entered into by Inland Revenue and the participating agencies (being Police, Customs, and the SFO) for the sharing of information in relation to serious offences.

Definition of serious crime

The AISA applies to offending that relates to crimes punishable by a term of imprisonment of four years or more and replicates the threshold used in the original agreement between Inland Revenue and Police. The four-year threshold aligns with the test for the offence of participation in an organised criminal group under section 98A of the Crimes Act 1961 and is consistent with the definition of a "serious crime" in the United Nations Convention against Transnational Organised Crime. The Customs offences that meet this threshold are such crimes as relating to controlled drugs (the importing, exporting or possessing for supply), knowingly importing or exporting objectionable publications, money laundering, and defrauding Customs revenue. These offences carry penalties that are between five years and life imprisonment.

All the offences considered by the Serious Fraud Office carry maximum terms of imprisonment of at least seven years and involve the most serious forms of financial crime.

Test for sharing

Information sharing under this AISA will only occur where the following strict tests are met.

A participating agency can request information from Inland Revenue

A participating agency may request Information from Inland Revenue where the agency:

- considers that there are reasonable grounds to suspect that a serious crime has been, is being, or will be, committed
- considers that there are reasonable grounds to suspect that the Information is relevant to the prevention, detection or investigation of, or is evidence relevant to, a serious crime
- confirms that it reasonably believes that the amount of Information requested is reasonable and proportionate for those purposes, in the circumstances, and
- has taken all reasonable steps to obtain the Information from other sources without success (where practicable).

In considering whether to share information with a participating agency, Inland Revenue reviews the request and may share information where all of the following are met. Inland Revenue:

- requests any additional information necessary from the participating agency or clarification of the request to enable the department to consider the request
- determines that it is practicable to share the Information
- is satisfied that the scope of the Information to be shared is limited to that which is necessary for the purposes of the particular request, and
- is satisfied that it is reasonable, necessary and in the public interest to provide the Information to the participating agency.

Inland Revenue can proactively share information

Inland Revenue may proactively share information with a participating agency where the department:

- considers that there are reasonable grounds to suspect that a serious crime has been, is being, or will be, committed
- considers that there are reasonable grounds to suspect that the Information is relevant to the prevention, detection or investigation of, or is evidence relevant to, a serious crime
- determines that it is practicable to share the Information
- is satisfied that the scope of the Information to be shared is limited to that which is necessary in the circumstances of the particular disclosure, and
- is satisfied that it is reasonable, necessary and in the public interest to provide the Information to the participating agency.

Information that can be shared

The AISA provides for the sharing of information between Inland Revenue and each of the other agencies either in response to a request for information from another agency or proactively, from Inland Revenue to the other agencies. The agreement does not provide for the sharing of information between the other agencies (for example, sharing cannot occur between SFO and Customs under the AISA).

The information that Inland Revenue can disclose to the other agencies under the AISA will be information that is readily available and has been collected for tax purposes. Inland Revenue will not exercise its powers to collect information on behalf of other agencies, share information that is not readily available within Inland Revenue or share information that is not relevant to the serious crime in question.

Where the tests for sharing information above have been met, an agency may request that Inland Revenue share Information falling within the categories in Row 1 of the table below and Inland Revenue may share such Information in response to a request. In making such a request of Inland Revenue, a participating agency may itself need to share information (both personal and non-personal) and the grounds for the request to enable Inland Revenue to process the request and/or for Inland Revenue to assess whether relevant parts of the test are met.

Inland Revenue may proactively share Information described in Row 2 of the table below where it considers that a serious crime has been, is being, or will be committed and the tests above have been met. This means that Inland Revenue may proactively share Information with a participating agency that could otherwise be requested by the agency under Row 1. Inland Revenue may also share any other Information discovered by IR whilst carrying out its usual functions and duties, when the test for sharing is met.

Inland Revenue may share the following information with a participating agency:

Row 1	Information Inland Revenue may share with a participating agency upon request	<ul style="list-style-type: none"> • Information about a person’s associates • Tax Information • Financial Transaction Information • Financial relationship information (for example, a fellow director of a company or a fellow partner of a partnership) • Domestic relationship information (for example, whether the suspect has a partner, husband, wife, children) • Information about assets • Employment information • Person records • Social assistance information
Row 2	Information Inland Revenue may share with a participating agency proactively	<ul style="list-style-type: none"> • Information falling within the categories in Row 1 above • Any other Information discovered by Inland Revenue while carrying out its usual functions and duties (however discovered). For example, information obtained during an audit about where drugs are located.

Sharing information obtained by compulsion

The AISA imposes conditions on Inland Revenue sharing information with the other agencies that was obtained by compulsion for tax purposes using section 17B of the TAA. Prior to sharing such information, Inland Revenue needs to review the information to determine whether limitations should be placed on its use and/or its security.

