

Standard Practice Statement

SPS 19/02

Voluntary disclosures

This statement also appears in *Tax Information Bulletin* Vol 31, No 4 (May 2019).

Introduction

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 Statement sets out the factors that the Commissioner will consider when forming an opinion as to whether a taxpayer has made a full voluntary disclosure to the Commissioner of all the details of a tax shortfall.

Unless specified otherwise, all legislative references in this Statement are to the Tax Administration Act 1994 (the TAA).

Application

This Statement applies from 27 March 2019 and replaces *SPS 09/02: Voluntary disclosures* published in *Tax Information Bulletin* Vol 21, No 5 (July 2009).

Standard practice

Summary

1. An important feature of the shortfall penalties regime is that shortfall penalties are reduced in certain specific circumstances. Section 141G(1) allows a shortfall penalty to be *reduced if, in the Commissioner's opinion, the taxpayer makes a full voluntary disclosure to the Commissioner of all the details of the tax shortfall.*
2. Voluntary disclosures may be made by a taxpayer in person, by telephone or in writing, including by modifying their existing tax return by using myIR.
3. Making a "full" voluntary disclosure involves the taxpayer disclosing the following information to the Commissioner in relation to each tax shortfall (as a minimum):
 - sufficient details for the Commissioner to satisfactorily identify the taxpayer (name, trade name, IRD number) and confirm the taxpayer's contact details (postal address, contact telephone number(s), email address); and
 - the tax periods and tax types involved; and
 - an explanation as to why the tax shortfall occurred; and
 - sufficient detail of the tax shortfall including its amount, and full details of the facts and circumstances leading to the tax shortfall to enable the Commissioner to make a correct assessment of the tax shortfall; and
 - any further information that is necessary for the Commissioner to make a correct assessment.

4. The wording of s 141G(1) discloses four essential elements to a voluntary disclosure. A voluntary disclosure:
 - must disclose a tax shortfall; and
 - must disclose all the details of the tax shortfall; and
 - must disclose something to the Commissioner; and
 - must be made voluntarily.
5. All these elements must be present before the Commissioner will form an opinion that what has been disclosed by a taxpayer amounts to a full voluntary disclosure.
6. Many disclosures made to the Commissioner are unprompted. That is, they are not made as a consequence of the Commissioner first contacting the taxpayer. They will often arise when the taxpayer notices an error or omission in a tax return that has been filed and proactively contacts the department. If the disclosure is clearly unprompted, then as long as the taxpayer provides all the details of the tax shortfall, the disclosure made by the taxpayer will be treated by the Commissioner as a full voluntary disclosure; it is the disclosure of a tax shortfall that has been made voluntarily. Because of this, a taxpayer in this position will not have to consider further the detailed discussion of the four essential elements to a voluntary disclosure (stated at [4] above) that follows.

A voluntary disclosure must disclose a tax shortfall

7. A tax shortfall is defined by s 3(1) as being the difference between the tax effect of the tax position taken by a taxpayer and the correct tax position, where that difference results in an increase in the tax payable by the taxpayer (or results in a decrease in a tax benefit). In making a voluntary disclosure, a taxpayer is disclosing to the Commissioner what the taxpayer now believes is an incorrect tax position that they have taken and requesting that the Commissioner make an assessment that they believe is based on a correct tax position.
8. A taxpayer is not able to make a voluntary disclosure on a matter that they wish to dispute. Nor will the Commissioner accept as voluntary disclosures, disclosures that are conditional on a particular outcome, or on the Commissioner doing (or not doing) something. This is because, given the definition of "tax shortfall" discussed above, a voluntary disclosure can only disclose a tax position that the taxpayer believes to be the correct tax position.
9. A taxpayer may make a voluntary disclosure and subsequently have a change of view as to whether the tax position disclosed is correct. This may occur, for instance, if further facts become available to the taxpayer, judicial authority is released, or the Commissioner changes her view in a public statement or ruling.

A voluntary disclosure must disclose all the details of a tax shortfall

10. For the purposes of the voluntary disclosure regime, disclosing all the details of a tax shortfall is known as "making a full voluntary disclosure". A "full" voluntary disclosure under s 141G requires a clear statement by the taxpayer of all the details of the difference between the tax effect of the tax position taken by the taxpayer, and the correct tax position.
11. All the details of a tax shortfall, including the monetary difference between the original tax position taken by the taxpayer and the correct tax position, should be disclosed by the taxpayer, as well as details of how this monetary difference was arrived at.

12. Although this does not necessarily require quantification of the tax shortfall to the last dollar in every circumstance, if the taxpayer makes little or no attempt to quantify the tax shortfall, or deliberately understates the tax shortfall, the voluntary disclosure cannot be a full voluntary disclosure. If the taxpayer is unable to quantify the exact amount of the tax shortfall, in order to allow the disclosure to be treated as a full voluntary disclosure, there is an expectation that the taxpayer will co-operate with the Commissioner to arrive at the amount of the tax shortfall.
13. A taxpayer's tax return is made up of a number of tax positions and an error in any of them may lead to a tax shortfall for that tax position. A taxpayer's tax return that contains a number of incorrect tax positions means that there will be a number of tax shortfalls that may have a shortfall penalty imposed on each of them separately. Where a taxpayer has multiple tax shortfalls they may make full voluntary disclosures for any of these tax shortfalls separately.
14. In some circumstances the Commissioner is required to amalgamate a number of tax shortfalls and create an aggregated tax shortfall for which only one shortfall penalty is imposed. This occurs because of s 141(10). As a voluntary disclosure must contain all the details of a tax shortfall, if a number of tax shortfalls have been aggregated by the Commissioner, any voluntary disclosure made by a taxpayer will need to disclose all the details of all the individual incorrect tax positions taken for the aggregated tax shortfall in order to be treated as a full voluntary disclosure.

A voluntary disclosure must disclose something to the Commissioner

15. For the purposes of the voluntary disclosure regime a "disclosure" is made if the taxpayer reasonably believes that the tax shortfall being disclosed is not known to the Commissioner. This is an objective test; whether the taxpayer's belief that the Commissioner was unaware of the details of the tax shortfall at the time that it was disclosed was reasonable in the circumstances.
16. It is the Commissioner's view that if a voluntary disclosure of a tax shortfall is made by a taxpayer and the Commissioner is already aware of that tax shortfall, this will generally still amount to a "disclosure" by the taxpayer. It will not amount to a disclosure if:
 - the Commissioner has expressly advised the taxpayer of an incorrect tax position and a tax shortfall; or
 - the facts and circumstances of the interactions between the taxpayer and the Commissioner clearly indicate that it was reasonable for the taxpayer to infer that the Commissioner already knew of a tax shortfall. Any decision to not accept a voluntary disclosure on this basis will be made by a senior officer.

A voluntary disclosure must be made voluntarily

17. A disclosure will always be made voluntarily unless a taxpayer, in making the disclosure, was acting under an obligation to do so, such that the making of the disclosure was not as a result of "acting on one's own free will". Meeting an obligation to provide information to the Commissioner does not necessarily mean that a voluntary disclosure cannot be made separately. A general invitation/suggestion by the Commissioner for a taxpayer (or group of taxpayers) to consider making a voluntary disclosure cannot amount to an "obligation" being imposed on those taxpayers.

