Thirty Years On: GST at a Crossroads

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Editorial: Thirty Years On: GST at a Crossroads

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1.0 INTRODUCTION

This special edition of the *New Zealand Journal of Taxation Law and Policy* (NZJTLP) is devoted to the goods and services tax (GST) regime. Papers included in this special edition were first presented at a symposium hosted by the University of Auckland Business School in September 2016 to mark the thirtieth anniversary of the introduction of GST in New Zealand.

Since its introduction in October 1986, GST has established itself as a corner-stone of the New Zealand tax regime. Recognised world-wide as the purest example of a value-added tax (VAT), GST raises a greater share of New Zealand Government revenue at a lower rate than in all other comparable jurisdictions, with lower compliance costs and fewer distortionary effects. But GST is not a simple tax and constant changes over the past 30 years to close loop-holes, prevent abuse and extend its reach has only added to that complexity. Some commentators are calling for a full and coherent re-write of the Act. GST has therefore increasingly become an important focus for governments, tax advisers, businesses and researchers.

The University of Auckland Symposium built on the twentieth anniversary conference hosted by Victoria University of Wellington in November 2006. A decade later, GST continues to adapt to changing business practices. The latest reform, the imposition of GST on the supply of online services by non-residents, came into effect on 1 October 2016 to coincide with the anniversary. So it seemed a good time to take stock of how GST has changed since its introduction… and speculate over what further changes may be needed. The Symposium analysed all aspects of the design and operation of the GST regime. Papers were delivered by presenters from private practice, barristers, Inland Revenue and academia.

2.0 THE PAST

We were fortunate to open the Symposium with presentations from both of the principal architects of the GST regime. First, Sir Roger Douglas spoke of his recollections of the political pressures and problems leading to the introduction of GST. Next, Dr Don Brash — who chaired the committee that published the White Paper calling for the enactment of a comprehensive, broad-base consumption tax — explained the administrative and consultation process that gave rise to the Goods and Services Tax Act 1985. Unfortunately, papers by those speakers are not available. **[(2017) Vol 23:1 NZJTLP 5, 6]**

The first paper from the Symposium included in this special edition covers the history behind the adoption of a VAT regime in its present form in New Zealand in 1985. Professor Adrian Sawyer and Associate Professor Andrew Maples then consider the influence the New Zealand GST regime has had on the subsequent development and adoption of similar regimes by other countries. They conclude that, while no other country has found the courage to implement a GST regime free of all concessions and political trade-offs, most countries that adopted a VAT/GST model after 1986 have been heavily influenced by the approach taken by New Zealand.

The second paper, by barrister Dr Geoff Harley, defends the original policy decision underlying the GST regime to tax all forms of consumption without exception. Dr Harley explains why no exemptions are warranted or can be justified on policy grounds, whether for tax, social justice or economic reasons. While the regressive nature of GST is acknowledged, Dr Harley refers to overseas examples to demonstrate the flaws and problems arising from these kinds of policy concessions.

The third article counters that approach. Suzy Morrissey, Team Leader of the Tax Strategy Team at New Zealand Treasury, advocates for exceptions and exemptions to the broad-base and flat-rate approach under the GST regime. In addition to social justice concerns, Ms Morrissey identifies inherent gender bias from the impact of GST on women. She identifies examples of discrimination found in overseas regimes but argues the policy underlying the current GST regime should have prevented similar bias in New Zealand.

3.0 THE PRESENT

A feature of the GST regime has been its adaptability to changing circumstances and new technology. The fourth article, by Allan Bullot, GST Partner at Deloitte, examines how remarkably effective GST has been at responding to both globalisation and e-commerce over 30 years. The article considers the ongoing changes needed for GST to continue to meet unexpected and unforeseen economic upheaval in the future.

The fifth article picks up that theme of the internationalisation of GST. Marie Pallot, Senior Policy Adviser for indirect taxes at Inland Revenue, explains the recent OECD guidelines on the application of consumption taxes to international transactions and their possible application to New Zealand. The article also addresses the specific responses to those base-maintenance concerns, most notably the expansion of GST to online services supplied by non-residents (the so-called "Netflix tax").

The sixth article considers the parallel concern of base-maintenance regarding the application of GST to goods purchased online. Paul Smith, GST Partner at EY, examines the current exemption for the importation of low-value goods. The article identifies the experiences of other countries in addressing the same issue and considers possible responses to address what has become an unresolved conflict between tax neutrality and efficiency.

4.0 THE ONGOING PROBLEMS

Despite its efficiency and success over 30 years, problems with the GST regime remain. Past attempts to correct or address these areas have generally been successful, but sometimes the correction of one problem has created new concerns.

The seventh article considers continued problems with the GST treatment of land. Eugen Trombitas, GST Partner at PwC, reviews the policy and operation of the compulsory zero-rating rules enacted in **[(2017) Vol 23:1 NZJTLP 5, 7]** 2011. While introduced to prevent abuse of the GST system by so-called "phoenix companies", the reform has created its own minor subset of unexpected problems in its application. The article reviews those new concerns and suggests possible reforms to correct them in order to give effect to the underlying policy.

The eighth article reviews continued difficulties with the adjustment and apportionment rules regarding mixed-use assets or change-in-use of supplies. Grant Pearson, the New Zealand Customs Review Authority, and Craig Macalister, Tax Partner at Crowe Horwarth, explain the different provisions that apply to these compound or distinct supplies. They identify a number of examples that demonstrate the inconsistencies in both the underlying policy and the application of these legislative provisions.

At the Symposium, Jared Otto, Principal Adviser for GST at Inland Revenue, gave a presentation identifying a number of practical problems and repeated concerns with the administration of the GST regime. At a high-level, the presentation explained what mistakes taxpayers commonly make and what (non)compliance issues Inland Revenue continues to find. Unfortunately, due to concerns over the level of detail required for an academic paper, particularly in light of Inland Revenue's secrecy obligations, it was not possible to include that presentation in this special edition.

5.0 THE FUTURE

One of Inland Revenue's primary concerns regarding the GST regime over the past 30 years has been base maintenance. A manifestation of that concern has been the Commissioner's increased use of the anti-avoidance provisions.

The ninth article, by barrister Andrew Beck, examines the scope and application of the general and specific anti-avoidance provisions, and reviews the significant GST tax avoidance case law developed over the past decade. The paper then considers the implication of those decisions for taxpayers in the future.

The final article, by Peter Scott, GST Partner at KPMG, speculates on the effect of technological change on the GST regime into the future. In particular, the article explains how Revenue Authorities around the world and in New Zealand are using technology to improve GST administration and compliance, and considers what impact this will have on future taxpayer compliance.

6.0 A DARK CLOUD STILL LINGERS …

The only notable failing identified at the Symposium was the continued lack of research conducted into GST-related topics compared to other revenue types. While GST in New Zealand raises more than a quarter of New Zealand Government revenue and continues to generate a consistent proportion of tax disputes and decided cases, it suffers from a lack of serious academic

consideration.

In an article to mark the twentieth anniversary conference in 2006, Associate Professor David White lamented in this journal that "GST/VAT is not a simple tax that requires little study" but it is "surprising that the GST now has such a low research and university teaching profile". White concluded with the hope **[(2017) Vol 23:1 NZJTLP 5, 8]** that: "The time for New Zealanders to invest in GST research from all disciplinary perspectives is now, not sometime in the future, when a revenue crisis hits."

White's paper recorded that only 10 articles were published on GST out of a total of 199 articles published in NZJTLP between 1994 and 2007. Likewise, the paper recorded that there had been just 27 articles on GST out of the 256 articles published in the CCH Tax Planning Report.

Since that time, the Victoria Tax Working Group published its findings on the optimum tax regime and the rate of GST was increased from 12.5 per cent to 15 per cent. Yet the comparative figures regarding published academic or practitioner papers for the following 10 years (from mid-2007 until the end of 2016) show that only 11 articles were published in NZJTLP on GST-related topics out of the total of 168 articles (approximately 6.5 per cent). Of those 11 GST articles, for some reason the most common topic addressed (in four papers) related to the possible use of GST as a tool to fight obesity, while the next most common topic covered (in two papers) related to the GST treatment of bodies corporate. By contrast, over that time there were 16 articles published on the possible introduction of a capital gains tax in New Zealand: a regime that does not even exist.

Likewise, for that same period, the CCH Tax Planning Report also published only 11 articles on GST-related topics out of a total of 63. The most prevalent topic (addressed in four articles) was the enactment and subsequent operation of the compulsory zero-rating rules for land.

Sadly, White's criticism remains relevant and his hope still unfulfilled a decade later. However, the thirtieth anniversary symposium and this special edition of NZJTLP are significant steps to address that deficiency. I would like to thank all presenters and attendees for their participation. These papers demonstrate the breadth and depth of GST knowledge in New Zealand.

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FOOTNOTES

1 See the symposium programme "Thirty years on: GST at a crossroads" (1 September 2016) University of Auckland Business School <www.business.auckland.ac.nz>.

2 Papers from that conference were published in Richard Krever and David White (eds) *GST in Retrospect and Prospect* (Thomson Brookers, Wellington, 2007).

3 See Taxation (Residential Land Withholding Tax, GST on Online Services, and Student Loans) Act 2016, introduced on 16 November 2015 and received Royal Assent on 13 May 2016.

4 Goods and Services Tax Act 1985, s 11(1)(mb).

5 Tax Administration Act 1994, s 81.

6 See New Zealand Treasury "Where does the Government's Revenue come from?" in *The 2016 Snapshot: The key facts and figures of the Financial Statements of the Government for the year ended 30 June 2016* (13 October 2016).