Also, where Inland Revenue obtains information by compulsion by way of an inquiry held by the Commissioner or a District Court Judge (under sections 171 or 17) of the Tax Administration Act 1994), information may only be shared with:

- Police or Customs in relation to charges of perjury against a person, or
- SFO upon request (not proactively) where SFO confirms that there are reasonable grounds to suspect that an offence involving serious or complex fraud may have been committed and confirms that the test for sharing information upon request under this AISA is met.

Information obtained by Inland Revenue by compulsion can be shared with the SFO as it has similar powers to compel the production of information as Inland Revenue.

An agency may proactively share information that it holds in relation to serious crime with IR where other legislation provides for such sharing. For example, section 36 of the Serious Fraud Office Act 1990 or under one of the exceptions to the privacy principles contained in section 22 of the Privacy Act 2020.

Sharing information about third parties

The AISA enables a participating agency to request information about third parties, being a person that is connected to a suspect in a serious crime. A third party can include a person in a relationship with a suspect or a family member or an associate of a suspect.

Before information about a third party is provided to an agency, the agency has to both justify that the above tests are met with regard to the suspect and justify that the above tests are met with regard to linking the third-party to the suspect. The agency also has to prove that the third-party information is relevant to the prevention, detection or investigation of, or is evidence relevant to, a serious crime and confirm that it reasonably believes that the amount of Information requested is reasonable and proportionate for those purposes, in the circumstances.

Prior to Inland Revenue sharing third party information with Police, Customs, or SFO, it will ensure that it meets the above tests, it is practicable for IR to share the Information, that the information is limited to that which is necessary for the purposes of the particular request, and that it is in the public interest to provide the Information to the participating agency.

Participating agencies will use reasonable endeavours to protect the interests of persons who are indirectly connected to a serious crime or related to a person who is a suspect in a serious crime. Such measures could include redacting third-party information from information given in evidence or requiring third-party information to be destroyed once it is no longer required.

How participating agencies may use the information

A participating agency may use information received under the AISA for purposes of prevention, detection, or investigation of, or to use as evidence of, a serious crime. For example, the types of activities could include, but are not limited to:

- the potential commissioning of a serious crime
- identifying individuals involved in a serious crime (including victims, witnesses, offenders)
- identifying lines of inquiry for a serious crime
- using information as intelligence for a serious crime investigation
- using the information as evidence in the investigation and prosecution of any person for a serious crime
- using information as part of an investigation into serious crime to identify roles and relationships within criminal networks to then identify the enablers of financial structures
- identifying potential victims or offenders of serious crime to enable activation of preventative measures, or
- enabling, where the test is met, the sharing of information for joint participating agency and IR taskforces.

An agency cannot use any information obtained under the AISA for any other purpose that is not enabled under the AISA.

The order can be viewed [here](#)

The AISA can be viewed [here](#)

Application date

This order came into force on 1 October 2020.

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.

COV 20/11: Variation of section 15D(2) of the Goods and Services Tax Act 1985 for applications to change GST taxable period

Determination

The Commissioner of Inland Revenue has, under the discretion provided under section 6I of the Tax Administration Act 1994, made the following statutory variation:

Section 15D(2) of the Goods and Services Tax Act 1985 is varied to state that a change in taxable period takes effect at the commencement of the [6-month] taxable period in which the person applies to change the basis on which the person's taxable period is set.

This variation applies to a registered person who wishes to change from a 6-month to a 1-month taxable period, and for a 6-month taxable period commencing between 1 April 2020 and 31 March 2021.

The variation is subject to the following conditions:

- The person notifies the CIR before 31 March 2021 that they wish their election to have this effect; and
- The person does not elect to change back from a 1-month taxable period before 30 September 2021.
- The impacts of COVID-19, including uncertainty as to its financial impacts, materially affected the person's ability to make this election earlier and they expect applying this variation will materially assist the sustainability of their business.

Application date

This variation applies from 4 November 2020 to 31 March 2021

Dated at Wellington on 4 November 2020

Martin Smith

Chief Tax Counsel
Inland Revenue

Background (material under this heading does not form part of the variation)

Summary of effect

1. Section 15(3) of the Goods and Services Tax Act 1985 allows a person to apply to the Commissioner to have a one-month taxable period for GST. Under s 15D(2) of the GST Act, the change in taxable period takes effect at the end of the taxable period in which the person applies. The effective date of the change has been modified to the start of the taxable period using s 6I of the TAA.

