

TAX INFORMATION

Bulletin

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YOUR OPPORTUNITY TO COMMENT

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

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

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

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

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

Your opportunity to comment

Ref	Draft type	Title	Comment deadline
PUB00432	Interpretation Statement	Income Tax – deductibility of costs incurred due to COVID-19	30 March 2022

IN SUMMARY

New legislation

Taxation (COVID-19 Support Payments and Working for Families Tax Credits) Act 2021

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This legislation amends the existing COVID-19 Resurgence Support Payments (RSP) Scheme into a more general COVID-19 Support Payments (CSP) Framework to provide the Government with the flexibility to continue supporting businesses under a variety of scenarios. The Act also increases the Family Tax Credit, Best Start Tax Credit, the Minimum Family Tax Credit, and the Family Credit abatement rate. Minor remedial changes are also made to the Working for Families indexation settings.

Rulings

BR Prd 22/01: Kiwibank Ltd

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The Arrangement is a product that Kiwibank offers to its customers which is marketed as the "Kiwibank Offset Mortgage" (the Product). The Product allows a customer to elect that interest payable by the customer on a loan made by Kiwibank should be calculated by offsetting the balance of the loan against the aggregate credit balances of certain nominated transaction and savings and investments bank accounts (hereafter referred to as "credit accounts") held either by that customer or by certain other eligible person(s). Interest is payable on the net notional balance of these combined accounts.

Technical decision summaries

TDS 22/01: Disputes resolution process – adjustments in notice of response

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Dispute process: adjustment in notice of response.

NEW LEGISLATION

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

Taxation (COVID-19 Support Payments and Working for Families Tax Credits) Act 2021

Overview

The Taxation (COVID-19 Support Payments and Working for Families Tax Credits) Act 2021 was passed under urgency on 23 November 2021. The Act received Royal assent on 25 November 2021. It amends the Tax Administration Act 1994 and Income Tax Act 2007.

The new legislation amends the existing COVID-19 Resurgence Support Payments (RSP) Scheme into a more general COVID-19 Support Payments (CSP) Framework to provide the Government with the flexibility to continue supporting businesses under a variety of scenarios. The Act also increases the Family Tax Credit, Best Start Tax Credit, the Minimum Family Tax Credit, and the Family Credit abatement rate. Minor remedial changes are also made to the Working for Families indexation settings.

COVID-19 Support Payments Framework

Sections 3, 7AAB, 7AAC, 157 and schedule 7 of the Tax Administration Act 1994; sections MB 13 and YA 1 of the Income Tax Act 2007.

The Act contains a number of amendments to adapt the existing RSP scheme into a more general CSP Framework.

Background

The Taxation (COVID-19 Resurgence Support Payments and Other Matters) Act 2020 amended the Tax Administration Act 1994 and Income Tax Act 2007 to introduce provisions allowing the Commissioner of Inland Revenue to make grants to eligible businesses impacted by increases to the COVID-19 Alert Levels.

The COVID-19 Resurgence Support Payments (RSP) scheme was explicitly connected to the COVID-19 Alert Level Framework and was limited to “an escalation in COVID-19 Alert Levels”. Due to the move to the COVID-19 Protection Framework, the RSP scheme needed to be adapted to provide the Government with the flexibility to continue supporting businesses in a variety of scenarios.

Key features

The new Act made the following changes to the Tax Administration Act 1994 (TAA) by amending:

- section 7AAB authorising the Commissioner of Inland Revenue to make grants to eligible businesses
- section 7AAC which allows the scheme to be activated by Order in Council
- the definition of “tax” in section 3 of the TAA to allow Inland Revenue to use its existing debt management and care and management powers to administer the scheme, and
- schedule 7 of the TAA to allow the Commissioner of Inland Revenue to publish information relating to the scheme, including names of persons to whom the Commissioner has made a grant under the scheme.

Application date

The amendments apply from the date the Act received Royal assent.

Detailed analysis

The Act amends the Tax Administration Act 1994 and the Income Tax Act 2007.

As with the RSP scheme, the CSP framework is provided for in primary legislation to allow the Commissioner of Inland Revenue to use her existing tax administration powers for the purposes of administering the CSP framework. The amendments in this Act do not make available any powers that were not already available for the administration of the RSP scheme.