7 David White "Twenty Years of GST: The Best Path Forward" (2007) 13(3) NZJTLP 357 at 357.

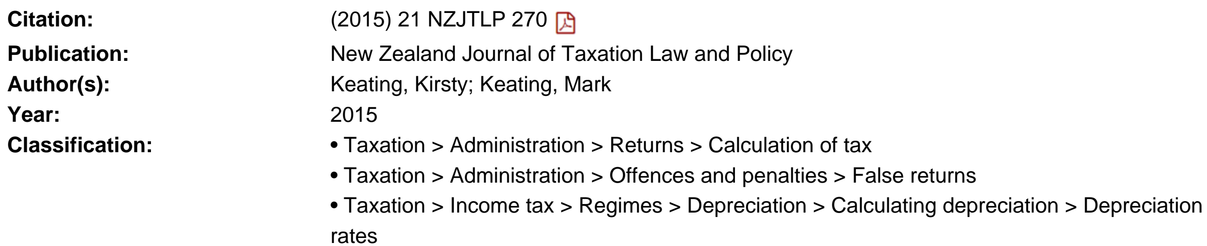
8 White, above n 7, at 378.

9 White, above n 7, at 367, Table 1, covering 1994 to mid-2007.

10 White, above n 7, at 367, Table 2, covering 1985 to mid-2007.

11 Although seven of these articles were published in a special edition of NZJTLP examining "key issues in the design of capital gains tax regimes". See Craig Elliffe and Michael Littlewood "Editorial" (2015) 21(1) NZJTLP 11.

Commissioner's Official Opinion: A "Get Out of Gaol Free" Card?



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Commissioner’s Official Opinion: A “Get Out of Gaol Free” Card?

(2015) Vol 21:3 NZJTLP 270

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In 2010, a statutory defence against the imposition of shortfall penalties or the application of use-of-money interest was enacted for taxpayers who have taken their tax position in reliance on the “Commissioner’s official opinion”. This new concept covers both specific advice given by Inland Revenue to individual taxpayers and published policies applying to taxpayers generally. Taxpayers who rely upon guidance provided by Inland Revenue when taking their tax position should no longer face the imposition of either penalties or interest. But while the enactment of this statutory protection is welcome, uncertainty remains. Whether and how this protection applies when the taxpayer attempts to dispute the correctness of its underlying tax position is unclear. Likewise, a lack of clarity about what may constitute an “official opinion”, and which Inland Revenue officers may issue such advice, is unsatisfactory. This article examines the new rules and identifies issues of concern over their scope and application. It then retrospectively applies these new rules to a number of previous cases to which they may have applied in order to test how the protection offered would have applied in those circumstances. It concludes that, contrary to the underlying policy behind their enactment, in many instances the new rules would still not provide sufficient protection for taxpayers who have relied upon Inland Revenue when taking their tax position.

1.0 INTRODUCTION

The shortfall penalties (SFP) and use-of-money interest (UOMI) regimes came into effect on 1 April 1997. The stated purpose of the UOMI regime is:

> “to compensate the Commissioner (or taxpayers) for the loss of use of money through taxpayers paying too little (or too much) tax, and to encourage taxpayers to pay the correct amount of tax on time.”

That provision also stipulates that “interest payable under this Part is not a penalty.” This means the imposition of UOMI cannot be disputed or challenged by the taxpayer. Likewise, the purpose of the penalties regime is: **[(2015) Vol 21:3 NZJTLP 270, 271]**

> “to encourage taxpayers to comply voluntarily with their tax obligations and to co-operate with the Department … and to sanction non-compliance with tax obligations effectively and at a level that is proportionate to the seriousness of the breach.”

Those regimes have now been operating in tandem, with regular amendments, for almost 20 years. Accordingly, it is worth considering whether they are fulfilling their stated purpose. In particular, it may be worth examining whether the imposition of UOMI and/or SFP by Inland Revenue is “proportionate to the seriousness of the breach”. That question is most directly raised in those instances when the taxpayer’s shortfall results directly from its attempts to follow Inland Revenue’s own policy. This article examines what is meant by the Commissioner’s opinion, and analyses how it has been applied.

2.0 THE COMMISSIONER’S OFFICIAL OPINION

An issue that has received little consideration is the application (or more correctly, the non-application) of UOMI and SFP on

taxpayers who have reached their tax position in reliance on the "Commissioner's official opinion". This new concept was introduced into s 120W and s 141B(1D) of the Tax Administration Act 1994 from 7 September 2010. Generally, it provides that taxpayers who have relied upon Inland Revenue's advice when taking their tax position should not face the imposition of either UOMI and/or an SFP.

The "Commissioner's official opinion" is defined in s 3(1) of the Tax Administration Act 1994. It means:

> "(i) an opinion of the Commissioner concerning the tax affairs of the taxpayer, given by the Commissioner, either orally or in writing, after all information relevant to forming the opinion has been provided to the Commissioner, if that information is correct:
>
> "(ii) a finalised official statement of the Commissioner, in writing, if it specifically applies to the taxpayer's situation."

Accordingly, an "official opinion" falls into one of two categories:

- A taxpayer-specific opinion, given by Inland Revenue in respect of a particular taxpayer's circumstances, who may then rely upon it; or
- A generic opinion, issued by Inland Revenue generally in respect of a particular issue, upon which an individual taxpayer relies.

But what are the consequences (or protections) for taxpayers who have relied upon the Commissioner's specific advice or general information when taking their tax positions?

2.1 Core Tax

Reliance on the Commissioner's official opinion offers absolutely no defence or protection with respect to the substantive tax assessment. It is a regrettable but long-standing rule that, even if the Commissioner has made an error upon which taxpayers have relied, she cannot be estopped or prevented from changing **[(2015) Vol 21:3 NZJTLP 270, 272]** that position and, if necessary, reassessing the taxpayer in order to correct that error. In effect, a taxpayer can have no "legitimate expectation" that the Commissioner will conform with or continue to apply a previously stated position. This position was made clear by the Court of Appeal in *Brierley Investments Ltd v Bouzaid*. There, Richardson J explained:

> "Even where the decision the Commissioner makes affects the amount of taxable income and so the quantum of tax payable, the Act itself contemplates that subject only to the time limit the Commissioner will revisit and reassess so as to ensure the correctness of the assessments. … The Commissioner cannot contract out of the responsibilities imposed by the Act. He cannot tie his hand. He cannot create no-go areas for himself. … Any agreement or understanding which precluded the Commissioner from reinvestigating and possibly reassessing so as to tax what the Act requires to be taxed would be in dereliction of the Commissioner's statutory responsibilities. To allow the Commissioner to do so by private bargain would undermine the public interest in the equal treatment of taxpayers under the legislation and in due compliance with every requirement of the statute. Taxpayers must be taken to know that while the 4-year period still operates they cannot safely rely on the general practice of the Commissioner or on any indication to them as to how particular matters will be dealt with by the Department or on the way their returns have been processed in the past."

Likewise, in *Commissioner of Inland Revenue v New Zealand Wool Board*, Richardson J stated:

> "It is sufficient [to say that] any scope for invoking legitimate expectation is necessarily limited by the scheme and purpose of the income tax legislation. Legitimate expectation cannot frustrate an honest appraisal by the Commissioner of the income tax liability of the taxpayer by means of an assessment of that liability."

The result of this is that taxpayers cannot rely upon, or bind the Commissioner to honour, any statements or advice issued by Inland Revenue either to an individual taxpayer or in its various policies or publications. The Commissioner is duty-bound to reassess a taxpayer to ensure its tax position is corrected.

2.2 Binding Ruling

The only exception to this harsh result is a binding ruling issued by the Commissioner under pt VA of the Tax Administration Act 1994. That regime was enacted in 1995 to help taxpayers achieve certainty in relation to their tax affairs. Where a binding ruling has been issued that applies to a taxpayer, that taxpayer, by following the binding ruling, can be certain about how the Commissioner will apply the law. In those circumstances, the Commissioner is precluded from reassessing the taxpayer contrary to the ruling. But a binding ruling is "the only basis on which taxpayers can bind the Commissioner." And that ruling applies **[(2015) Vol 21:3 NZJTLP 270, 273]** only to the specific arrangement in question and not to other identical arrangements entered into by that same taxpayer.

2.3 Use-of-Money Interest and Shortfall Penalties

Despite the lack of protection against the reassessment of core tax, reliance by a taxpayer on the Commissioner's official opinion now provides absolute protection against UOMI and/or SFP. In effect, the new rules offer taxpayers a limited form of statutory estoppel against the Commissioner with respect to those impositions of additional tax. It allows taxpayers to rely upon "indicative views" and "non-binding opinions" issued by Inland Revenue to prevent the imposition of UOMI or an SFP.

With respect to UOMI, s 120W of the Tax Administration Act 1994 provides:

> "(1) A taxpayer that, but for this section, is liable to pay interest on unpaid tax to the Commissioner, is not liable to pay that interest to the extent to which it arises because they relied on a Commissioner's official opinion."

Subsection (2) provides that it applies to an official opinion given by the Commissioner on or after 7 September 2010. This section ensures that any tax shortfall arising from the taxpayer's reliance on the Commissioner's advice will cease to attract UOMI.

Likewise, with respect to SFP, s 141B(1D) of the Tax Administration Act 1994 provides:

> "A taxpayer does not take an unacceptable tax position to the extent to which they have taken their position because they have relied on a Commissioner's official opinion."

This ensures a taxpayer who has relied upon the Commissioner's advice cannot be found to have taken an unacceptable tax position and therefore cannot be liable for the SFP of 20 per cent under that section. However, both s 141A(3) and s 141C(4) of the Tax Administration Act 1994 (paraphrase) stipulate that:

> "a taxpayer who takes an acceptable tax position is also a taxpayer who has taken reasonable care/not been grossly careless in taking the taxpayer's tax position."