Provisions affected

2. Section 15D(2) of the Goods and Services Tax Act 1985.

Application of variation:

3. This variation applies to a person who wishes to change from a six-month taxable period to a one-month taxable period for GST. A person is permitted to do so under s 15(3) of the GST Act, but the change will take effect from the end of the taxable period in which they apply. This variation allows that change to be effective from the start of the taxable period in which a person applies. The variation recognises that the impact of COVID-19 means that some taxpayers may now wish to file on a one-monthly basis to provide earlier access to any GST refunds. It allows the change of taxable period to take effect much sooner than would otherwise be the case.
4. The variation is aimed primarily at a person who applies to change their taxable period after 1 October 2020 to allow that change to take effect sooner. A person who has a standard balance date and applied after the expiry of variation COV 20/03 on 30 June 2020, but before 1 October, will already be on a one-monthly taxable period effective 1 October 2020 without the need for a variation. The variation may apply to a person with a non-standard balance date who applies in a taxable period that commenced before 1 October 2020 and is still in progress.

Associated variations: COV 20/03

5. See also "Variation of the application of s 15D(2) of the Goods and Services Tax Act 1985 to extend time to make an application to change GST taxable period" issued 6 June 2020.

Legislative References

Tax Administration Act 1994: ss 6H and 6I

Goods and Services Tax Act 1

COV 20/12: Variation in relation to the definition of “finance lease” in s YA 1 of the Income Tax Act 2007

Determination

The Commissioner of Inland Revenue has, under the discretion provided under section 6I of the Tax Administration Act 1994, made the following statutory variation:

The time period of “more than 75% of the asset’s estimated useful life” referred to in paragraph (b) of the definition of “finance lease” in s YA 1 of the Income Tax Act 2007 is extended to “more than 75% of the asset’s estimated useful life plus an additional 18 months” where the term of the lease is extended between 14 February 2020 and 31 March 2021.

The variation is subject to the following conditions:

- The lease was entered into before 14 February 2020.
- The lease term was not more than 75% of the estimated useful life when the lease was entered into.
- The lease term is not extended more than 18 months beyond the end of its term as at 14 February 2020.
- The lease was extended because, in the period between January 2020 and 31 March 2021, the lessee’s business has experienced a significant decline in actual or predicted revenue which means the lessee had difficulty satisfying their existing lease agreement, and that decline in actual or predicted revenue is related to COVID-19.

Application date

This variation applies from 5 November 2020 to 31 March 2021

Dated at Wellington on 5 November 2020

Martin Smith

Chief Tax Counsel

Inland Revenue

Background (material under this heading does not form part of the variation)

Summary of effect

1. An operating lease of an asset has a maximum term of 75% of the asset's estimated useful life before it is treated for tax purposes as a finance lease (with different tax treatment) under the Income Tax Act 2007. Lessors and lessees may have agreed to extend lease terms (or intend to do so) due to the financial impacts of COVID-19. The time period in the definition of "finance lease" has been extended using s 6I of the Tax Administration Act 1994 to allow certain extended leases to continue to be treated as operating leases.

Provisions affected

2. Paragraph (b) of the definition of "finance lease" in s YA 1 of the Income Tax Act 2007.

Application of variation:

3. This variation applies to a person who has entered into an operating lease of an asset, but the lease term has been extended beyond 75% of the estimated useful life of the asset, and so in the absence of this variation it would be reclassified as a finance lease for tax purposes, with associated complexity and compliance costs.
4. The variation is subject to the conditions that the lease was entered into before 14 February 2020; that the lease term was not more than 75% of the estimated useful life when the lease was entered into; and that the lessee has experienced a significant decline in actual or predicted revenue related to COVID-19 meaning the lessee had difficulty in satisfying their existing lease agreement.
5. Customers who may wish to apply this variation should note:
 - A lessor and lessee are not required to adopt the same treatment of the lease asset as both parties can make their own decision about whether they rely on the variation;
 - Customers do not need to take the same approach to all leases they have entered into for the same class of lease asset;
 - The variation applies to leases that are extended between 14 February 2020 and 31 March 2021 and is not limited to leases where the lease term would otherwise have ended during that period.

Associated variations: COV 20/03

6. This variation has the same effect as the earlier COV 20/08 "Variation in relation to the definition of "finance lease" in s YA 1 of the Income Tax Act 2007" which expires on 30 November 2020. It provides additional time for a person to decide whether to extend their operating leases without them becoming finance leases for tax purposes.

Legislative References

Tax Administration Act 1994: ss 6H and 6I

Income Tax Act 2007: s YA 1, paragraph (b) of the definition of finance lease

About this document

These variations concern the Commissioner's additional discretion to extend a due date, deadline, time period or timeframe or vary a procedural or administrative requirement arising from COVID-19 or the Government's response measures.

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 20/05: Student loan repayment – options for relief

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

This standard practice statement updates and replaces SPS 11/03 Student Loans - Relief from repayment obligations. This replacement standard practice statement reflects the Student Loan Scheme Act 2011 and changes introduced by the Inland Revenue transformation programme to encourage borrowers to self-manage student loans via the myIR secure online service.