Voluntary disclosures and subsequent prosecution action

18. If a taxpayer makes a full voluntary disclosure before they are first notified of a pending investigation, the Commissioner's usual practice is not to prosecute those taxpayers. In circumstances where the Commissioner forms the view that a taxpayer's actions or

omissions is such that non-prosecution could lead to voluntary compliance more generally being undermined, the Commissioner may still proceed with that subsequent prosecution action. A decision to prosecute in these circumstances will be an exceptionally rare occurrence, limited to serious offences, and will require the approval of a very senior officer.

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Detailed discussion

19. An important feature of the shortfall penalties regime is that shortfall penalties are reduced in certain specific circumstances. The reduction of a shortfall penalty occurs¹:
 - to take into account a taxpayer's previous good behaviour (s 141FB);
 - to acknowledge the adequate disclosure of a taxpayer's tax position (s 141H); and
 - to account for a tax shortfall that is temporary (s 141I).
20. Additionally, s 141G(1) allows that a shortfall penalty *may be reduced if, in the Commissioner's opinion, the taxpayer makes a full voluntary disclosure to the*

¹ Note that a shortfall penalty may also be increased to address a taxpayer's obstruction of the Commissioner (s 141K)

Commissioner of all the details of the tax shortfall.

21. The purpose of imposing shortfall penalties is to encourage voluntary compliance, and to address non-compliance in a way that is consistent, impartial and proportionate to the seriousness of that breach. The main forms of civil penalty are those listed at ss 141A to 141EB. These sections impose a shortfall penalty for taking an incorrect tax position or for doing or failing to do anything described in one of these shortfall penalty provisions. Shortfall penalties are imposed on a graduating scale from 20% to 150% of the difference between the tax effect of a taxpayer's tax position and the correct tax position; the "tax shortfall"².
22. The purpose of allowing a reduction to a shortfall penalty when a taxpayer makes a full voluntary disclosure is two-fold. It provides an incentive to taxpayers to determine their correct tax liability and aids voluntary compliance. It also provides cost savings in investigation time for Inland Revenue and other benefits that result from taxpayer co-operation.
23. If the Commissioner forms the opinion that a taxpayer has made a full voluntary disclosure before the taxpayer is first notified of a pending audit or investigation (investigation³), this is known as a *pre-notification disclosure*. In this circumstance the shortfall penalty will be reduced by 100% if that shortfall penalty was initially imposed for not taking reasonable care, taking an unacceptable tax position, or for an unacceptable interpretation. All other shortfall penalties will be reduced by 75%.
24. Full voluntary disclosures made after a taxpayer is first notified of an investigation, but before that investigation commences, are known as *post-notification disclosures*. In this circumstance the shortfall penalty will be reduced by 40%. Pre- and post-notification voluntary disclosures are further discussed at [79] and [85] below. No reduction in the quantum of a shortfall penalty is available where a disclosure is made after an investigation has commenced.

Voluntary disclosures and section 113

25. A voluntary disclosure provided by a taxpayer that discloses a tax shortfall is both a request that the Commissioner form an opinion that the disclosure amounts to a full voluntary disclosure, and a request that the Commissioner exercise the discretion contained in s 113 to amend the relevant assessment.
26. If a taxpayer makes a full voluntary disclosure to the Commissioner, s 113 provides the legislative authority for effecting the reassessment (but see discussion below regarding *proposed tax positions* (at [43]) and *conditional disclosures* (at [44] – [47])).
27. The discretion contained in s 113 is a broad one allowing the Commissioner to amend assessments to ensure their correctness. The Commissioner will generally agree to amend assessments that are requested if making the requested adjustment will result in a correct assessment being issued.
28. A full discussion on how the Commissioner will use the s 113 discretion can be found in SPS 16/01: *Requests to amend assessments*, published in *Tax Information Bulletin* Vol 28 No 4, May 2016 and at www.ird.govt.nz⁴.

² Section 3(1)

³ For the purposes of this Statement, the term *audit or investigation* will be referred to as an *investigation*

⁴ Search term: 16/01

How to make a voluntary disclosure

29. Voluntary disclosures may be made by a taxpayer in person, by telephone or in writing⁵.
30. If a voluntary disclosure is made in person to an officer of Inland Revenue, the officer will either
 - record the disclosure in writing and ask the taxpayer to sign that document as being a correct record of the voluntary disclosure; or
 - ask the taxpayer to make the disclosure in writing, including by email, completing the *Voluntary disclosure* (IR 281) form⁷ or letter, as is most convenient for the taxpayer.
31. To ensure there is a clear record of all the details of the voluntary disclosure, the ability to accept a voluntary disclosure by telephone is limited to calls that are received by Inland Revenue at a site that has call recording. For practical purposes, this means that a taxpayer will need to call using one of Inland Revenue's 0800 numbers. If a call is received by a site that does not have call recording, the taxpayer will be asked to put their voluntary disclosure in writing and/or complete either an IR 281 or IR 281P form as appropriate.
32. Whether the voluntary disclosure is made in person, by telephone or in writing, in order for a "full" voluntary disclosure to be made requires the disclosure of all relevant details of the tax shortfall. This is so the Commissioner can make a correct assessment in terms of s 113 with little requirement for further resources and time to be spent on the matter. The taxpayer must disclose all the details of the difference between the tax effect of the tax position(s) originally taken by the taxpayer, and the correct tax position(s). Note that full voluntary disclosures may be made for a number of different tax positions. This is discussed further at [54] – [59] below.
33. Making a "full" voluntary disclosure involves the taxpayer disclosing the following information to the Commissioner in relation to each tax shortfall (as a minimum):
 - sufficient details for the Commissioner to satisfactorily identify the taxpayer (name, trade name, IRD number) and confirm the taxpayer's contact details (postal address, contact telephone number(s), email address); and
 - the tax periods and tax types involved; and
 - an explanation as to why the tax shortfall occurred; and
 - sufficient detail of the tax shortfall including its amount (but see further discussion at [35] and [52] – [53] below), and full details of the facts and circumstances leading to the tax shortfall so as to enable the Commissioner to make a correct assessment of the tax shortfall; and
 - any further information that is necessary for the Commissioner to make a correct assessment.
34. Where a voluntary disclosure is made by a taxpayer using myIR to modify an existing tax return, much of the above information will be supplied while undertaking that modification. Despite this it will still be necessary for a taxpayer to provide an explanation as to why the tax shortfall occurred as well as full details of the facts and circumstances leading to the tax shortfall. When modifying a tax return this information can be provided in the space provided for the "description" of the "amendment information".