Accordingly, a taxpayer who has relied upon the Commissioner's official position also cannot be exposed to those SFP. Finally, because one of the elements required to apply the SFP for taking an abusive tax position under s 141D of the Tax Administration Act 1994 is that the taxpayer has also taken an unacceptable tax position, that higher penalty also cannot apply.

As a result, a taxpayer who relies upon the Commissioner's official opinion can only face the potential application of the SFP for evasion under s 141E of the Tax Administration Act 1994. Perhaps, it was considered unnecessary to extend the scope of the new rules to that penalty on the logical ground that a taxpayer could not possibly commit evasion in reliance upon a Commissioner's official opinion. If so, that **[(2015) Vol 21:3 NZJTLP 270, 274]** logic was misplaced and, remarkably, this very issue has already arisen in a recent case, albeit that it related to the 2003-2005 income years and therefore the official opinion relied upon predated the September 2010 application of these new rules.

Strangely, there is no equivalent provision preventing the imposition of late payment penalties under s 139B. This seems to be an oversight. Generally, such penalties only apply prospectively, in that they arise only after the due date for payment of that tax has passed, which generally must be at least 30 days following the date of reassessment. The presumption must therefore be that the taxpayer's future late payment penalties cannot be blamed upon the taxpayer's reliance upon the Commissioner's prior advice. However, where the Commissioner has issued a default assessment, the due date (and therefore the liability for late payment penalties) applies retrospectively back to the original due date when the applicable tax return and payment were due. The adverse tax consequences from the resulting accumulation of late payment penalties from this kind of assessment, and how it can arise as a result of the taxpayer following incorrect advice given by the Commissioner, is amply demonstrated in *Thompson v Commissioner of Inland Revenue*, where the Court of Appeal noted that:

> "Mr Thompson also complains about the punitive late payment penalties applied to the GST assessments. The Commissioner's default assessments originally totalled around $365,000. We were told that the debt is now more than $2,000,000 due to compounding interest and penalties."

Yet while the taxpayer in that case may now bring himself within s 120W to prevent the accrual of UOMI because of his reliance on the Commissioner's mistaken advice, there is no equivalent provision to relieve the application of accumulated late payment penalties. Such an omission should be corrected to ensure all types of additional tax imposed on taxpayers as a result of their reliance upon the Commissioner's mistaken advice are reversed.

3.0 WHAT IS A "COMMISSIONER'S OFFICIAL OPINION"?

A "Commissioner's official opinion", as defined in s 3(1) of the Tax Administration Act 1994, falls into one of two categories. Each of these categories is discussed below.

3.1 Category 1: Taxpayer-Specific Opinion

The first category of official opinion is one about the tax affairs of a specific taxpayer. Presumably, that taxpayer must be named (or at least sufficiently identified) in that particular advice. It therefore applies only to that taxpayer and cannot be relied upon by other taxpayers (even if it would apply to their circumstances).

As this type of opinion is taxpayer-specific, it will arise only once the taxpayer has provided the Commissioner with "all information relevant" to their circumstances and/or the issue in question. Furthermore, the requirement that all information disclosed "is correct" ensures that the Commissioner's opinion is based upon the fullest and best information available. The Commissioner's policy on this point explains: **[(2015) Vol 21:3 NZJTLP 270, 275]**

> "the Commissioner must first have been provided with all information relevant to forming the opinion, and that information must be correct. Consequently, if the taxpayer has not provided all the information that is relevant to the Commissioner reaching a correct view (whether intentionally or otherwise), or not all of the relevant information is correct, then the view given will not be a 'Commissioner's official opinion'."

Quite naturally, the Commissioner would not agree to be bound to an official opinion based on incomplete facts or obtained by deceit. This truthful disclosure requirement mirrors the obligation imposed on taxpayers applying for a private binding ruling to "disclose all relevant facts and documents relating to the arrangement for which the ruling is sought." Similarly, any ruling issued will be of no effect if "there was a material omission or misrepresentation in, or in connection with, the application for the ruling."

Despite the requirement for truthful disclosure, there appears to be no procedure, or even any requirement for formality, around the seeking and issuing of an official opinion. Significantly, such opinions may be given "either orally or in writing", which indicates that the opinions or expressions given by Inland Revenue officers in meetings or even over the phone (such as from Inland Revenue call-centre staff) may qualify under this definition. However, reliance on such oral opinions cannot be recommended as the difficulty faced by taxpayers in proving its existence, let alone the content, cannot be underestimated.

For instance, in *Anderson v Commissioner of Inland Revenue* the Commissioner had imposed a shortfall penalty of 150 per cent for tax evasion, despite the taxpayer's allegation that she had filed the GST returns at issue in reliance on verbal advice provided by a named Inland Revenue debt and returns officer. That officer acknowledged having several telephone conversations and meeting

with the taxpayer but denied ever having given the taxpayer “any advice”. In her affidavit, the officer claimed that “to have done so would have been contrary to departmental policy” – although the precise nature and scope of that policy was not disclosed. The officer’s file notes of her various dealings with the taxpayer were unclear and ambiguous.

This factual dispute over what, if any, advice had been provided to the taxpayer was ultimately resolved in the Commissioner’s favour. This result highlights that under s 149A of the Tax Administration Act 1994, the onus of proof in all matters with respect to the imposition of SFP (other than for evasion) falls on the taxpayer.

Given the breadth of the definition of “Commissioner’s official opinion”, particularly the fact that it could potentially apply to “off-the-cuff” statements made by Inland Revenue officers, it is surprising that there is no restriction on which officers can issue such official opinions or at which level within Inland Revenue can such official opinions be issued. All powers, duties and discretions under the revenue Acts are held personally by the Commissioner and then only delegated to the officers working under her authority. Accordingly, Inland Revenue officers hold only such power and authority as has been expressly delegated to them, either personally or by virtue of their role within Inland Revenue.

[(2015) Vol 21:3 NZJTLP 270, 276]

Taxpayers have no way to know whether the particular officer/s with whom they are dealing hold the required delegation. This raises the possibility that specific advice from an officer that was relied upon would nevertheless offer no protection to the named taxpayer because (unknown to the taxpayer) that officer lacked the proper delegation. Such a result would fundamentally undermine the intended operation of this provision.

Strangely, it appears there is no internal Inland Revenue delegation authorising officers of any level to issue an “official opinion”. In response to a request under the Official Information Act 1982 for details of the applicable delegations, Inland Revenue advised:

> “we don’t think that there is a particular power in section 120W which needs a delegation and accordingly there is nothing specific relating to it or to section 141B. One of the reasons for reviewing the current delegations is that quite a number of provisions don’t seem to actually contain specific powers, but simply apply as a matter of law. …“As to delegation impacts, it would really depend upon whether or not there was a specific provision engaged such as the binding ruling regime at one end of the scale. If the advice whether by letter or orally relates to specific powers or provisions which require a delegation, then the delegation in question would be relating to the underlying provision, if there was one.”

This response confirms that, as the non-application of UOMI or SFP under the relevant sections is automatic if the taxpayer has relied upon the Commissioner’s official opinion, it does not require the separate exercise of a discretion or power by an Inland Revenue officer. As a result, no delegation under those sections is required.

However, that response overlooks the question of which officer/s within Inland Revenue are authorised to issue such an official opinion in the first place? Does the lack of delegation mean that any and all officers have the power to give an official opinion? Or does the lack of express delegation create a vacuum under which only opinions otherwise officially authorised to be made by officers under some other delegated authority will be sufficient to bind the Commissioner?

3.2 Category 2: Generic Opinion

The second category of official opinion is a finalised official statement published by the Commissioner. Inland Revenue’s policy explains:

> “These must be in writing and will be published by Inland Revenue, in hardcopy and/or on the Inland Revenue website. Examples include interpretation statements, interpretation guidelines, Questions We’ve Been Asked, Inland Revenue guides, *Agents Answers* and *Business Tax Update* newsletters.”

The policy concludes that Inland Revenue Standard Practice Statements also come within the scope of this category as “these statements describe how the Commissioner will usually exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.” As such, they are also a “Commissioner’s official opinion” and therefore “to the extent that taxpayers take a tax position in reliance on a Standard Practice Statement and that tax position is incorrect, sections 120W and 141B(1D) apply” to exclude UOMI and SFP.

[(2015) Vol 21:3 NZJTLP 270, 277]

Given Inland Revenue's common practice to issue policy statements in draft form for public consultation, the policy stresses that only "a finalised statement" comes within the definition. Draft statements and those that are not yet operative (and presumably statements that have lapsed) do not qualify. Nevertheless, despite that statutory requirement, Inland Revenue has indicated that:

> "However, the Commissioner will generally not impose shortfall penalties under sections 141A-141D when taxpayers follow the position set out in a draft statement."

That definition also expressly states that it "does not include a private binding ruling".

3.3 Taxpayer Must Have Relied upon the Opinion

Both s 120W and s 141B(1D) stipulate that they apply only when the taxpayer has relied upon a Commissioner's official opinion. Accordingly, the taxpayer must not only identify the opinion in question but establish their reliance upon it. In other words, there must be a causal connection between the opinion and the taxpayer's tax position.

With taxpayer-specific opinions, this will be relatively easy to establish. But it will be less certain with respect to generic opinions. In order to come within that definition, the taxpayer must establish that the published policy "specifically applies to the taxpayer's situation". Presumably, the taxpayer must therefore prove how their individual circumstances fell within the scope of a particular policy or statement.

Even when a taxpayer can demonstrate that its circumstances bring it within the scope of a particular official opinion, it must still establish that it has actually relied upon that opinion. In other words, the theoretical application of an official opinion is not enough – actual reliance on that policy is required.