START DATE

10 Nov 2020

REPLACES: SPS 11/03

Introduction

This Statement sets out Inland Revenue's practice for providing relief¹ under the Student Loan Scheme Act 2011 (the "Act"). It covers relief from payments for:

- overdue student loan repayment obligations
- student loan repayment obligations not yet due
- student loan repayment obligations for the current tax year, and
- penalty² and late payment interest imposed on overdue student loan repayment obligations.

All legislative references in this Statement refer to the Student Loan Scheme Act 2011, unless otherwise specified.

Application

This Statement applies from the date of signing. It replaces SPS 11/03: *Student Loans – relief from repayment obligations*, which was published in *Tax Information Bulletin*, Vol 23, No 2 (March 2011).

Standard practice

Summary

1. Requests for relief are generally not required by any specific time. However, a request for anticipated hardship for a future year's obligations should be received by Inland Revenue on or before 31 March in the current tax year.
2. Requests will be considered based on a borrower's current or future ability to meet their student loan repayment obligation. In considering a request, the Commissioner will look at all options available to a borrower to enable them to meet their loan repayment obligations.
3. When providing relief, the Commissioner may:
 - refrain from issuing a notice of assessment, and may write off a student loan repayment obligation not more than \$20;
 - refrain from the collection of any student loan repayment obligation payable that is more than \$20 but less than \$334 (excluding late payment interest);

¹ The reference to "relief" for the purposes of this statement is to the overall relief provisions contained in Subpart 4 of the Act and includes "hardship relief" in section 147 of the Act. The reference to "serious hardship" is as provided under section 147(1)(a) of the Act, where hardship relief may be granted based on serious hardship.

² The reference to "penalty" in this statement refers to penalties defined in section 146A of the Act and does not include abusive tax position penalties or evasion or similar act penalties as per sections 141D and 141 E of the Tax Administration Act 1994.

- reduce any amount that must be paid by a borrower for the current tax year, or the next tax year;
- reduce a repayment obligation for a previous tax year (the amount not collected is capitalised and will remain on their loan);
- agree to an instalment arrangement to repay an unpaid amount;
- refund any amount paid for the previous or current tax year;
- cancel some or all the late payment interest if it would be equitable to do so.

Detailed discussion

Request for relief

4. Borrowers are encouraged to contact Inland Revenue at the earliest opportunity if they think that they may have trouble meeting their repayment obligations on time, so that the options for payment and loan relief can be discussed³.
5. Requests can be made through the self-service options available in Inland Revenue's myIR Secure Online Services, by telephone or other manner acceptable to the Commissioner.
6. To ensure there is a record of a request made by a borrower, the ability to accept requests by telephone is limited to calls that are received by Inland Revenue at a site that has call recording. That can be achieved by calling one of Inland Revenue's 0800 numbers. Where a call is received by a site that does not have call recording, the borrower may be asked to put their request through use of the myIR Secure Online Services or by letter.
7. A borrower requesting relief should clearly advise why they cannot make loan repayments as required or why they think relief should be given for some other special reason. Each application will be considered on its own merits. The Commissioner may ask the borrower to provide further information in support of their request.

Relief options

Relief from small amounts

8. For small amounts owed, the Commissioner:
 - will not issue an assessment nor collect⁴ a student loan repayment obligation, if the amount payable is \$20 or less. However, this discretion will not generally apply to situations where borrowers have not provided their employer a "SL" Tax Code Declaration and a pay period student loan obligation repayment shortfall occurs as a consequence. Alternatively, when a borrower's consolidated loan balance is \$20 or less at the end of the year, a write-off will occur at that date; or
 - if the amount is more than \$20 but less than \$334 (excluding late payment interest), the Commissioner may choose to not collect the small amount if the due date for payment has passed. However, the amount not collected will remain on the loan balance and where applicable will accrue interest.

Reduce a repayment obligation

9. A student loan borrower's repayment obligation may be reduced if the Commissioner is satisfied that serious hardship will be caused as a consequence of a repayment obligation or there are other special reasons that make it fair and reasonable to do so.

Salary and wage earners

10. If a borrower is a salary and wage earner, their repayment obligation is determined on a pay period basis. If the Commissioner grants hardship relief by reducing the borrower's repayment obligation, she will issue the borrower with a special repayment deduction rate certificate that varies the rate of payment for a current or future year to reflect the reduced repayment obligation.
11. Relief is also available via a repayment exemption for full-time students who also work and earn under the annual repayment threshold. An exemption applies only to borrowers' who receive salary or wages or pre-taxed income, and any untaxed income is less than \$500. Eligible borrowers may request an exemption on a quarterly basis, so that their earnings do not have student loan repayment deductions made by an employer, when their pay period earnings would otherwise prompt loan repayments.

³ If a student loan borrower also has a tax debt or a child support debt, they should refer to **SPS 18/04 Options for relief from tax debt** or **SPS 19/05 Options for relief from Child Support debt**.

⁴ and write off an amount payable (less than \$20) by an employer or PAYE intermediary.