⁵ "in writing" includes by electronic means, including using myIR to modify a tax return

⁶ For a GST return, taxpayers may also use the "make an amendment" option in myIR

⁷ Or our *Voluntary disclosure (IR281P)* form if a taxpayer wishes to disclose the sale of a property

35. When a taxpayer makes a voluntary disclosure in writing, the Commissioner will acknowledge its receipt and advise the taxpayer whether the disclosure meets all of the requirements of a full voluntary disclosure. Irrespective of how a taxpayer makes a voluntary disclosure (by person, by telephone or in writing) if, in examining the voluntary disclosure, the Commissioner requires additional information, the taxpayer will be contacted and allowed a reasonable period of time to provide that information. The time period for providing the information will be negotiated between the taxpayer and the Inland Revenue officer. So long as the additional information is supplied within the agreed period (or such other period as is subsequently negotiated), the failure to supply that information in the first instance will not prevent the taxpayer's initial voluntary disclosure from being treated as a full voluntary disclosure, on the date that the initial disclosure was made.

Unprompted disclosures

36. The wording of s 141G(1) discloses four essential elements to a full voluntary disclosure. A full voluntary disclosure:
- must disclose a tax shortfall; and
 - must disclose all the details of the tax shortfall; and
 - must disclose something to the Commissioner; and
 - must be made voluntarily.

All these elements must be present before the Commissioner will form an opinion that what has been disclosed by a taxpayer amounts to a full voluntary disclosure.

37. Many disclosures made to the Commissioner are unprompted. That is, they are not made as a consequence of the Commissioner first contacting the taxpayer; often they arise because the taxpayer notices an error or omission in a tax return that has been filed and proactively contacts Inland Revenue (often by telephoning one of the department's contact centres) to have it corrected⁸.

When an unprompted disclosure is made, then as long as the taxpayer provides all the details of the tax shortfall (per [32] and [33] above), the Commissioner accepts that all the essential elements of a voluntary disclosure will have been met; that is, the disclosure has been made "voluntarily" and "discloses" a tax shortfall that the taxpayer believes that the Commissioner is not aware of. As long as all the details of the tax shortfall are provided, the Commissioner accepts that a full voluntary disclosure has been made by the taxpayer.

38. Some of these unprompted disclosures will not be liable to a shortfall penalty. In this circumstance, the fact that the disclosure is accepted as being a full voluntary disclosure is moot as there will be no reduction in the amount of a shortfall penalty that needs to be considered.

Where the disclosure is treated as a full voluntary disclosure, then if the unprompted disclosure attracts the imposition of a shortfall penalty, because there has been no relevant prior contact by the Commissioner the voluntary disclosure will be treated as a pre-notification disclosure and the appropriate voluntary disclosure reduction applied.

⁸ Note that s 113A also allows taxpayers to self-correct some low value errors in a subsequent return. Discussion on this can be found in SPS 16/01 *Requests to amend assessments* (at [86]).

The detailed discussion that now follows considers in some depth the above four essential elements of a disclosure that are stated at [36] above. Given the statements at [37] and [38] regarding unprompted disclosures, this discussion is only relevant if a shortfall penalty is imposed, the disclosure is not clearly an unprompted voluntary disclosure, and/or the voluntary disclosure has not disclosed all the details of the tax shortfall (per [32] and [33] above).

A voluntary disclosure must disclose a tax shortfall

39. A shortfall penalty is applied to a “tax shortfall”. A tax shortfall is defined by s 3(1) as being the difference between the tax effect of the tax position taken by a taxpayer and the correct tax position, where that difference results in an increase in the tax payable by the taxpayer (or a decrease in a tax benefit).
40. In making a voluntary disclosure, a taxpayer is disclosing to the Commissioner a tax position that the taxpayer now believes to be incorrect and requesting that the Commissioner make an assessment that they believe is based on the correct tax position. Any discussion regarding a taxpayer’s culpability for a shortfall penalty (including any matter pertaining to a taxpayer’s perceived guilt or wrongdoing) is a matter for separate discussion between the CIR and the taxpayer.
41. For a voluntary disclosure to be effective and reduce the amount of a shortfall penalty, the Commissioner must first impose a shortfall penalty. If the Commissioner does not impose a shortfall penalty, then the fact that the disclosure of the tax shortfall has been made voluntarily can have no effect (in this regard see also [38] above). Where this occurs, the voluntary disclosure will simply be treated as a request to amend the relevant assessment in terms of s 113.
42. If a taxpayer purports to make a voluntary disclosure that discloses a tax position that is merely proposed or is conditional, the Commissioner will not accept that the taxpayer has made a full voluntary disclosure. A full voluntary disclosure will also not be accepted where the taxpayer supplies false or misleading information in support of the proposed tax position.

Proposed tax positions

43. Given that in making a full voluntary disclosure, a taxpayer is disclosing to the Commissioner both a previously incorrect tax position and what they now believe to be the correct tax position, there are two matters that need to be noted. Firstly, a voluntary disclosure cannot be made for a tax position that is yet to be taken. A taxpayer could not make what purports to be a voluntary disclosure, as a means of having the Commissioner give a view on a tax position that was merely being considered.

Conditional disclosures

44. Secondly, it is the Commissioner’s view that a taxpayer is not able to make a voluntary disclosure on a matter that they wish to dispute. Nor will the Commissioner accept as a voluntary disclosure, a disclosure that is conditional on a particular outcome, or on the Commissioner doing (or not doing) something. This is because, given the definition of “tax shortfall” discussed above, a voluntary disclosure can only disclose a tax position that the taxpayer believes to be the correct tax position. For instance, the Commissioner would not accept as a voluntary disclosure the disclosure of a purported tax shortfall when it was the taxpayer’s intention to engage in the disputes process with the

Commissioner once the relevant assessment had been made on the basis that the new tax position was incorrect.

45. It is implicit in the scheme of s 141G that the taxpayer is committed to the disclosed tax position being the correct tax position. The disclosure of a tax shortfall is not a negotiation between the taxpayer and the Commissioner where the correctness of the tax position being disclosed is arguable by the taxpayer. Nor is it an opportunity for a taxpayer to make partial disclosures of the tax shortfall (for instance, making only a partial disclosure of their understated sales). Section 141G is a voluntary, "all cards on the table" approach for a taxpayer to disclose how their original tax position differs from what they now believe to be the correct tax position. Non-committal to, or non-acceptance of this correct tax position is inconsistent with the purpose of s 141G.
46. A taxpayer may make a voluntary disclosure and subsequently have a change of view as to whether the tax position disclosed is correct. This may occur, for instance, if further facts become available to the taxpayer, judicial authority is released, or the Commissioner changes her view in a public statement or ruling. If this occurs before the Commissioner makes the relevant assessment, a taxpayer can:
- resile from the tax position that they took in their initial voluntary disclosure and provide a new voluntary disclosure to the Commissioner providing the full details of what they now consider to be the correct tax position (but see [59] below regarding the timing of any new voluntary disclosure). Where this new tax position does not disclose a tax shortfall the disclosure will be treated as a request to amend an assessment in terms of s 113.
 - resile from the tax position that they took in their full voluntary disclosure and revert to their original tax position. Where the Commissioner agrees with this outcome, nothing further will occur. However, if the Commissioner believes that the tax position disclosed in the voluntary disclosure is correct then the taxpayer is free to dispute any adjustment (including the imposition of a shortfall penalty) that the Commissioner subsequently makes. In this circumstance a voluntary disclosure reduction of the shortfall penalty will still be available to the taxpayer. This is based on the fact that the Commissioner accepts that the tax position disclosed in the voluntary disclosure is the correct tax position and despite resiling from it, the taxpayer did initially make a full voluntary disclosure of that tax position.
 - resile from the tax position that they took in their initial voluntary disclosure, but only to the extent of the quantum of the tax shortfall. This may occur, for instance, where the taxpayer and the Commissioner are unable to agree on the correct quantum of the tax shortfall. For further discussion on this matter see [43] – [45] above and [52] – [53] below.
47. Once an assessment has been made and the applicable response period for the taxpayer to issue a *Notice of Proposed Adjustment* has passed, a taxpayer is not able to enter into a dispute with the Commissioner⁹.