While the circumstances are obviously different, this potentially raises issues of reliance similar to that considered under either the Contractual Remedies Act 1979 (dealing with misrepresentation) or the tort of negligent misstatement. In both instances, the injured party must establish not only that the counterparty has made an incorrect or negligent statement but also that:

- The injured party actually relied upon that statement; and
- This reliance caused its loss.

If actual reliance on that statement cannot be established by the injured party, it cannot show that its loss was caused by the incorrect statement and therefore cannot recover any damages. For instance, under contract law the injured party must establish that it was induced to enter into the contract by the counterparty's representations. As stated in a leading text:

> "the plaintiff will not succeed unless it can be shown that the misrepresentation induced him or her to enter into the contract. It must have produced a misunderstanding in his or her mind, and that misunderstanding must have been one of the reasons which induced him or her to make the contract."

[(2015) Vol 21:3 NZJTLP 270, 278]

Significantly, under contract law reliance on the misrepresentation need not be the sole factor inducing a party to act, provided it was "a material factor". So errors or mistakes caused by other factors will not prohibit a finding of reliance.

A further requirement under the common law for both contract and tortious misstatement is that the party actually knew of the statement. A person cannot rely upon a statement of which they are unaware. Accordingly, ignorance of the existence of a misstatement at the material time will preclude a remedy.

Note that another limitation imposed on the scope of negligent misstatement (that is, whether the injured party was sufficiently proximate and therefore reasonably entitled to rely upon the incorrect statement) will not arise with respect to the application of the

official opinion rules for tax purposes. This is because the definition of “Commissioner’s official position” expressly includes both statements made directly to an individual taxpayer (who would obviously have sufficient proximity) and statements made by Inland Revenue to the world at large by way of its published statements (which would normally lack proximity).

While the question of reliance may appear theoretical, this requirement has already been considered in a recent case. In that case, a building contractor was uncertain whether payments made to subcontractors were liable to withholding tax. Form IR330 issued in March 2000, and then as updated in March 2003, stipulated that withholding payments were required with respect to “labour only contracts in the building industry”. As the subcontractors employed by the taxpayer were required to provide their own tools (and therefore were not “labour only”), the taxpayer claimed to have concluded that its payments were not subject to the withholding requirements.

In January 2006, Inland Revenue issued a revised Form IR330. This new form stipulated that “contracts wholly or substantially for labour only in the building industry” were to be subject to withholding tax. Once notified of that change in policy, the taxpayer began deducting withholding tax from its subcontractors.

Inland Revenue admitted that “its forms were not entirely correct”. Nevertheless, following an audit of the taxpayer’s affairs, Inland Revenue reassessed him for the undeducted withholding tax and imposed a shortfall penalty for evasion. The case came before the High Court which:

> “was asked to make a finding as to whether or not Mr Lim did in fact honestly rely on the Inland Revenue forms when his partnership failed to deduct withholding tax in the 2003 to 2005 income tax years.”

So, the issue in that case was whether the taxpayer had taken his tax position (being the decision not to deduct withholding tax):

- Truly in reliance on the Commissioner’s Form IR330; and
- Not for the purpose of evasion.

[(2015) Vol 21:3 NZJTLP 270, 279]

This issue was explained by Collins J as follows:

> “Counsel for the Commissioner quite properly proceeded on the basis that Mr and Mrs Lim’s dramatic change in approach to withholding tax deductions probably occurred after they had read one or both of the IRD forms. To this extent counsel for the Commissioner agreed that Mr Lim had probably relied on the IRD forms. *They submitted, however, that Mr Lim did not honestly rely on those forms because if he did read those forms he simply took advantage of the minor error in those forms and in doing so deliberately chose not to comply with his tax obligations.”*

In effect, the Commissioner alleged the taxpayer either:

- Was not actually aware of the forms at the time and was only now pointing to the errors in them to serendipitously justify his non-compliance; or
- Was aware of the forms but suspected they contained an error and therefore capitalised on it to justify his knowing non-compliance.

In either instance, the Commissioner alleged the taxpayer had not truly relied upon the errors in Form IR330 and therefore his conduct warranted the imposition of the shortfall penalty for evasion. Given the taxpayer’s conduct was entirely in accordance with the Commissioner’s published guidelines, it seemed an improbable and worrying argument. Not surprisingly, the Court ruled in the taxpayer’s favour, finding that he did honestly rely upon the Commissioner’s incorrect form, which fully justified his non-compliance.

That case was not decided under the new official opinion rules for two reasons:

- Those rules do not mitigate against the imposition of the shortfall penalty for evasion; and
- While the case was decided in 2013, the official opinion in question (that is, Form IR330) was not operative when those rules came into effect in September 2010.

Nevertheless, the Commissioner's approach to that case may provide an insight into how Inland Revenue will interpret and apply the official opinion rules. In particular, it demonstrates that a taxpayer may be required to prove actual reliance on the official opinion before the concessions flowing from that reliance will be granted. However, it would be concerning if the scepticism evident in the Department's approach to that case became common. If an error applying to a taxpayer can be established, it would defeat the purpose of the new rules if Inland Revenue routinely attempted to salvage its position by obliging taxpayers to prove their specific reliance. Of additional interest in that case is that:

> "Agreement had been reached by the parties in this case whereby the Commissioner had agreed to set aside the outstanding debt and penalty payments if [the High Court] was satisfied that Mr Lim held an honest belief in respect of the Inland Revenue forms."

That "agreement" was even more generous than the new Commissioner's official opinion rules because it resulted not only in the SFP and UOMI being set aside, but also the underlying tax debt (which the case law on estoppel referred to above uniformly confirms is not required). However, the existence of such an agreement in that case still raises the question of why that evasion penalty would be lifted only by virtue of the Commissioner's concession and not as of right under the statute (as would automatically apply with respect to the other SFP).

[(2015) Vol 21:3 NZJTLP 270, 280]

4.0 INVOKING THE NEW RULES

The application of s 120W and s 141B both may be disputed by taxpayers under the statutory disputes procedure in pt IVA. Unlike many other provisions which involve the exercise of "the discretion, judgment, opinion, approval, consent, or determination of the Commissioner", the application of the new rules in relation to official opinions is a disputable decision. Accordingly, taxpayers can positively rely upon those provisions to exclude the imposition of UOMI and/or SFP.

In practice, the Commissioner would seek to impose those additional assessments by raising a default assessment or by issuing a Notice of Proposed Adjustment. The taxpayer can then dispute the application of a SFP by positively relying upon the application of s 141B to prevent the imposition of that penalty. Generally, UOMI is not explicitly proposed by the Commissioner in a NOPA as imposition of UOMI under pt VII simply follows an assessment automatically. Imposition of UOMI cannot normally be disputed on any grounds as it is excluded from the scope of a "disputable decision". However, s 120W is not excluded in this way and therefore appears to be the sole ground upon which a taxpayer may legitimately dispute the imposition of UOMI. As such, this defence may be raised by taxpayers in their disputes documents as part of the dispute.

The reliance by the taxpayer on the Commissioner's official opinion and its justification for the taxpayer's mistaken tax position will then be determined (potentially alongside any reassessment for the underlying core tax) under the normal disputes procedure. Note that the onus of proof to establish that reliance falls on the taxpayer.

4.1 Likely Application of New Rules

As the new rules apply only to tax positons taken by taxpayers in reliance on official opinions issued by the Commissioner on or after September 2010, there is presently no case law to provide guidance on their application. Instead, it may be possible to gain some foresight by considering how these new rules may have applied to a number of previous cases. These are considered below.

4.1.1 New Zealand Ostrich Export Co Ltd

This case concerned the correct treatment of losses incurred by an LAQC under the then-regime in subpt HA of the Income Tax Act 2007. Inland Revenue's booklet IR435 explaining the Qualifying Companies regime contained a statement that LAQCs could elect to offset their losses against other group companies' income, before attributing any remaining loss to the shareholders personally. This booklet was subsequently discovered to be incorrect and misleading following the decision in *New Zealand Ostrich Export Co Ltd v Commissioner of Inland Revenue*. In that instance, the Commissioner's booklet would obviously fall within the generic limb of the definition of official opinion ("a finalised official statement … in writing") and therefore a taxpayer who had taken a tax position in reliance on the advice contained in that booklet would become entitled to the protection against UOMI and SFP provided under the new rules.

[(2015) Vol 21:3 NZJTLP 270, 281]

4.1.2 Structured finance

The structured finance litigation involved the application of the general anti-avoidance provision in s BG 1 of the Income Tax Act 2007 to certain "repo-deals" implemented by the Australian-owned trading banks. Significantly, Westpac Banking Corp had obtained a favourable Private Binding Ruling under pt VA of the Tax Administration Act 1994 with respect to one of those transactions confirming the bank's tax treatment. Unfortunately, the bank treated that Ruling as establishing a precedent and therefore entered into a number of replica transactions using that Ruling as a template. The Commissioner then reassessed each of those replica transactions – but not the original transaction for which the Ruling had been issued.

In the subsequent litigation, the Commissioner's reassessment of those transactions on the grounds of tax avoidance was upheld. More significantly, the Courts also rejected the taxpayer's argument that it was entitled to compel the Commissioner to apply the reasoning in the favourable Ruling to all the other transactions. Presumably, on the basis Inland Revenue itself had originally agreed with the taxpayer's treatment of these transactions in the favourable Binding Ruling, no SFP were imposed on the banks in that instance. But the subsequent settlement of that litigation for $2.2 billion was publicly acknowledged by the banks to include an amount towards UOMI.