12. Similarly, borrowers with more than one employer and whose main income is below the student loan repayment threshold can apply for a reduced deduction rate on their secondary employment earnings for any remaining unused repayment threshold. These payment reductions also only apply on a quarterly basis and a new request is required if borrowers want a reduced payment rate extended for any quarterly unused repayment threshold amount that is available for offset against pre-taxed income.
13. The borrower may request Inland Revenue send a certificate directly to their employer, or they will need to give the certificate received to their employer, who can then apply a reduced rate for, or exemption from, a student loan repayment.
14. The amount not collected because of a repayment rate reduction will remain on the loan balance.

Income from other sources

15. If a borrower receives income from other sources (other than or in addition to their salary and wages) of \$500 or more, their repayment obligation is the amount of their student loan repayable determined on their adjusted net income for a tax year.
16. If the Commissioner grants repayment relief, the percentage payable by the borrower (for receiving income that is not subject to PAYE) will be reduced.
17. The amount not collected because of a reduction of a repayment obligation will remain on the loan balance.

Temporary repayment suspension

18. A borrower who intends to be overseas-based for 365 consecutive days or less, may request a temporary repayment suspension⁵ (formally called a repayment holiday) from their repayment obligations. A criterion is that a borrower must be New Zealand based and is required to nominate a contact person who resides in New Zealand, for the period of their absence from New Zealand. Borrowers can apply for a temporary repayment suspension in myIR or by calling us.

Commissioner may treat certain borrowers as being physically in New Zealand

19. Borrowers can apply to keep a student loan interest free overseas, when they are:
 - unexpectedly delayed when returning to New Zealand
 - unexpectedly required to travel after having returned to New Zealand
 - studying overseas
 - working overseas for the government, or sent overseas for work by a business that has a permanent establishment in New Zealand, and borrowers have a permanent place of abode only in New Zealand
 - receiving a qualifying government-funded scholarship for study or an internship
 - living in Niue, Cook Islands, Tokelau or Ross Dependency
 - have a serious illness, injury or disability that means you're not able to engage in paid work nor meet your repayment obligation.
20. Further information on how to make an application can be found at www.ird.govt.nz/student-loans/when-can-i-keep-my-student-loan-interest-free-overseas

Hardship relief: serious hardship or other special reasons

21. Applications for relief are considered on a case-by-case basis. The onus is on the borrower to show that payment of their student loan obligations will cause serious hardship or there is good reason for the Commissioner not to require repayment of their full student loan repayment obligation for a period.

Serious hardship

22. If the Commissioner is satisfied a repayment obligation will cause serious hardship to a borrower or there are special reasons that make it fair and reasonable to provide relief, the Commissioner may:
 - refund⁶ any amount that was paid that is considered more than a borrower can afford to pay without causing hardship; and/or
 - adjust the repayment obligation amount to what the borrower can afford without causing serious hardship.

⁵ Further information on how to make a request is available at the Inland Revenue website www.ird.govt.nz/student-loans/what-happens-to-my-student-loan-when-i-go-overseas/temporary-repayment-suspension-for-student-loans

⁶ However, any overpayment 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 (s 122(2)).

23. The Act does not provide a definition of “serious hardship”. However, s 154 (applications for instalment arrangement) of the Act does refer to s 177A of the Tax Administration Act 1994 (the “TAA”), which provides what considerations should be made when applying the serious hardship provisions in the TAA.
24. The TAA sets out a list (although not exhaustive) of circumstances that would indicate a taxpayer is experiencing significant financial hardship because of:
 - a serious illness suffered by the taxpayer or the taxpayer's dependant(s); or
 - 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
 - the cost of education for the taxpayer's dependant(s).
25. The Commissioner may also consider other factors relevant to whether a taxpayer will experience serious hardship, when deciding if relief should be provided, and the extent of such relief.

Other special reasons

26. The Commissioner can grant relief from a repayment obligation if satisfied there are “other special reasons” that make it fair and reasonable to do so.
27. Providing relief because a borrower perceives their repayment obligation as unfair or unreasonable, is not a sufficient reason to apply the “other special reason” relief without first explaining how the unfair or unreasonable situation, led to hardship.
28. Consideration of what is fair and reasonable should have regard to the perception of other borrowers who are meeting their repayment obligations.

Examples of relief under “serious hardship” and “other special reasons”

Example 1

Relief is likely to be granted under “serious hardship” where a borrower's partner (the household primary income earner) experiences a severe health problem and is on medical leave without any income for 8 months to recuperate. In the interim, their partner (a student loan borrower) claims hardship as they struggle to support a family household and extra costs of medical treatment, on their modest wage income. After looking at the borrower's financial situation and being satisfied no other payment option is available, the Commissioner will likely agree hardship is being experienced and provide relief from their current loan repayment obligation.

The borrower is required to advise the Commissioner of any change or improvement to their financial circumstances that impact on their ability to make loan repayments.