A voluntary disclosure must disclose all the details of a tax shortfall

48. Disclosing all the details of a tax shortfall is known as making a *full voluntary disclosure*. A "full" voluntary disclosure under s 141G requires a clear statement by the taxpayer of all the details of the difference between the tax effect of the tax position taken by the taxpayer, and the correct tax position.

⁹ Sections 89C(c), 89D(1),

49. The voluntary disclosure regime is predicated on the fact that under a self-assessment regime, the taxpayer has the best knowledge of their tax affairs. In order for a voluntary disclosure to be said to be a full voluntary disclosure, there is the expectation that all the details of a tax shortfall, including the monetary difference between the original tax position taken by the taxpayer and the correct tax position, should be disclosed, as well as details of how this monetary difference (the tax shortfall) was arrived at (but see [52] – [53] below).
50. Making a full voluntary disclosure will generally involve the taxpayer disclosing the following information to the Commissioner in relation to each tax shortfall (as a minimum):
- sufficient details for the Commissioner to satisfactorily identify the taxpayer (name, trade name, IRD number) and confirm the taxpayer's contact details (postal address, contact telephone number(s) and email address); and
 - the tax periods and tax types involved; and
 - an explanation as to why the tax shortfall occurred; and
 - sufficient detail of the tax shortfall including its amount (but see [35] above and [52] – [53] below for further discussion on this matter), and full details of the facts and circumstances leading to the tax shortfall so as to enable the Commissioner to make a correct assessment of the tax shortfall; and
 - any further information that is necessary for the Commissioner to make a correct assessment.

Sufficient detail of the tax shortfall

51. To make a correct assessment, the Commissioner requires details of the amount of the tax shortfall and how this has been calculated.
52. This does not necessarily require quantification of the tax shortfall to the last dollar in every circumstance. What is required is that the taxpayer attempts to quantify the amount of the tax shortfall to the best of their ability, given their knowledge and expertise. If the taxpayer makes little or no attempt to quantify the tax shortfall, or deliberately understates the tax shortfall, the voluntary disclosure cannot be a full voluntary disclosure. If the taxpayer is unable to quantify the exact amount of the tax shortfall, then in order to allow the disclosure to be treated as a full voluntary disclosure, there is an expectation that the taxpayer will co-operate with the Commissioner to arrive at the correct calculation of the tax shortfall within an agreed timeframe (see [35] for further discussion on this matter). This co-operation will also fulfil the final requirement of what constitutes a full voluntary disclosure (per [50] above), *any further information that is necessary for the Commissioner to make a correct assessment*.
53. This does not obligate the taxpayer to agree with the Commissioner in all circumstances (but see further discussion at [43] – [45] above). Where, despite the honest endeavours of both parties, agreement is unable to be reached on the exact quantum of the tax shortfall, the taxpayer is able to dispute any adjustment that the Commissioner subsequently makes, and their disclosure will be treated as a full voluntary disclosure.

Example 1: *Treatment of unprompted voluntary disclosure of a partial tax shortfall*

Peter is the owner of a popular restaurant. Peter is aware that a number of local restaurants have recently been subject to investigation by Inland Revenue. He decides that he should disclose to the Commissioner that he has not been declaring all the cash sales that are made by the restaurant.

Peter will often remove amounts of cash from the till for his personal use but has not kept any record of how much has been taken over the years. He makes a voluntary disclosure to the Commissioner disclosing the nature of the understated sales, providing a rough estimate of how much he believes he has taken (and how he has calculated these takings) and makes an offer to assist the Commissioner to arrive at a more accurate figure if required.

Peter is true to his word and after the Commissioner and Peter have undertaken a thorough analysis of the restaurant's sales data, Peter and the Commissioner come to an agreement as to the likely amount of the omitted sales. On this basis the Commissioner accepted that Peter voluntarily disclosed a tax shortfall. Because Peter initially quantified the tax shortfall to the best of his ability and then assisted the Commissioner to arrive at the correct tax shortfall, his voluntary disclosure amounted to a full voluntary disclosure. As the disclosure was unprompted it was treated as a pre-notification disclosure (per box at [37] above).

The 2nd bullet point of [46], and [53] above provides discussion of the potential outcome should Peter and the Commissioner not be able to agree on the quantum of the tax shortfall.

Because he made an unprompted voluntary disclosure, Peter received a 75% reduction on the evasion shortfall penalty that was imposed. This can be compared to the 40% reduction that would have applied if Peter had waited until he was notified of a pending investigation before making a voluntary disclosure.

The relationship between a tax shortfall and a taxpayer's tax position

54. As already discussed (at [39] above), a "tax shortfall" is the difference between the tax effect of the tax position taken by a taxpayer and the correct tax position.
55. A taxpayer's tax return is made up of a number of tax positions and an error in any one of them may lead to a tax shortfall for *that* tax position. A taxpayer's tax return that contains a number of incorrect tax positions means that there may be a number of tax shortfalls that may have a shortfall penalty imposed on each of them separately. In these circumstances, a taxpayer may make a full voluntary disclosure in respect of each separate tax shortfall. If full voluntary disclosures are made in respect of some incorrect tax positions and not others, a voluntary disclosure reduction in the quantum of any shortfall penalty subsequently imposed will only be available in respect of those tax positions (and tax shortfalls) that were the subject of a full voluntary disclosure.
56. This same rationale applies to voluntary disclosures made in respect of some tax types (and not others) and/or some tax periods (and not others). If full voluntary disclosures are made in respect of some separate tax types and/or periods and not others, a voluntary disclosure reduction will only be available in respect of the tax positions (and tax shortfalls) that were the subject of a full voluntary disclosure.
57. Sometimes making a full voluntary disclosure in relation to a tax position will result in a consequential adjustment being required to another tax type. For instance, an income tax adjustment may have a consequential impact for GST purposes. In addition, a full voluntary disclosure made in relation to a tax position in one tax period may result in the same or similar adjustments being required in other tax periods. Despite the statements

made at [55] above, where a taxpayer initially (and inadvertently) omits to include these additional tax types/periods in their voluntary disclosures and this fact is obvious to the Commissioner, the Commissioner will advise the taxpayer of the apparent omission(s) and allow the taxpayer to include these additional facts. If this consequential alteration is made in a timely manner after the inadvertent omission is brought to the taxpayer's attention (per [35] above), the initial full voluntary disclosure will continue to be treated as a full voluntary disclosure in relation to these additional facts.

Example 2: *Voluntary disclosures only disclose some of the tax shortfalls discovered during an investigation*

Carol operates a café and has been notified by the Commissioner that the department intends to carry out an investigation of her tax affairs for the 2016 income year.