If that litigation was repeated under the new official opinion rules, the outcome would be the same because the definition of "Commissioner's official opinion" in s 3(1) expressly excludes "a private binding ruling". Accordingly, taxpayers cannot rely upon a Ruling to exclude the application of UOMI and/or SFP to similar transactions. The reasoning for this exclusion was explained by Inland Revenue as follows:

> "The amendment will not apply to advice that is in the form of a private binding ruling. As the ruling is binding on the Commissioner, the taxpayer, in following the ruling, will not be subject to interest or the unacceptable tax position penalty."

However, as discovered by Westpac, a Ruling applies only with respect to a specific arrangement and has no precedential value even for other identical arrangements. Therefore, while a specific transaction to which a Ruling applies cannot be reassessed, it provides no comfort or protection with respect to other similar transactions. Furthermore, that Ruling also cannot be relied upon by taxpayers as an official opinion to escape the imposition of UOMI and SFP for other transactions. Given the special status enjoyed by binding rulings, this omission appears incongruous.

4.1.3 Alesco

In *Alesco*, the taxpayer used a hybrid instrument to borrow funds from its Australian parent. That hybrid instrument took advantage of the different tax treatments in Australia (as equity) and New Zealand (as **[(2015) Vol 21:3 NZJTLP 270, 282]** debt). Furthermore, the New Zealand tax treatment of that instrument was mandated by the operation of Determination G22 issued under pt V of the Tax Administration Act 1994. The Commissioner reassessed the taxpayer's tax position applying that Determination using the general anti-avoidance provision in s BG 1 of the Income Tax Act 2007.

The Court upheld the Commissioner's assessment and also imposed the SFP for adopting an abusive tax position under s 141D of the Tax Administration Act 1994. This conclusion caused some consternation amongst commentators. While it was found that the taxpayer's use of the hybrid instrument lacked commerciality in the circumstances, it was considered by many as unduly harsh and perhaps incorrect in law to impose a penalty on the taxpayer for following the tax position mandated by the Determination.

Firstly, as a threshold issue, in order to impose shortfall penalties for taking an abusive tax position, the Commissioner must establish that the taxpayer has taken an unacceptable tax position in s 141B of the Tax Administration Act 1994. In order for a taxpayer to fail to meet the statutory standard of being "about as likely as not to be correct", it was generally understood that its

position must not be "seriously arguable". The guidance on this is well established and not proposed to be set out in detail here. For present purposes, it is sufficient to note that it does not require a particular percentage of correctness (such as more than 50 per cent) or even that the taxpayer's position be actually found to be correct. For instance, in *Ben Nevis* the Supreme Court recognised that:

> "on its terms this standard does not require that the appellants' tax position had a 50 per cent prospect of success but, subject to that qualification, the merits of the arguments supporting the taxpayer's interpretation must be substantial."

If that litigation was repeated under the new official opinion rules, the outcome would arguably be different. While the status of Determinations is not specifically identified in the Inland Revenue's policy on these new rules, Determination G22 would undoubtedly come under the category of a generic official opinion as "a finalised official statement … in writing, if it specifically applies to the taxpayer's situation". Given that the Determination specifically applied to that type of hybrid instrument, in the author's view there would be an extremely strong argument that it falls within the statutory definition of Commissioner's official opinion. If upheld, the taxpayer's reliance on that Determination when taking its tax position would not prevent a core tax adjustment for the disallowed interest deductions but it would prevent the imposition of SFP and the accrual of UOMI.

If the official opinion rules had applied retrospectively (and not only to opinions issued on or after September 2010), it would have significantly changed the nature of that litigation. The taxpayer would have faced only the possibility of reassessment of its core tax and not the imposition of a 100 per cent SFP plus UOMI. At the very least, it would have had a likely impact on the terms of settlement ultimately reached to resolve that litigation.

[(2015) Vol 21:3 NZJTLP 270, 283]

4.1.4 Australian limited partnerships

It is understood the Commissioner is presently investigating (and possibly in litigation with) a number of taxpayers regarding their use of Australian limited partnerships (ALPs). This hybrid structure takes advantage of the different tax treatments in Australia (as a separate corporate taxpayer) and in New Zealand (as a transparent entity). This allows taxpayers to claim deductions for some expenditure (particularly borrowing costs) in both jurisdictions while returning only a single income stream (due to the tax credits generated on any profits derived in Australia being available to offset any additional tax in New Zealand).

Depending upon the year/s under dispute, that litigation may fall under the official opinion rules applying from September 2010. As such, any generic public policy or taxpayer-specific advice issued to any taxpayer adopting such a structure may potentially prevent the imposition of SFP or the accrual of UOMI.

Unfortunately for taxpayers, the Commissioner has perhaps anticipated this possibility. Inland Revenue has issued Public Binding Rulings BR Pub 14/01 to BR Pub 14/05 on many aspects of the tax treatment of these hybrid entities. Inland Revenue explains:

> "These five Public Rulings … deal with the ability of a New Zealand resident partner of an Australian limited partnership to claim foreign tax credits for Australian income tax and dividend withholding tax paid by an Australian limited partnership. The Rulings do not consider any other situations involving foreign income and foreign tax paid."

Those Rulings apply from the 2013-14 to the 2016-17 income years, so thereby come within the scope of the official opinion definition. The reasoning and tax treatment contained in those Rulings may be relied upon by taxpayers. Unfortunately, that reliance extends only to the black-letter aspects of that tax treatment. In particular, the single commentary to those Rulings expressly states that:

> "To avoid doubt, the Arrangement does not include arrangements where subpart BG applies to void the arrangement."

Accordingly, while those Rulings can be relied upon by taxpayers with respect to their technical compliance, they cannot be relied upon as "specifically applying to the taxpayer's situation" with respect to whether the use of that hybrid structure breaches the general anti-avoidance provision. If ultimately found to constitute tax avoidance, then those Rulings have no application to the potential imposition of SFP or the accrual of UOMI.

Given the potentially wide application of the new official opinion rules, it can be expected that this kind of limitation or disclaimer will become a common feature of Inland Revenue policies and Rulings. Nevertheless, taxpayers faced with the imposition of SFP and UOMI should scour Inland Revenue policy in the hope that some unrestricted policy bears upon their position such that they can bring themselves under, and therefore obtain the benefit of, the new rules.

[(2015) Vol 21:3 NZJTLP 270, 284]

4.2 Operation of Disputes Procedure

Inland Revenue has published comprehensive policies on the operation of the statutory disputes procedure. Likewise, the Commissioner has issued numerous Standard Practice Statements indicating how it will exercise its statutory powers during the conduct of an investigation. While Inland Revenue confirms that it cannot be bound to apply those policies in all instances, it recognises that:

> "Standard Practice Statements are, however, a 'Commissioner's official opinion'. To the extent that taxpayers take a tax position in reliance on a Standard Practice Statement and that tax position is incorrect, sections 120W and 141B(1D) apply[.]"

This is welcome confirmation that no UOMI or SFP will result from an increased assessment resulting from the Commissioner's decision not to follow a Standard Practice Statement. However, in practice those policies govern:

- The procedure under which the Commissioner determines the taxpayer's correct assessment; and
- Not the quantum of that assessment.

It is therefore difficult to see how Inland Revenue's non-application of a Standard Practice Statement could itself result in an increased tax assessment. An example of the consequences of Inland Revenue's failure to apply the Commissioner's policy on the operation of the disputes procedure is found in *Allen v Commissioner of Inland Revenue*. In that case, the Commissioner's policy wrongly advised that a taxpayer in receipt of a default assessment need only file the outstanding return to commence a dispute over that assessment, when s 89D actually required the taxpayer to both file the outstanding return and issue a Notice of Proposed Adjustment. Following that advice, the taxpayer had thereby failed to properly commence the dispute and therefore had forfeited its rights to dispute that default assessment.

Despite the devastating consequences for the taxpayer, the Supreme Court upheld the Commissioner's refusal to permit the taxpayer to bring its dispute. The Court explained:

> "Given the elucidation of the law in the course of this litigation, a taxpayer who relied on the departmental advice between 1996 and 2004, including the taxpayer in the present case, would have been misled by it. That is regrettable but we are not persuaded that the departmental publications bear on the question of interpretation."

Accordingly, despite the taxpayer's reliance on Inland Revenue's incorrect explanation of the requirements to commence a dispute, its failure to adopt the correct requirements meant it could not now dispute the Commissioner's assessment.

If that litigation was repeated under the new official opinion rules, the Commissioner's mistaken advice on the operation of the disputes procedure would clearly fall within the definition of an official opinion. Therefore, no UOMI or SFP would apply. But the imposition of those additional amounts was not the focus of that case; rather, it was whether the taxpayer could dispute the underlying core tax assessment. As such, the non-application of UOMI or an SFP in that instance was not germane to the taxpayer's situation. As a **[(2015) Vol 21:3 NZJTLP 270, 285]** result, it is difficult to see how the removal of those additional obligations under the new rules will avail a taxpayer in this type of situation. What they seek is a procedural concession – not the removal of additional taxes. Accordingly, the new rules would produce no change in the outcome of that case and still leave the taxpayer without an effective remedy.

The inadequacy of the official opinion concession in these circumstances was in fact demonstrated in *Charter Holdings Ltd v Commissioner of Inland Revenue*. That case concerned a taxpayer who had mistakenly failed to carry forward past year losses into its current tax calculation. When the problem was identified, Inland Revenue officers advised the taxpayer its only remedy was to apply for the Commissioner to exercise her general discretion to reassess the relevant past years to permit the losses to be properly carried forward, under s 113 of the Tax Administration Act 1994. When the Commissioner refused to exercise that discretion in favour of the taxpayer, Inland Revenue then advised that the taxpayer's only remedy was to bring a judicial review. Unfortunately, in reliance on this advice the taxpayer failed to take the correct approach, which was to commence a valid tax dispute regarding the availability of those past losses in the current income year, under pt IVA of the Tax Administration Act 1994. As a result, the Commissioner successfully applied to have the judicial review struck out, thus effectively depriving the taxpayer of any remedy. Again, this shows that the concession available to taxpayers who rely on the Commissioner's official opinion is an inadequate remedy for taxpayers who have relied upon the Commissioner's advice over procedural matters.