Example 2

A borrower has received a lump sum payment from the Accident Compensation Corporation to provide for alterations to their home to improve the borrower's mobility around their home. The borrower has unpaid student loan obligations for the previous year which they have no prospect of making an immediate payment of the loan debt.

As the ACC lump sum payment has a specified purpose of promoting a borrower's mobility and preserve their independent living standard, the Commissioner will consider relief under the other special reasons provision. The borrower's repayment obligation would likely be reassessed to what they can afford to pay and the unpaid balance would remain as part of the loan balance.

Example 3

A borrower has access to savings, but they intend to use those funds as a deposit to purchase a house. The Commissioner is unlikely to provide relief when funds are available to pay a debt. In considering this, the Commissioner will give regard to promoting compliance, maintaining the integrity of the tax administration and that other borrowers would have reduced savings as a consequence of meeting their repayment obligations.

Entering into an instalment arrangement

29. As noted above, borrowers who are likely to experience hardship in meeting their repayment obligations are encouraged to contact Inland Revenue early to obtain an agreed solution, particularly as late payment interest is charged on defaulted repayment obligations. Early contact may minimise late payment interest charged on any amount that remains unpaid after the due date for payment.
30. When a borrower complies with an agreed instalment arrangement, a lower late payment interest rate⁷ will apply to the unpaid amount for each month while an instalment arrangement applies.
31. The Commissioner may agree to an instalment arrangement where a borrower can demonstrate that they will experience hardship if they are required to pay their repayment obligation in full but can make a partial payment.
32. The Act imposes no time limit on when an instalment arrangement must be completed. However, the Commissioner considers that instalment arrangements should be for as short a period as possible without causing serious hardship to a borrower.
33. When the Commissioner enters into an instalment arrangement, the terms will be confirmed with the borrower via myIR or by letter to ensure that both parties clearly understand their obligations and for future reference by the borrower.
34. A borrower 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, as long as the borrower maintains the terms of their arrangement.

Refund amount paid

35. The Commissioner may refund any amount paid to meet a student loan repayment obligation, limited to the current tax year and the previous tax year, where that repayment will cause serious hardship, or there are other special reasons that would make it fair and reasonable to make a refund.

Relief from late payment interest and penalties

36. A penalty and late payment interest may be imposed if a borrower does not meet their student loan repayment obligations in full and on-time. Late payment interest will also compound monthly until the arrears are paid.
37. Upon application, and depending on the borrower's circumstances, the Commissioner can cancel some or all of the late payment interest if it would be equitable to do so. The Commissioner will only consider an application for the cancellation of a penalty and late payment interest once the initial repayment obligation has been paid.
38. The Commissioner has no discretion to cancel base interest charged on student loans held by overseas based borrowers, that will remain payable.
39. The Commissioner will cancel a penalty and late payment interest when it is considered equitable to do so, after looking at the reasons for late payment. For example, a penalty and late payment interest may be cancelled when a payment default was:
 - the result of a genuine error;
 - beyond the control of the borrower or the borrower's agent; or
 - any other situation in which the Commissioner considers it is equitable to do so.
40. When considering an application to cancel a penalty or late payment interest, the Commissioner will consider the borrower's previous loan repayment record, including whether they have paid their student loan repayment obligations as soon as practicable. The borrower's overall loan compliance history will also be a factor in deciding whether to cancel late payment interest.

Consideration of requests for relief

41. Where it is apparent a borrower can pay overdue repayment obligations immediately, the Commissioner will not enter into an arrangement. For example, if the borrower has access to investment funds, beneficial interests, shareholder current accounts or trusts, the Commissioner expects those funds will be used to pay the overdue repayment obligation. A decision will be based on the financial information provided by a borrower along with any further enquiries the Commissioner considers necessary.

⁷ When a borrower meets their obligations in an instalment arrangement, late payment interest payable is reduced from the base rate plus 4% to the base rate plus 2% interest.

42. The Commissioner will look at all options available for collection of unpaid repayment obligations when considering a request for relief. Options may include requesting that the borrower sells assets or arranges other finance to pay their unpaid repayment obligations more promptly.
43. Despite any application for relief, the Commissioner may make a counteroffer based on the information available and what is considered appropriate for a borrower's circumstances.
44. If the Commissioner is satisfied that meeting a repayment obligation will cause serious hardship to a borrower or there are special reasons that make it fair and reasonable to provide relief, the Commissioner may:
 - refund⁸ any amount that had been paid that is considered more than a borrower should have been expected to pay without causing hardship, and/or
 - reduce the amount that must be paid, and so enable the borrower to meet their adjusted repayment obligation.
45. The unpaid balance of the original student loan repayment obligation that is not recovered when providing hardship relief, remains as part of the loan account.
46. When the Commissioner agrees to provide relief, the terms and details of the adjusted student loan repayment obligation and other matters (eg, refunds, changed tax code for PAYE purposes) will also be confirmed, with a borrower or a nominated contact person by letter. If registered for myIR they will receive a notification of this letter to view in their account unless they have asked communications to be directed to a tax agent.