Before this investigation commences, Carol and her agent take the opportunity to review the café's 2016 income tax return and discover that some private expenditure has been claimed in error as business purchases. The over-claimed expenditure is for the purchase of private food items. Carol makes a post-notification voluntary disclosure of all the details of this over-claimed expenditure.

During the subsequent investigation other errors are located in the 2016 income tax return. These additional errors relate to an incorrect trading stock calculation and the use of incorrect depreciation rates for some asset types.

The tax positions taken for purchases, trading stock and depreciation are all separate tax positions that result in separate tax shortfalls. The fact that a voluntary disclosure was made by Carol only for the tax position taken for purchases does not mean that this voluntary disclosure is not a full voluntary disclosure specifically for this tax position.

Carol's full voluntary disclosure in relation to business purchases initially related to income tax only. When the Commissioner pointed out to Carol that this would have a consequential effect on her GST return Carol immediately amended her initial voluntary disclosure to include this fact. This amendment was accepted by the Commissioner as part of the initial full voluntary disclosure, as it was made in a timely manner after she was advised of the consequential adjustment that was required.

In this case Carol received a reduction in the shortfall penalty imposed for the over-claimed purchases (for both income tax and GST). Because they were not included in Carol's full voluntary disclosure, no voluntary disclosure reduction was available for the shortfall penalties imposed for the other incorrect tax positions taken.

58. As can be seen from the above discussion and example, the term "tax position" is able to be viewed quite narrowly and, in these circumstances, a failure to disclose every incorrect tax position will not necessarily invalidate full voluntary disclosures that have been made for one or more of these incorrect tax positions.
59. Because separate full voluntary disclosures may be made for each of the various tax positions taken by a taxpayer in their tax returns, the timing of the making of each full voluntary disclosure may impact the level of shortfall penalty reduction available for each shortfall. For instance, a full voluntary disclosure made for a tax position before the taxpayer receives a notification of a pending investigation will attract a reduction of either 100% or 75% (depending on the type of shortfall penalty imposed). If that same taxpayer were to make a separate full voluntary disclosure in respect of a different tax position they have taken (or make a new voluntary disclosure in respect of the same tax position), and not make that disclosure until after being notified of the pending investigation (but before the investigation had commenced), then the shortfall penalty reduction for that separate tax position and tax shortfall would be only 40%. No reduction would be available if the disclosure was made after the investigation had

commenced.

Treatment of multiple, similar tax positions

60. In some circumstances the Commissioner is required to amalgamate a number of tax shortfalls and create one aggregated tax shortfall for which only one shortfall penalty will be imposed. This occurs because of s 141(10). This section states that if a taxpayer takes various tax positions in the same return period, that are a "similar or identical taxpayer's tax position", any tax shortfalls resulting from these tax positions must be aggregated and are treated as one tax shortfall.
61. Because a voluntary disclosure must contain all the details of a tax shortfall, if a number of tax shortfalls have been aggregated by the Commissioner in terms of s 141(10), then to be effective any voluntary disclosure made by a taxpayer will need to disclose all the details of all the individual incorrect tax positions taken for the aggregated tax shortfall.

A voluntary disclosure must disclose something to the Commissioner

62. As stated at [36] above, another essential voluntary disclosure element is that a taxpayer must "disclose" something to the Commissioner. While this term is not defined in any of the revenue Acts, the Concise Oxford English dictionary defines "disclose" in the following terms:

Disclose *v* 1. Make (secret or new information) known...

63. The ordinary meaning of a "disclosure" emphasises that the information being imparted is "new". It is the Commissioner's view that, for the purpose of the voluntary disclosure regime, whether information that is being disclosed is new is judged from the taxpayer's perspective. That is, a "disclosure" is made if the taxpayer reasonably believes that the information being disclosed is not known to the Commissioner. This is an objective test; whether the taxpayer's belief that the Commissioner was unaware of the details of the tax shortfall at the time that it was disclosed was reasonable in all the circumstances. The Commissioner's actual knowledge is not relevant in this context.
64. Although s 141G contemplates that it is the Commissioner's opinion that is relevant as to whether a taxpayer has made a full voluntary disclosure, this does not mean that whether a "disclosure" has been made is tested from the Commissioner's perspective. It simply means that it is for the Commissioner to form an opinion as to whether a disclosure of information is a "full voluntary disclosure".

Disclosures made when the Commissioner is already aware of the tax shortfall

65. For the purposes of the voluntary disclosure regime, it is the taxpayer's knowledge when making a disclosure that requires consideration. Taxpayers should not be put into a position of having to second guess the Commissioner's knowledge regarding a tax shortfall to gain a full voluntary disclosure reduction.
66. It is the Commissioner's view that, if a voluntary disclosure is made by a taxpayer of a tax shortfall and the Commissioner is already aware of that tax shortfall, this will generally still amount to a "disclosure" by the taxpayer. It will not amount to a disclosure when the taxpayer, viewed objectively, was "clearly aware" that the Commissioner already knew of a tax shortfall.
67. Generally, a taxpayer will be said to be clearly aware of the Commissioner's knowledge of a tax shortfall if:
- the Commissioner has expressly advised the taxpayer of an incorrect tax position and a tax shortfall; or
 - the facts and circumstances of the interactions between the taxpayer and the

Commissioner clearly indicate that it was reasonable for the taxpayer to infer that the Commissioner already knew of a tax shortfall.

For the purposes of this paragraph, it is not necessary for the Commissioner to advise the taxpayer of “the” tax shortfall; that is, the exact amount of the tax shortfall. It will be sufficient for the taxpayer to be advised that the Commissioner is aware that the tax position that they have taken is incorrect and there is “a” tax shortfall.

68. This inference (that the Commissioner was aware of the tax shortfall, per [67] above) may include situations where there has been so much interaction between the Commissioner and the taxpayer narrowing down the tax shortfall through, for instance, repeated correspondence, interviews and information requests, that it would be reasonable for a taxpayer to infer that the Commissioner knew that there was an incorrect tax position and a tax shortfall. This represents a high bar and instances of this occurring will be highly fact specific. It is the Commissioner’s view that it will only be in rare instances that the level of interaction will be such that it would be reasonable for a taxpayer to infer that the Commissioner already knew of the incorrect tax position and a tax shortfall. Any decision to not accept a voluntary disclosure on this basis will be made by a senior officer.

Example 3: *Making a voluntary disclosure when Commissioner is aware of a likely tax shortfall*

The Commissioner has received information from Land Information New Zealand (LINZ) regarding sales of residential properties by taxpayers in the 2017 income year. The Commissioner commences a project to contact all taxpayers who have acquired and on-sold properties within a two-year timeframe. The first step in that project is to contact affected taxpayers and gain a greater understanding of the individual circumstances of each transaction. Note that this contact would not constitute a notification of a pending investigation (for further discussion on notifications see [81] – [85] and [88] – [90] below).