4.3 Likely Attitude of the Court

While the official opinion rules are yet to be tested before the courts, at least one past case indicates that the judiciary is likely to welcome the grounds to remit UOMI and SFP for taxpayers who face significant additional tax assessments for relying upon Inland Revenue's advice. For instance, in *Thompson v Commissioner of Inland Revenue* the Court of Appeal found a taxpayer liable for GST owing on the sale of properties following deregistration. However, the evidence established that the taxpayer had been incorrectly advised over the proper deregistration date, and then received a default assessment more than three years after that deregistration. As a result, the taxpayer faced a core GST debt of $365,000 that, with accumulated UOMI and late payment penalties, had risen to $2 million. Faced with that outcome, the Court of Appeal stated:

> "Instead, the [High Court] Judge invited the Commissioner to reconsider his discretion under s 183D of the Tax Administration Act and remit the penalties that had accrued up to 1 December 2005. Until the *Lopas* decision was delivered by this Court on 30 November 2005, it was open to Mr Thompson to interpret s 52(1) so that he could deregister before disposing of the properties. It is now clear that this interpretation was incorrect, but at the time it seems to have been the Commissioner's view also. Moreover, the Judge identified a number of other circumstances that might make remission appropriate. We agree with the Judge's views."… But the conduct of IRD officers in telling Mr Thompson he was deregistered as at 31 July 2000 and then assessing him for a later period more than three years later provides a strong basis for the Commissioner to acknowledge his Department's contribution to the non-payment of GST on supplies in the period from 1 August 2000 to 31 January 2001 by an appropriate remission of penalties."

Two significant points arise from that decision. The first is somewhat worrying in that the Commissioner had attempted to impose the full weight of the SFP and UOMI regimes on this taxpayer when Inland Revenue's own conduct and mistaken advice had been a factor in allowing them to accumulate. In such circumstances, it would have been hoped that Inland Revenue would itself have recognised its contribution to the situation and voluntarily exercised its discretion under s 183D to remit those penalties. However, it appears the taxpayer's insistence upon disputing the underlying core tax assessment somehow precluded the Commissioner from giving the taxpayer the benefit of that provision, even when its circumstances fell within the applicable policy. It is hoped the Commissioner does not adopt an equally antagonistic approach to the application of the official opinion rules towards taxpayers who also seek to dispute the underlying core tax that they believe (and presumably Inland Revenue previously agreed) was not payable.

Secondly, it is positive the Court of Appeal both recognised that Inland Revenue's mistaken advice had contributed to the massive accumulation of UOMI and SFP, and that the Commissioner should therefore exercise whatever discretion was appropriate to reverse that result. While the courts firmly oppose any attempt to estop the Commissioner from reassessing the underlying core tax, it is comforting that they view the imposition of UOMI and SFP in a different light. As such, it is hoped the courts will take a similarly liberal approach to the application of the official opinion rules in order to ensure the underlying policy of those rules is realised.

4.4 Other Taxpayer Protections?

The new Commissioner's official opinion rules replaced the former s 141KB of the Tax Administration Act 1994, which provided the Commissioner with the discretion to cancel SFP in certain limited circumstances. That short-lived discretion applied from April 2006 until it was repealed in April 2008, when it was considered redundant due to the enactment of more generous voluntary disclosure concessions in s 141G of the Tax Administration Act 1994. Nevertheless, while it applied, that provision permitted the

Commissioner to cancel the SFP that would otherwise have applied for taking an unacceptable tax position if it arose from “a clear mistake or simple oversight”.

Little consultation was possible on that provision as it was introduced as a Supplementary Order Paper to the Taxation (Depreciation, Payment Dates Alignment, FBT, and Miscellaneous Provisions) Bill 2005. Nevertheless, at the time the then-Minister of Revenue, the Hon Peter Dunne, explained the provision was intended “to give Inland Revenue greater flexibility in imposing shortfall penalties for taking an unacceptable tax position.”

The Minister explained:

> “It has been brought to the government’s attention that penalties for having an unacceptable tax position are being applied to a wider range of tax shortfalls than was envisaged by Parliament when it passed the legislation, in 1996. The penalty was aimed at ensuring that taxpayers take extra care, when declaring their income for tax purposes, in cases where there was potential for very large shortfalls. The penalty should not generally apply to those who have made a clear mistake or simple oversight and then attempt to rectify it.”

[(2015) Vol 21:3 NZJTLP 270, 287]

To qualify for the discretion, a taxpayer had to make a pre-notification voluntary disclosure of its error to Inland Revenue, under s 141G(1)(a) of the Tax Administration Act 1994. So, if that error was not identified by the taxpayer but only as a result of Inland Revenue’s audit activity, the discretion was not available. Interestingly, at that time Mr Dunne acknowledged that it was only “a short-term measure to reduce the harshness of the penalty in some cases. In the longer term I would like to devise legislative solutions that address a whole range of concerns about the tax penalty rules.”

It is presumed the enactment of the Commissioner’s official opinion rule is part of that package of measures ensuring the SFP and UOMI regimes do not wrongly penalise taxpayers who have placed a reasonable reliance on Inland Revenue when taking their tax position. Furthermore, that reduction does not rely upon the taxpayer itself having first identified and made a voluntary disclosure of that error.

4.5 Care and Management?

Given that the taxpayer has suffered the tax shortfall as a result of reliance upon Inland Revenue’s incorrect advice, it can logically be assumed that further imposing UOMI and/or SFP is unlikely to enhance the Commissioner’s duty to “protect the integrity of the tax system” under s 6 of the Tax Administration Act 1994. In particular, that duty encompasses “taxpayer perceptions of that integrity”. Likewise, when administering the tax system, the Commissioner must have regard to “the importance of promoting compliance, especially voluntary compliance by all taxpayers”, under s 6A(3) of the Tax Administration Act 1994. Presumably, a large part of taxpayers’ perceptions and the promotion of voluntary compliance is to encourage taxpayers to seek advice and assistance from Inland Revenue over the correct application of the tax laws. If that advice is wrong, taxpayer perceptions can only suffer.

As a result, not surprisingly the Commissioner acknowledges that while core tax remains payable (for the reasons summarised above), UOMI and SFP may be cancelled in certain circumstances. For instance, in Interpretation Statement IS 10/07: Care and Management of the Taxes Covered by the Inland Revenue Acts, the Commissioner provides two examples of how those duties apply to taxpayers who have relied upon mistaken advice from Inland Revenue. Interestingly, both would now fall for consideration under the rules governing reliance on the Commissioner’s official opinion: one involves a generic opinion while the other a taxpayer-specific opinion.

Example 18 examines the situation where Inland Revenue’s booklet IR435 explaining the Qualifying Companies regime contains a statement that loss-attributing qualifying companies could elect to offset their losses against other group companies’ income, before accounting for any remaining loss to the shareholders. This booklet was subsequently discovered to be incorrect and misleading following the decision in *New Zealand Ostrich Export Co Ltd v Commissioner of Inland Revenue*. The Commissioner therefore acknowledged that “many taxpayers are likely to have relied on the booklet, so their self-assessments will be incorrect. Some of the affected taxpayers have asked the Commissioner not to apply the current interpretation of the law to returns for years before the year in which the error was discovered.”

[(2015) Vol 21:3 NZJTLP 270, 288]

While restating that Inland Revenue’s policy is not binding and taxpayers cannot estop the Commissioner from correcting their tax

positions, the example recognises:

> “the risk that reassessing would be detrimental to taxpayers’ confidence in relying on Inland Revenue publications. If this occurs it might result in increased numbers of incorrect assessments … The Commissioner would also take account of the possibility that the taxpayers might consider it unfair that they are reassessed given they relied on the booklet and that they will incur additional compliance costs as a result. However, the Commissioner would weigh this consideration against the fact that he is not bound by the booklet (unlike binding rulings).”

While the Commissioner concluded that it would be permissible to reassess those taxpayers who had relied upon the Commissioner’s mistaken policy, any UOMI or late payment penalties that resulted from the increase in core tax would likely be remitted under existing Inland Revenue policy on the application of s 183D of the Tax Administration Act 1994.

Example 19 examines the situation of an individual taxpayer who is given incorrect advice from Inland Revenue’s public call centre. The taxpayer follows that advice and the resulting shortfall is identified by Inland Revenue as part of a subsequent audit. Again, the Commissioner confirms that “on the facts of this example, the Commissioner would be likely to reassess the taxpayer” because “it would result in her complying fully with her tax obligations” and “by contrast, a decision not to reassess could be seen as likely to undermine the integrity of the tax system”.

Again, the Commissioner:

> “… acknowledged that the taxpayer may consider it unfair that she is reassessed given that she relied on call centre advice, and that she will incur additional compliance costs as a result. There could also be a risk that reassessing her would result in other taxpayers becoming less confident in using Inland Revenue’s call centres. … These considerations are important and the Commissioner would necessarily take them into account. However, the Commissioner could well take the view that they are outweighed by the following factors:
>
> “• Reassessing would result in the taxpayer complying with her tax obligations. The tax obligations are imposed directly on the taxpayer by Parliament and, accordingly, she should expect to comply with them.
>
> “• The call centre advice does not alter the taxpayer’s legislative obligations. The Commissioner is not legally obliged to adhere to that advice (unlike binding rulings).”