Reviewing a decision

Change in circumstances (for a reduced payment obligation)

47. Borrowers, who are under a current relief arrangement, must notify the Commissioner if there is a change in their circumstances. The Commissioner may review any decision to grant relief if it is considered there has been a material change in the circumstances upon which the relief had been agreed.
48. A change in circumstances, includes any information given to the Commissioner that is no longer correct, or likely impact on whether hardship relief will continue to be granted. Upon review, all or part of a repayment obligation may be reinstated by the Commissioner.

Misleading or false information

49. The Commissioner may cancel an instalment arrangement if a borrower had provided false or misleading information, or a borrower is not meeting their obligations under an instalment arrangement.

Service feedback

50. If a borrower is concerned that their circumstances have not been given proper consideration, they should raise their concern with the staff member that considered their request and ask for the decision to be reviewed by a more senior officer.
51. If a borrower is still not satisfied with the level of service they receive, they can obtain more information about the Inland Revenue complaints management service at www.ird.govt.nz/contactus/complaints-disputes-compliments/complaints or phone 0800 274 138 (Monday to Friday between 8am and 5pm).

Challenges

52. A borrower may challenge a decision⁹ by the Commissioner to not to grant relief or enter into an instalment arrangement by commencing proceedings to the Taxation Review Authority, on the ground that the decision is not fair and reasonable.

This Standard Practice Statement is signed on 10 November 2020.

Rob Falk

National Advisor, Technical Standards - Legal Services

⁸ However, any overpayment 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 (see section 122(2)).

⁹ Dispute process must be completed before challenge is made. Refer to **Standard Practice Statement 16/06 Disputes resolution process commenced by a taxpayer** for further information.

References

Legislative References

Student Loan Scheme Act 2011, s 141, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154.

Tax Administration Act 1994, s 177A, 177B, 177CA.

LEGAL DECISIONS – CASE SUMMARIES

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, 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.

CSUM 20/12: Debut Homes Ltd (in liquidation) v Cooper

Case	Vivien Judith Madsen-Reis and Henry David Levin as Liquidators of Debut Homes Limited (in Liquidation) and Debut Homes Limited (in Liquidation) v Leonard Wayne Cooper and Leonard Wayne Cooper and Tracey Cooper as Trustees of the L & T Cooper Family Trust [2020] NZSC 100
Decision date	24 September 2020
Legislative References	Companies Act 1993, ss 131, 135, 136, and 301
Legal terms	Directors duties, solvency, reckless trading, best interests of the company, incurring obligations, breach of duty, interest of creditors, compensation, “rob Peter to pay Paul”.

Summary

This Judgment sets out the scheme of the Companies Act 1993 (“the Act”) and the underlying principles for assessing whether a director has breached their duties under ss 131 (duty to act in the best interests of the company), 135 (reckless trading), 136 (duty not to incur obligations without reasonable grounds to believe the company can meet them when they fall due) and the correct approach to determining the compensation to be ordered under s 301. The Appeal was allowed.

Impact

This has a significant impact on clarifying when the actions of will be in breach of their duties under the Act. In particular, directors must consider the interests of creditors in cases of near insolvency. It also confirmed that s 136 applies in respect of all debts incurred, not only contractual debts, otherwise the situation would allow Peter to be robbed to pay Paul. The effect of this decision is that if the director incurred GST when they knew that it could not be paid, this was a breach of duty under s 136. The approach to the calculation of compensation under s 301 was confirmed as a two-step approach.

Facts

Debut Homes Ltd (“Debut”) was a property development company and had been balance sheet insolvent since 2009 but by October 2012 was in serious financial difficulty and unable to pay its debts. In November 2012 its director, Mr Cooper, sought advice from his accountant and it was clear that the company debt was insurmountable. A GST debt to Inland Revenue was expected to be \$300,000 at that stage. Debut still owned six properties, all at various stages of completion. Mr Cooper made the decision to complete these properties on the belief that they would sell for a higher price once they were completed rather than if they were sold incomplete. Mr Cooper obtained further finance to complete the building projects which he personally guaranteed and also obtained a loan from his family trust, subject a general security agreement. The properties were sold, and the sale proceeds used to pay secured creditors, but no GST was paid on any of the property sales.

Inland Revenue applied to liquidate the company and in 2014 and at the time of the liquidation Debut owed approx. \$499,000 to its creditors, of which approx. \$450,000 was owed to Inland Revenue for unpaid GST on property sales.

Issues

Whether the Court of Appeal decision was in error. Specific issues included:

- Whether continuing to trade to complete the unfinished properties and incur further debts was a breach of duty under ss 131, 135 and 136.
- Whether creditors interests had to be considered by directors in cases of near insolvency
- Whether incurring GST was the type of debt that was captured under s 136
- The correct approach to calculating compensation

Decision

The appeal was allowed.