One of the affected taxpayers is Sally. The LINZ information available to the Commissioner shows that she has sold a residential property 10 months after it was acquired, and that the property’s land transfer tax statement did not show it as being used as Sally’s family home. Sally is contacted by letter and asked to confirm the sale details and provide her explanation of the circumstances of this transaction. Also included in this letter are details of the brightline test and the exemptions available from it. Although the Commissioner believes that it is likely that this transaction may be liable to income tax, until this further information is received that is by no means certain (it could be for instance, that the properties land transfer tax statement did not correctly claim the property as a family home, or one of the other brightline exemptions applies).

Sally responds by confirming the details of the transaction and notifies the Commissioner of the tax shortfall from the sale of the property. Sally’s notification of a tax shortfall is a “disclosure” under s 141G because, although Sally is aware that the Commissioner knows of the transaction, the Commissioner has not advised her of a tax shortfall (and as a matter of fact, at this early stage the Commissioner would not be certain that a tax shortfall existed) nor does the limited interaction between Sally and Commissioner reasonably indicate to Sally that the Commissioner was aware of the tax shortfall.

This can be contrasted with the example of Sally being in the business of property development. In this scenario the Commissioner may be in a position to advise Sally from the outset that the Commissioner believes that there was a tax shortfall (irrespective of the brightline test. If the Commissioner were to advise Sally of the tax shortfall in this circumstance Sally would not be in a position to make a full voluntary “disclosure”, as she would be aware that she was not disclosing anything new to the Commissioner; she would merely be confirming a tax shortfall that she knew the Commissioner was already aware of.

A voluntary disclosure must be made voluntarily

69. The final essential element of the voluntary disclosure regime (per [36] above) is that the disclosure must be “voluntary”. This term is not defined in any of the revenue Acts, so will take its ordinary meaning.

70. The Concise Oxford English dictionary¹⁰ defines “voluntary” as:

Voluntary *adj* 1 *done, given, or acting of one's own free will...*

This definition has been affirmed by case law. For instance, in *AG v Ellis*¹¹ the meaning of “voluntarily” (in the context of the Customs and Inland Revenue Act 1881) was held to mean:

*“Voluntarily” is not used in the sense of “without consideration”, but in its ordinary sense of “freely”, “without compulsion”, and “not under any obligation”.*¹²

71. Bearing this definition in mind, it is the Commissioners view that a disclosure will always be made voluntarily unless a taxpayer, in making the disclosure, was acting under an obligation to do so, such that the making of the disclosure was not as a result of “acting on one’s own free will”. The Concise Oxford English dictionary defines “obligation” in the following terms:

Obligation *n* 1. *An act or course of action to which a person is morally or legally bound; the condition of being so bound...*

72. Sections 17 – 17M impose legal requirements for taxpayers to disclose information to the Commissioner on request, and ss 15B(e) and (f) impose less formal obligations on taxpayers to disclose information and co-operate with the Commissioner. If the Commissioner makes either formal or informal requests for documents or information, it could be argued that any information subsequently disclosed cannot be said to have been disclosed voluntarily by the taxpayer; in the circumstances they were under an obligation to make a disclosure.

73. Merely meeting the Commissioner’s request for information does not necessarily mean that the taxpayer could not subsequently (or additionally) “voluntarily” make a disclosure of a tax shortfall. These two acts can be mutually exclusive. Section 141G is clear that the voluntary disclosure must be of a tax shortfall. In the context of a Commissioner’s request for information, this would require the specific disclosure of a tax shortfall and not just a provision of documents and/or information more generally. For a disclosure not to have been made voluntarily in these circumstances would require the information provided to the Commissioner to clearly show a tax shortfall, without the need for the Commissioner to undertake “further investigatory work”. In this context “further investigatory work” is limited to any further investigatory work required in order for the Commissioner to be satisfied that a correct assessment is able to be issued in respect of the tax position disclosed by the information provided.

74. Whether further investigatory work would be necessary, such that the disclosure may not be a full voluntary disclosure, will be determined on a case by case basis. It is the Commissioner’s view that this will be a high threshold and the information requested and provided would need to clearly show a tax shortfall.

75. For instance, if a taxpayer was under an obligation to supply personal bank statements and those statements showed a number of deposits, the Commissioner would not be able to state that those deposits were assessable income (and therefore disclosed a tax

¹⁰ Concise Oxford English dictionary (12th Ed.)

¹¹ [1895] 2 QB 466

¹² See also *Re Wilkinson, Page v Public Trustee* [1926] Ch 842, 850

shortfall) without having to undertake further investigatory work. They could, for instance, be capital or private in nature. In this circumstance, any disclosure made by the taxpayer relating to these deposits would be treated as having been made voluntarily. It needs to be noted that, in order to be eligible for a voluntary disclosure reduction of any subsequent shortfall penalty that was applied, the taxpayer would need to make a “full” voluntary disclosure of all of the tax shortfall in relation to the tax position in question; in the example given, the taxpayer would need to disclose all of the assessable income and not just that shown on the bank statements (see also discussion at [49] and [52] above).

76. This can be contrasted with the scenario of bank statements that showed the receipt of amounts of “interest”. In the situation where that interest had not been returned, the taxpayer could not argue that the provision of these statements amounted to a voluntary disclosure. The taxpayer was under an obligation to provide the bank statements and the statements clearly show a tax shortfall with no further investigatory work required of the Commissioner.
77. A general invitation/suggestion by the Commissioner for a taxpayer (or group of taxpayers) to consider making a voluntary disclosure cannot amount to an “obligation” being imposed on those taxpayers. Section 141G does not impose any legal obligation on taxpayers to make voluntary disclosures and so, in these circumstances the Commissioner is merely pointing out the existence and purpose of the voluntary disclosure regime. If this type of suggestion is made to a taxpayer and that taxpayer subsequently makes a full voluntary disclosure, that disclosure will be treated as having been made voluntarily.

Example 4: *Whether a disclosure is being made “voluntarily”*

George owns a dairy and has been notified by the Commissioner that the department intends to carry out an investigation of his tax affairs for the 2016 income year. The notification includes a request for business records.

Before sending his business records to the Commissioner, George and his accountant review these records and his tax returns for the 2016 year. This review reveals that George has failed to make an allowance for groceries that he and his family have taken for their personal use. This has resulted in purchases being overstated in his income tax return, as well as errors being made in his GST returns.

George then provides the business records to the Commissioner and discloses the relevant tax shortfalls.

While George is involuntarily discharging an obligation to provide information to the Commissioner (his business records), the disclosure of the tax shortfalls has been made separately and voluntarily. This is because the business records, by themselves, are not capable of disclosing a tax shortfall without further investigatory work by the Commissioner.

In this case George received a post-notification shortfall penalty reduction.

78. The filing of tax returns is not a voluntary act, but rather a legislative requirement imposed on taxpayers generally. Neither could the contents of these returns usually amount to a voluntary disclosure. This is because the tax return merely records the various tax positions taken by a taxpayer and therefore cannot disclose a tax shortfall as is required by s 141G. If a taxpayer wished to make a voluntary disclosure in respect of a period for which they had not filed the required return, the Commissioner would expect that return to be filed before or at the time that the voluntary disclosure was made.