However, the Commissioner would also likely remit any UOMI or late payment penalties that resulted from the reassessment under existing Inland Revenue policy on the application of s 183D of the Tax Administration Act 1994.

Both of those examples would now fall squarely within the new official opinion provisions to automatically cancel any UOMI or SFP resulting. Those taxpayers therefore do not need to apply to Inland Revenue **[(2015) Vol 21:3 NZJTLP 270, 289]** and rely upon the exercise of the Commissioner’s discretion to remit that additional tax. This change is recognised in the introduction to that policy which states:

> “This item may overlap with “Remission of penalties and interest – SPS 05/10”, *Tax Information Bulletin* Vol 17, No 9 (November 2005), insofar as that item deals with remission where Inland Revenue has given incorrect advice to a taxpayer. New legislation provides that no interest will be charged where a taxpayer relies on a ‘Commissioner’s official opinion’. However, *SPS 05/10* still applies to a variety of circumstances where it is possible to obtain remission not covered by the new legislation.”

SPS 05/10 also provides a limited form of relief against the imposition of UOMI and SFP under the Commissioner’s discretions under s 183D. That section provides discretion to remit UOMI (but not an SFP, other than a penalty for non-payment of PAYE):

> "if the Commissioner is satisfied that the remission is consistent with the Commissioner's duty to collect over time the highest net revenue that is practicable within the law."

Inland Revenue policy identifies a number of factors that will (and will not) be relevant to the exercise of that discretion. For present purposes, the policy confirms that:

> "Generally, the Commissioner will grant remission of penalties where there was a genuine oversight, a 'one-off' situation, or incorrect advice was given by an Inland Revenue officer that led to the taxpayer not filing their return or paying the tax on time. The Commissioner will remit interest in limited circumstances such as where an Inland Revenue officer has given incorrect advice to the taxpayer, and that advice has directly resulted in the non-compliance."

The application of this policy requires consideration of whether an Inland Revenue officer has given incorrect advice or a published policy is incorrect, which has resulted in non-compliance. Again, questions of reliance and causation are relevant. It then concludes that:

> "If an Inland Revenue officer has given incorrect advice to a taxpayer (for example, the taxpayer has directly been given an incorrect date or amount for tax payment) or the taxpayer relies on incorrect information contained in an Inland Revenue publication, the imposition of the penalty may adversely affect future compliance by the taxpayer or other taxpayers. However, this does not apply to misinterpretations of what is written in an Inland Revenue publication."

The policy then provides three simple examples of errors by Inland Revenue that would warrant remission. Importantly, in each instance they require the taxpayer to provide proof to support their reliance. For instance, one example involving the receipt of mistaken advice as to the date when a GST return and payment was due, stipulates that:

> "The taxpayer sought penalty remission and provided supporting documentation confirming the name of the Inland Revenue officer who gave the advice, the date of obtaining that advice and the contents of that advice."

[(2015) Vol 21:3 NZJTLP 270, 290]

Likewise, the second and third examples involving the receipt of incorrect advice both stipulate that:

> "the taxpayer would be expected to provide evidence to support that incorrect information was given by Inland Revenue. Relevant evidence may include the name of the Inland Revenue officer who gave the advice, the date of obtaining that advice and the contents of that advice."

It is expected that this kind of proof will also be required in all instances when taxpayers assert they are entitled to the benefits of reliance upon an official opinion. As such, this policy may provide a further indication of how Inland Revenue is likely to apply the new rules.

Somewhat strangely, the Commissioner's policy states that:

> "Remission applications under [section] … 183D will only be considered when the returns relevant to the remission requests have been filed *and the tax has been paid.*"

Section 183D itself contains no such requirement. Accordingly, there appears to be no justification for insisting that full payment of the UOMI and/or SFP be made by the taxpayer before the Commissioner will consider remitting those sums, and then presumably refunding them to the taxpayer. By contrast, the application of the new official opinion provisions does not require payment of the

disputed amounts before they can be relied upon by the taxpayer.

Finally, the remission of UOMI and SFP under s 183D is solely at the discretion of the Commissioner. Those amounts are payable and will remain collectable until and unless the Commissioner exercises that discretion in the taxpayer's favour. Furthermore, the refusal to grant the taxpayer's application for remission is not a disputable decision, which precludes the taxpayer from disputing the imposition of those amounts under the statutory disputes procedure. Taxpayers are therefore obliged to bring judicial review proceedings if they wish to contest the Commissioner's decision to decline their application for remission. The new rules therefore represent a substantial improvement for taxpayers as compared to the former position.

4.6 Effect of Unintended Legislative Change?

Finally, the decade-long process of rewriting our tax legislation was completed with the enactment of the Income Tax Act 2007. That process involved the re-ordering and rewriting of the legislation into plain English. Significantly, that process was not intended to involve any substantive amendment to the application of the legislation. As a result, the savings provision in s ZA 3(3) of the Income Tax Act 2007 stipulates that:

> "The provisions of this Act … are the provisions of the Income Tax Act 2004 in rewritten form, and are intended to have the same effect as the corresponding provisions of the Income Tax Act 2004."

Likewise, subs (4) explains that:

> "in circumstances where the meaning of a taxation law that comes into force at the commencement of this Act (the new law) is unclear or gives rise to absurdity … the wording of a taxation law that is repealed … and that corresponds to the new law (the old law) must be used to determine the correct meaning of the new law"."

[(2015) Vol 21:3 NZJTLP 270, 291]

Accordingly, as far as possible given its different wording and approach, the new law should have a consistent interpretation and application as its predecessor provisions. An exception to this rule exists only to accommodate "identified changes in legislation" – more commonly known as "intended changes".

By contrast, it is recognised that the savings provisions will not be totally effective and the process of rewriting the tax legislation will also have given rise to some "unintended changes" to its interpretation or application. A Rewrite Advisory Panel was formed to consider the effect of these unintended changes. Significantly, that Panel recommended, and the Commissioner accepted, that no SFP or UOMI should be imposed when a taxpayer takes a tax position and a tax shortfall subsequently arises because of an unintended legislative change from the corresponding provision in the Income Tax Act 2004. That concession is set out in SPS 08/03. However, that concession applies only where:

- The taxpayer has taken reasonable care and an acceptable tax position in applying the old interpretation; and
- The taxpayer writes to the Commissioner requesting remission (as that is a legislative requirement).

The taxpayer will still be required to pay the core tax arising on the reassessment by the due date.

If any unintended change is also the subject of a published policy or specific advice from Inland Revenue, then presumably it would now fall under the general policy dealing with the Commissioner's official position and therefore need no longer be considered under that narrower policy. However, it demonstrates how taxpayers who find themselves facing UOMI and SFP resulting from their reliance on Inland Revenue advice have a number of avenues by which they can seek to have those reversed.

5.0 CONCLUSION

The enactment of a statutory protection against the imposition of SFP and UOMI on taxpayers who have applied Inland Revenue's guidelines or advice is welcome. However, uncertainty remains. In particular, whether and how it may apply when the taxpayer attempts to dispute the correctness of its position is unclear. Likewise, a lack of clarity about what may constitute an official opinion and which Inland Revenue officers may issue it is unsatisfactory. But for taxpayers who qualify for the concession, it is welcome they are no longer forced to rely upon the discretion and sympathy of the Commissioner to ensure the SFP and UOMI imposed is "proportionate to the seriousness of the breach."

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FOOTNOTES

1 From the Taxpayer Compliance, Penalties, and Disputes Resolution Bill 1995 (119), enacted as the Tax Administration Amendment Act (No 2) 1996 and other Acts on 26 July 1996. The SFP regime is found in pt IX of the Tax Administration Act 1994 and the UOMI regime in pt VII of the Tax Administration Act 1994. All references in this article are to the Tax Administration Act 1994, unless provided otherwise.

2 Tax Administration Act 1994, s 120A(1) (paraphrase).

3 Tax Administration Act 1994, s 120A(2).

4 Tax Administration Act 1994, s 138E(1)(e).

5 Tax Administration Act 1994, s 139.

6 "Tax position" is defined widely in s 3(1) of the Tax Administration Act 1994.

7 See the Taxation (Annual Rates, Trans-Tasman Savings Portability, KiwiSaver, and Remedial Matters) Act 2010, which received Royal assent on 7 September 2010.

8 Under pt VII of the Tax Administration Act 1994.

9 Under pt IX of the Tax Administration Act 1994.

10 For examples, see *Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd*[2001] 1 NZLR 147, (2000) 19 NZTC 15,874 (CA); *Lemmington Holdings Ltd (No 2) v Commissioner of Inland Revenue*[1984] 2 NZLR 214, (1983) 6 NZTC 61,576, (1983) 6 TRNZ 333; and *Westpac Banking Corp v Commissioner of Inland Revenue*(2008) 23 NZTC 21,694 (HC).

11 *Brierley Investments Ltd v Bouzaid*[1993] 3 NZLR 655 (CA).

12 At 661-662.

13 *Commissioner of Inland Revenue v New Zealand Wool Board*(1999) 19 NZTC 15,476 (CA) at [62].

14 See s 113 of the Tax Administration Act 1994. However, the Commissioner may exercise her discretion not to apply Inland Revenue resources to reassessing taxpayers to correct an assessment using the general discretion for care and management of taxes under ss 6 and 6A of the Tax Administration Act 1994: see Inland Revenue "IS 10/07: Care and Management of the Taxes Covered by the Inland Revenue Acts – Section 6A(2) and (3) of the Tax Administration Act 1994" (2010) 22(10) Tax Information Bulletin 17.