The full court made the following observations about the scheme of the Companies Act in general:

- Under the scheme of the Act, maintaining solvency is the key value in the Act and vital to the best interests of the company.
- In cases of near solvency, the interests of creditors must be considered.
- The formal mechanisms within the Act and the informal mechanisms of maintaining solvency all involve consultation and agreement with creditors.
- Directors may be compromised and where they have an interest (e.g. a security) in resolving the company debt.

Section 135

The Court took the view that contrary to the Court of Appeal's decision, it cannot sensibly be said that completing the properties benefitted Inland Revenue because higher sale prices would increase the GST payable, given that it was clear there was no intention or ability to pay GST on the sales of the properties.

If a company reaches the point where continued trading will result in a shortfall to creditors and the company is not salvageable, then continued trading will be in breach of s 135 of the Act. Subject to the use of the formal or informal mechanisms elsewhere discussed, this applies whether or not continued trading is projected to result in higher returns to some of the creditors than would be the case if the company had been immediately placed into liquidation, and whether or not any overall deficit was projected to be reduced.

Section 136

The Court held that as GST is payable at the time of supply, the obligation did not arise at the time the properties were purchased, there is no debt to Inland Revenue until the time they are sold.

It is not legitimate to take a course of action where some creditors have a higher return than others at the expense of new creditors not being paid, that it is not legitimate to “rob Peter to pay Paul”.

If directors agree to debts being incurred where they do not believe on reasonable grounds that the company will be able to perform the obligations when they fall due, then there will be a breach of s 136 of the Act. Such obligations do not need to arise from direct contractual arrangements between the company and the creditor.

Section 131

In cases of near insolvency, a director must consider the interests of creditors.

There will be no breach of s 131 if a director honestly believed they were acting in the best interests of the company. There will, however, be a breach of s 131 if directors, in an insolvency or near-insolvency situation, fail to consider the interests of all creditors. Such a breach may be exacerbated by a conflict of interest.

Where there are no prospects of a company returning to solvency, it makes no difference that a director honestly thought some of the creditors would be better off by continuing trading. There are alternatives other than liquidation open to directors where continued trading is projected to result in a shortfall. The formal mechanisms available include those in Parts 14 and 15A of the Act.

Section 301

Where there have been breaches of duties, any relief ordered under s 301 must respond to and provide redress for the particular duty or combination of duties breached. Relief can be compensatory or restitutionary in nature and must take account of all of the circumstances, including the nature of the breach or breaches, the level of culpability of the director, causation, duration of the breach, holding the director to account and reversing the harm to the company.

For breaches of s 135 the starting point is the net deterioration in the company's financial position between the date it should have stopped trading and the date of actual liquidation.

For breaches of s 136 the net deterioration method will not necessarily respond adequately to the breach, especially where new obligations are incurred and "Peter has been robbed to pay Paul". There the net deterioration will not reflect the harm. Any relief should therefore be restitutionary.

Other findings

The Court considered that the GSA should be set aside as the GSA would frustrate the purpose of the judgment if it would enable to family trust to claim the benefit of the judgment by returning any compensation paid by Debut to Mr Coopers as a beneficiary of the trust.

Mr Cooper could not rely on s 138 as the accountant's advice was too general and the forecast of \$300,000 GST debt was unsurmountable.

About this document

These are brief case summaries, prepared by Inland Revenue, of decisions made by the Taxation Review Authority, the District Court, the High Court, the Court of Appeal or the Supreme Court in matters involving the Revenue Acts. For Taxation Review Authority matters, names have been anonymized. The findings of the court described in a case summary will no longer represent current law where the matter has been successfully appealed or subsequent amended legislation has been enacted.

REGULAR CONTRIBUTORS TO THE TIB

Tax Counsel Office

The Tax Counsel Office (TCO) produces a number of statements and rulings, such as interpretation statements, binding public rulings and determinations, aimed at explaining how tax law affects taxpayers and their agents. The TCO also contributes to the "Questions we've been asked" and "Your opportunity to comment" sections where taxpayers and their agents can comment on proposed statements and rulings.

Legal Services

Legal Services manages all disputed tax litigation and associated challenges to Inland Revenue's investigative and assessment process including declaratory judgment and judicial review litigation. They contribute the legal decisions and case notes on recent tax decisions made by the Taxation Review Authority and the courts.

Technical Standards

Technical Standards sits within Legal Services and contributes the standard practice statements which describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical operational issues arising out of the administration of the Inland Revenue Acts. They also produce determinations on standard costs and amortisation or depreciation rates for fixed life property used to produce income, as well as other statements on operational practice related to topical tax matters. Technical Standards also contributes to the "Your opportunity to comment" section.

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