Related matters

Reductions in shortfall penalties

79. As stated at [21] above, ss 141A to 141EB impose a shortfall penalty for taking an incorrect tax position or for doing or failing to do anything described in one of these shortfall penalty provisions. Shortfall penalties are imposed on a graduating scale from 20% to 150% of the difference between the tax effect of a taxpayer's original tax position and the correct tax position; the "tax shortfall". An important feature of the shortfall penalties and voluntary disclosure regimes is that, once imposed on a taxpayer, shortfall penalties are reduced if the Commissioner forms the opinion that the taxpayer has made *a full voluntary disclosure to the Commissioner of all the details of the tax shortfall*¹³.
80. The reductions available to taxpayers that make a full voluntary disclosure are:
- If the full voluntary disclosure is made before the taxpayer is first notified of a pending investigation (pre-notification disclosure), the shortfall penalty will be reduced by 100% if that shortfall penalty was initially imposed for not taking reasonable care, taking an unacceptable tax position, or for an unacceptable interpretation. All other shortfall penalties will be reduced by 75%¹⁴.
 - If the full voluntary disclosure is made after a taxpayer is first notified of an investigation, but before that investigation commences (post-notification disclosure), the shortfall penalty will be reduced by 40%¹⁵.
 - The above reductions also apply if the shortfall penalty is for a temporary tax shortfall¹⁶.
 - The amount of shortfall penalty payable by a taxpayer for not taking reasonable care, or for taking an unacceptable tax position, must not exceed \$50,000 if the tax shortfall was voluntarily disclosed by the taxpayer within a specified timeframe¹⁷. It should be noted that this is a monetary cap rather than a reduction and that the cap only applies after all other reductions in the amount of the shortfall penalty have been taken¹⁸.

Notification and commencement of an investigation

81. As stated above, crucial to deciding the level of reduction that is available to a taxpayer that makes a voluntary disclosure to the Commissioner is whether that voluntary disclosure qualifies as a pre- or post-notification disclosure. In turn, this is dependent on the taxpayer being "notified" that an investigation is either pending or has commenced.
82. Inland Revenue will *notify* a taxpayer when they are about to be investigated and/or advise them when an investigation has commenced¹⁹. This notification will specifically use the word "audit" or "investigation".
83. This notification will be in writing and communicated by post, fax, personal delivery or by electronic means. The notice will inform the taxpayer of the tax periods and tax types that are being investigated. If the scope of an investigation widens during that investigation and other tax types or periods are to be reviewed, the taxpayer will be

¹³ See [19] for details of other circumstances that may give rise to a reduction in the level of shortfall penalty imposed by the Commissioner

¹⁴ Section 141G(3)

¹⁵ Section 141G(3)(b)

¹⁶ Section 141J

¹⁷ Section 141JAA

¹⁸ Interpretation Statement IS0053 *Shortfall penalty for not taking reasonable care* and Interpretation Statement IS0055 *Shortfall penalty – unacceptable interpretation and unacceptable tax position*. Included in Tax Information Bulletin Vol 17 No 9 (November 2005). See www.ird.govt.nz (search term: IS0053)

¹⁹ Section 141G(4) sets out who the Commissioner may notify of a pending audit or investigation. See Appendix attached to this SPS.

promptly notified in writing of this change. Each party to an investigation will be separately notified.

84. An investigation *commences* at the earlier of:

- the end of the first interview; and
- the time when an officer inspects information and the taxpayer is notified in writing of the inspection²⁰. Until the notification of inspection is given or the first interview has ended, a taxpayer will still qualify for a post-notification voluntary disclosure reduction.

85. Further information regarding these matters may be found in Standard Practice Statement *SPS 16/03 Notification of a pending audit or investigation*²¹.

When does a taxpayer make a full voluntary disclosure?

86. For a disclosure to be “full”, all information relating to the tax shortfall must be provided. The timing of when a disclosure can be accepted as being “full” is when all the details relating to that tax shortfall have been received by the Commissioner. For instance, if the initial details of a tax shortfall are disclosed before the taxpayer receives the notification of a pending investigation, but the final details of that tax shortfall are not supplied to the Commissioner until after the taxpayer receives that notification, the “full” disclosure has occurred after the notification of the pending investigation and would only qualify for a post-notification disclosure reduction.

87. Exceptions arise where, per [35] and [52] above, the taxpayer is assisting the Commissioner to make a final quantification of the tax shortfall, or per [56] above, when the taxpayer is in the process of confirming a consequential alteration to their initial voluntary disclosure. Where these occur, and the agreed timeframes are adhered to, the Commissioner will accept that the full voluntary disclosure was made on the date of the initial voluntary disclosure.

Disclosures for another tax type, another tax period or another entity

88. As stated at [83] above, the notification of a pending investigation will advise the taxpayer of the tax periods and tax types that are to be investigated. If a taxpayer subsequently makes a full voluntary disclosure that is for a tax shortfall in a tax period or to a tax type that is not covered by this notification, that full voluntary disclosure will qualify as a pre-notification voluntary disclosure.

89. Similarly, if a full voluntary disclosure is made on behalf of an entity not subject to a notice of pending investigation (for instance, another company in a group of companies), that full voluntary disclosure will be treated as a pre-notification voluntary disclosure. Note however that when a company has a branch, the branch and company are considered to have been notified of a pending investigation at the same time. This is because the branch is not a separate entity to the company.

90. It is not uncommon for an investigation to be extended beyond the scope of that stated in the original notification of a pending investigation to include, for instance, additional revenue types, tax periods or entities. As stated at [83] above, if this occurs, the Commissioner will promptly notify the taxpayer in writing of the intention to extend the investigation and the scope of this extension. For the purposes of the voluntary disclosure regime this additional notification will be treated as the first notification of a

²⁰ Section 141G(5)

²¹ This may be found at www.ird.govt.nz (search term: 16/03)

pending investigation for, as appropriate, the additional revenue(s), tax period(s) or entities stated in the notification.

Voluntary disclosures and subsequent prosecution action

91. If a taxpayer makes a full voluntary disclosure before they are first notified of a pending investigation, the Commissioner's usual practice is not to prosecute those taxpayers. The decision not to prosecute in such cases is an exercise of the prosecutorial discretion on the basis that any subsequent prosecution action in this circumstance would not aid voluntary compliance. While it may be the Commissioner's usual practice not to prosecute in such circumstances, the Commissioner may not abdicate the exercise of the prosecutorial discretion by a pre-emptive blanket policy of not prosecuting in every case of a pre-notification voluntary disclosure²². However, the Commissioner may, where there are proper authorised alternatives to prosecution, decide that prosecution is not justified in the public interest²³. This is likely to be the case where an appropriate shortfall penalty will ensure that the integrity of the tax system is not undermined.
92. In circumstances where the Commissioner forms the view that a taxpayer's actions or omissions are such that non-prosecution could lead to voluntary compliance more generally being undermined, the Commissioner may still proceed with that subsequent prosecution action. For instance, this may occur when the taxpayer has a history of serious non-compliance such that a decision not to prosecute would suggest that the integrity of the tax system in general, and voluntary compliance in particular, would be undermined; for example, where a taxpayer has been guilty of serious tax evasion in the past and, despite shortfall penalties being imposed at that time, further instances of evasion had been identified. Simply because a full voluntary disclosure had been received should not stand in the way of the Commissioner prosecuting when the previous imposition of other penalties have had little or no effect on the taxpayer's subsequent compliance behaviour. A decision to prosecute in these circumstances will be an exceptionally rare occurrence, limited to serious offences, and will require the approval of a very senior officer.
93. Prosecution action may be considered by the Commissioner when a taxpayer does not make a full voluntary disclosure of a tax shortfall (see [50] – [57] for further discussion) before they are first notified of a pending investigation or when a taxpayer makes a full voluntary disclosure after they have been notified of a pending investigation.