15 See s 91EA of the Tax Administration Act 1994.

16 See Organisational Review Committee *Organisational Review of the Inland Review Department: Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* (April 1994) app D at [39].

17 The limitations (and particularly the lack of precedential value of such a ruling on almost identical transactions entered into by the same taxpayer) were demonstrated in *Westpac Banking Corp v Commissioner of Inland Revenue*[2009] NZCA 24, [2009] 2 NZLR 99, (2009) 24 NZTC 23,340; confirmed by the Supreme Court in *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZSC 36, (2009) 24 NZTC 23,435, (2009) 19 PRNZ 281.

18 This interpretation is confirmed by the Commissioner's policy "Status of the Commissioner's Advice" (2012) 24(10) Tax Information Bulletin 86 at [29]-[30]. However, the Commentary on the Taxation (Annual Rates, Trans-Tasman Savings Portability,

KiwiSaver, and Remedial Matters) Bill appears to have assumed a much narrower application to exclude only the unacceptable tax position penalty in s 141B and this wider application was not expressly considered: see New Zealand Government *Taxation (Annual Rates, Trans-Tasman Savings Portability, KiwiSaver, and Remedial Matters) Bill: Commentary on the Bill* (November 2009) at 42.

19 See *Lim v Commissioner of Inland Revenue*[2013] NZHC 1220, (2013) 26 NZTC ¶21-018, discussed further below.

20 See s 139B(1)(c)(ii) of the Tax Administration Act 1994.

21 *Thompson v Commissioner of Inland Revenue*[2011] NZCA 132, (2011) 25 NZTC ¶20-041 at [67].

22 This interpretation is confirmed by the Commissioner's policy "Status of the Commissioner's Advice", above n 18, at [31].

23 See Inland Revenue "Status of the Commissioner's Advice", above n 18, at [31].

24 Under s 91ED(1)(b) of the Tax Administration Act 1994.

25 Under s 91EB(2)(b) of the Tax Administration Act 1994.

26 *Anderson v Commissioner of Inland Revenue*(2007) 23 NZTC 21,472 (HC).

27 Pursuant to s 141E of the Tax Administration Act 1994.

28 Pursuant to s 7 of the Tax Administration Act 1994.

29 For a discussion on the requirement for a valid delegation of power in respect of each exercise of that power by Inland Revenue officers, and a review of the relevant cases, see Mark Keating *Tax Disputes in New Zealand: A Practical Guide* (CCH NZ, Auckland, 2012) at [1205].

30 Response to Official Information Act 1982 request by Inland Revenue dated 19 September 2014.

31 See Inland Revenue "Status of the Commissioner's Advice", above n 18, at [32].

32 At [34] and [35].

33 At [32].

34 For instance, see the discussion in *JEB Fasteners Ltd v Marks, Bloom & Co*[1981] 3 All ER 289 (QB).

35 See JF Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington, 2007) at [11.2.4].

36 For example, see *Savill v NZI Finance Ltd*[1990] 3 NZLR 135, (1989) 2 NZBLC 103,771, (1989) 3 TCLR 673 (CA).

37 For example, see *New Zealand Motor Bodies Ltd v Emslie*[1985] 2 NZLR 569 (HC) and *Pearson v Wynn*(1986) 2 NZCPR 449 (HC).

38 See *Cumberworld Contracting Ltd v Foseco (NZ) Ltd*(1993) 5 TCLR 534 (HC), and *Savill v NZI Finance Ltd*, above n 36.

39 Contrast with the restriction imposed on who may reasonably rely upon a misstatement in *Scott Group Ltd v McFarlane*[1978] 1 NZLR 553 (CA).

40 See *Lim v Commissioner of Inland Revenue*, above n 19.

41 See *Lim v Commissioner of Inland Revenue*, above n 19 (headnote).

42 At [45] (emphasis added).

43 Note, the onus of proof with respect to the SFP for evasion falls on the Commissioner under s 149A(2)(a) of the Tax Administration Act 1994.

44 *Lim v Commissioner of Inland Revenue*, above n 19, at 27,226, n 2.

45 See s 138E of the Tax Administration Act 1994.

46 See s 138E(1) of the Tax Administration Act 1994.

47 Tax Administration Act 1994, s 149A.

48 *New Zealand Ostrich Export Co Ltd v Commissioner of Inland Revenue*(2006) 22 NZTC 19,812 (HC), upholding *Case X14* (2005) 22 NZTC 12,194 (TRA).

49 See *Westpac Banking Corp v Commissioner of Inland Revenue*, above n 17; *BNZ Investments Ltd v Commissioner of Inland Revenue; Bank of New Zealand v Commissioner of Inland Revenue*(2009) 24 NZTC 23,059 (HC).

50 See *Westpac Banking Corp v Commissioner of Inland Revenue*, above n 49, upheld in *Westpac Banking Corp v Commissioner of Inland Revenue*, above n 17.

51 Therefore, that interpretation or tax position was at least "about as likely as not to be correct" under s 141B of the Tax Administration Act 1994.

52 For example, see Westpac "Industry Resolution to NZ Structured Finance Litigation" (media release, 24 December 2009).

53 See Inland Revenue and Treasury *Taxation (Annual Rates, Trans-Tasman Savings Portability, KiwiSaver, and Remedial Matters) Bill 2009: Officials' Report to the Finance and Expenditure Committee on Submissions on the Bill* (March 2010).

54 See *Alesco New Zealand Ltd v Commissioner of Inland Revenue*[2013] NZCA 40, [2013] 2 NZLR 175, (2013) 26 NZTC ¶21-003 .

55 For example, see Craig Elliffe and Mark Keating "Alesco New Zealand Limited v CIR: Concerns over the broad discretion in the application of the New Zealand GAAR" (2013) BTR 275; and "Alesco: The pendulum continues to swing in Inland Revenue's favour" Deloitte *Tax Alert* (April 2013) 5.

56 See, for example, *Beacham v Commissioner of Inland Revenue*[2014] NZHC 2839, (2014) 26 NZTC 21-111, and *Vinelight Nominees Ltd v Commissioner of Inland Revenue*[2013] NZCA 655, (2013) 26 NZTC ¶21-055.

57 See, for example, Inland Revenue "Shortfall Penalty – Unacceptable Interpretation and Unacceptable Tax Position" (2005) 17(9) Tax Information Bulletin 26.

58 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[2008] NZSC 115, [2009] 2 NZLR 289, (2009) 24 NZTC 23,188 at [184].

59 See Inland Revenue "Public Rulings BR Pub 14/01–14/05: Income Tax – Australian Source Income Earned by Australian Limited Partnership and Foreign Tax Credits" (2014) 26(6) Tax Information Bulletin 10 at 10. BR Pub 14/01 to BR Pub 14/05 are a reissue of BR Pub 10/01 to BR Pub 10/05.

60 See Inland Revenue "SPS 11/05: Disputes Resolution Process Commenced by the Commissioner of Inland Revenue" (2011) 23(9) Tax Information Bulletin 16 and Inland Revenue "SPS 11/06: Disputes Resolution Process Commenced by a Taxpayer" (2011) 23(9) Tax Information Bulletin 50.

61 Inland Revenue "Status of the Commissioner's Advice", above n 18, at [35].

62 *Allen v Commissioner of Inland Revenue*[2006] NZSC 19, [2006] 3 NZLR 1, (2006) 22 NZTC 19,827.

63 At [21].

64 *Charter Holdings Ltd v Commissioner of Inland Revenue*[2015] NZHC 2041, (2015) 27 NZTC ¶22-022.

65 It is understood the correctness of that decision on the application of the Commissioner's discretion under s 113 is under appeal. Likewise, the Commissioner is presently reconsidering her policy on the exercise of that discretion in draft Standard Practice Statement SPS ED0162: *Standard Practice – Requests to amend assessments* (October 2015).

66 *Thompson v Commissioner of Inland Revenue*, above n 21.

67 At [68]-[69] (footnote references removed).

68 See Inland Revenue "Remission of Penalties and Interest – SPS 05/10" (2005) 17(9) Tax Information Bulletin 68.

69 In particular, the extent of a pre-notification voluntary disclosure by taxpayers was raised to 100 per cent of any potential shortfall penalty for lack of reasonable care or unacceptable tax position.

70 See Peter Dunne "Tax shortfall penalty change" (media release, 20 March 2006).

71 Above n 70.

72 See the discussion by McGrath J on the scope and operation of those duties in *Westpac Banking Corp Ltd v Commissioner of Inland Revenue*[2008] NZSC 24, [2008] 2 NZLR 709, (2008) 23 NZTC 21,896.

73 See Inland Revenue, above n 14.

74 *New Zealand Ostrich Export Co Ltd v Commissioner of Inland Revenue*, above n 48, upholding *Case X14*, above n 48.

75 Inland Revenue, above n 14, at [226].

76 At [229].

77 See Inland Revenue, above n 68.

78 Inland Revenue, above n 14, at [230].

79 At [231].

80 At [232].

81 At [233].

82 Inland Revenue, above n 14.

83 Inland Revenue "Status of the Commissioner's Advice", above n 18.

84 Tax Administration Act 1994, s 183D(1).

85 See Inland Revenue, above n 68, at [8].

86 At [49(e)].

87 At 73.

88 At 73.

89 At [10].

90 Tax Administration Act 1994, s 138E(1)(e)(iv).

91 For example, see *W v Commissioner of Inland Revenue*(2005) 22 NZTC 19,602 (HC).

92 Further details about the Rewrite Advisory Panel are available at: <www.rewriteadvisory.govt.nz/>.

93 Inland Revenue "SPS 08/03: Income Tax Act 2007 – Penalties and Interest Arising from Unintended Legislative Changes" (2008) 20(10) Tax Information Bulletin 34.