Challenge rights

94. After receiving and fully considering a disclosure received from a taxpayer, the Commissioner may form the opinion that the taxpayer has not provided a "full voluntary disclosure" as required by s 141G(1), or that a disclosure was not made before either the taxpayer was first notified of a pending investigation (s 141G(1)(a)) or before the investigation commenced (s 141G(1)(b)). If such an opinion is formed, the Commissioner may not provide the taxpayer with the level of reduction in a shortfall penalty to which the taxpayer believes they are entitled.
95. In these circumstances the taxpayer can challenge the amount of the shortfall penalty, including the fact that they may disagree with the level of reduction provided by the Commissioner.

²² See *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [69], approved in *Osborne v Worksafe* [2017] NZCA 11 at [35]

²³ Solicitor-General's Prosecution Guidelines, <http://www.crownlaw.govt.nz/publications/prosecution-guidelines/> at 5.9.13

Reconsideration and complaint rights

96. If a taxpayer is concerned that their circumstances have not been given proper consideration, they should raise their concern with the staff member that considered their disclosure and ask for the decision to be reviewed by a more senior officer.
97. If a taxpayer 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 (search keywords: complaints and disputes) or phone 0800 274 138 (Monday to Friday between 8am and 5pm).

This Standard Practice Statement is signed on 27th March 2019

Rob Wells
Manager, Technical Standards, OCTC

Appendix

Legislation and published statements

Of relevance to the Commissioner when considering voluntary disclosures are the following sections of the TAA:

3 Interpretation

3(1) [Definitions] In this Act, unless the context otherwise requires, -

...
...

shortfall penalty means a penalty imposed under any of sections 141AA to 141K for taking an incorrect tax position or for doing or failing to do anything specified or described in those sections.

...
...

tax shortfall, for a return period, means the difference between the tax effect of—

- (a) a taxpayer's tax position for the return period; and
- (b) the correct tax position for that period,—

when the taxpayer's tax position results in too little tax paid or payable by the taxpayer or another person or overstates a tax benefit, credit, or advantage of any type or description whatever by or benefiting (as the case may be) the taxpayer or another person

139 Purposes of this Part

The purposes of this Part are—

- (a) to encourage taxpayers to comply voluntarily with their tax obligations and to cooperate with the department; and
- (b) to ensure that penalties for breaches of tax obligations are imposed impartially and consistently; and
- (c) to sanction non-compliance with tax obligations effectively and at a level that is proportionate to the seriousness of the breach.

141 Tax shortfalls

...
...

141(10) If—

- (a) in a return period, a taxpayer takes a taxpayer's tax position—
 - (i) in respect of, or as a consequence of entering into, an arrangement; or
 - (ii) in respect of an article, item, or matter; and
- (b) in the same return period, the taxpayer takes a similar or identical taxpayer's tax position—
 - (i) in respect of, or as a consequence of entering into, a similar or identical arrangement; or
 - (ii) in respect of a similar or identical article, item, or matter—

the tax shortfalls arising from the taxpayer's tax positions are to be aggregated and deemed to be 1 tax shortfall.

141G Reduction in penalty for voluntary disclosure of tax shortfall

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

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

141G(2) The Commissioner may from time to time—

- (a) specify the information required for a full voluntary disclosure; and
- (b) the form in which it must be provided.

141G(3) The level by which the shortfall penalty is reduced—

- (a) for pre-notification disclosure is—
 - (i) 100%, if the shortfall penalty is for not taking reasonable care, for taking an unacceptable tax position, or for an unacceptable interpretation; or
 - (ii) 75%, if subparagraph (i) does not apply;
- (b) for post-notification disclosure is 40%.

141G(4) A taxpayer is deemed to have been notified of a pending tax audit or investigation, or that the tax audit or investigation has started, if—

- (a) the taxpayer; or
- (b) an officer of the taxpayer; or
- (c) a shareholder of the taxpayer, if the taxpayer is a close company; or
- (d) a tax adviser acting for the taxpayer; or
- (e) a partner in partnership with the taxpayer; or
- (f) a person acting for or on behalf of or as a fiduciary of the taxpayer,— is notified of the pending tax audit or investigation, or that the tax audit or investigation has started.

141G(5) An audit or investigation starts at the earlier of—

- (a) the end of the first interview an officer of the department has with the taxpayer or the taxpayer's representative after the taxpayer receives the notice referred to in subsection (4); and
- (b) the time when—
 - (i) an officer of the department inspects information (including books or records) of the taxpayer after the taxpayer receives the notice referred to in subsection (4); and
 - (ii) the taxpayer is notified of the inspection.

141J Limitation on reduction of shortfall penalty

- (1) This section applies to a shortfall penalty payable by a taxpayer if—
 - (a) the taxpayer makes a voluntary disclosure; and
 - (b) the shortfall penalty is payable in respect of a temporary tax shortfall; and
 - (c) the shortfall penalty would be reduced under section 141G or 141H in the absence of this section.
- (2) The shortfall penalty is reduced by—
 - (a) 100%, if—
 - (i) the shortfall penalty is for not taking reasonable care, for taking an

- unacceptable tax position, or for taking a tax position involving an unacceptable interpretation of a tax law; and
 - (ii) the tax shortfall is voluntarily disclosed under section 141G before notification of a pending tax audit or investigation; or
- (b) 75%, if paragraph (a) does not apply.

141JAA Shortfall penalty for not taking reasonable care or for taking unacceptable tax position may not be more than \$50,000

- (1) Despite section 141J, a shortfall penalty payable by a taxpayer for not taking reasonable care, or for taking an unacceptable tax position, may not be more than \$50,000 if the taxpayer voluntarily discloses the shortfall under section 141G, or the Commissioner determines the shortfall, no later than the date that is the later of—
- (a) the date that is 3 months after the due date of the return to which the shortfall relates; and
 - (b) the date that follows the due date of the return to which the shortfall relates by the lesser of—
 - (i) 1 return period; and
 - (ii) 6 months.
- (2) This section does not apply if section 141K applies.

Other relevant legislative provisions are:

Sections 15B(e) and (f), 17, 113, 141A – EB, 141FB, 141H, 141I and 141K of the TAA

Published statements

This SPS should be read in conjunction with the following statements published by the Commissioner and any issued in replacement:

*Standard Practice Statement 16/01: Requests to amend assessments*²⁴

*Standard Practice Statement 16/03: Notification of pending audit or investigation*²⁵

²⁴ Published in Tax Information Bulletin Vol 28 No 4 (May 2016)

²⁵ Published in Tax Information Bulletin Vol 28 No 7 (August 2016)