Section 3 of the Tax Administration Act 1994

The definition of “tax” in section 3 of the Tax Administration Act is amended to include an amount payable in relation to a grant made under the new framework. The amendment would allow Inland Revenue to continue to use its existing debt management and care and management powers to administer grants under the CSP Framework.

Section 7AAB of the Tax Administration Act 1994

The amendment to section 7AAB of the Tax Administration Act 1994 expands the existing RSP framework to allow the Governor-General, by Order in Council, to authorise grants to be made to an eligible person financially affected by a public health measure, a business circumstance, or a matter related to COVID-19.

The CSP framework retains the overall objective of the RSP scheme, namely supporting eligible businesses affected by COVID-19 restrictions, but it will no longer be specifically linked to the COVID-19 Alert Level Framework or limited to “an escalation in COVID-19 Alert Levels”. This ensures that the Government will have the flexibility to continue to support businesses under a variety of scenarios.

Section 7AAC of the Tax Administration Act 1994

Amendments to section 7AAC of the Tax Administration Act 1994 are consequential changes to replace references to the RSP scheme with the CSP scheme. This ensures that, similar to the RSP scheme, the CSP framework will allow for the payment activation criteria, eligible persons, circumstances of the payment, and calculation of payment amounts to be set by Order in Council.

Section 157 of the Tax Administration Act 1994

The definition of “income tax” in section 157(10) of the Tax Administration Act 1994 is amended to include the entire amount of the grant that the recipient has to pay back. In the event that the recipient makes a default in the repayment of the grant to the Commissioner of Inland Revenue, the Commissioner is able to pursue the outstanding balance by issuing a notice under section 157.

Schedule 7, part A, clause 13B of the Tax Administration Act 1994

The amendment to schedule 7, part A, clause 13B of the Tax Administration Act 1994 allows the Commissioner of Inland Revenue to publish information relating to the CSP scheme. This power was an integrity measure for the RSP scheme and the amendment ensures that it is available for the CSP scheme. The provision allows the Commissioner to publish information including the names of the persons to whom the Commissioner makes a grant under the scheme. However, the Commissioner is limited in the types of information that can be published and the clause imposes a time limit of 24 months for the information to remain published. This time limit may be extended by Order in Council made under section 7AAC on the recommendation of the Minister of Revenue.

Although this is not specified in the Act, Inland Revenue will publish specific information relating to the payment of the support payments:

- the name of the recipient of the grant
- the amount paid, and
- the period of alert level escalation for which this payment relates.

Inland Revenue will not publish details where:

- the recipient has fewer than three employees, or
- the amount paid is capped due to the “low revenue decline” test. This protects the privacy of the recipient by ensuring their actual revenue cannot be calculated based on the amount paid.

The information will be published on a searchable database on the Inland Revenue website.

Section MB 13 of the Income Tax Act

The amendment to section MB 13 of the Income Tax Act 2007 excludes a payment under the scheme from the calculation of a person's family scheme income. This is because a grant made under the scheme is for business purposes only. As the grant is not available for private use, it should not be included in calculating a person's family scheme income.

Section YA 1 of the Income Tax Act

The definition of "exempt interest" in section YA 1 of the Income Tax Act 2007 is amended to include interest payable in relation to the repayment of a grant under the scheme. This amendment relates to resident withholding tax (RWT) and ensures the grant recipient does not have to deduct RWT on any interest charged by the Commissioner of Inland Revenue.

Working for Families

Sections MD 3, MD 13, ME 1, MF 7, MG 2 of the Income Tax Act 2007.

The Act increases the Family Tax Credit (FTC), the Best Start Tax Credit (BSTC), the Minimum Family Tax Credit (MFTC), and the Family Credit Abatement rate. The Act also makes minor, remedial adjustments to the Working for Families (WFF) indexation settings.

Background

The WFF scheme provides financial support to low- and middle-income families with children.

Key features

The Act makes the following changes to the Income Tax Act 2007 by amending:

- Section MD 3 to increase the FTC eldest child rate from \$5,878 to \$6,642 and the subsequent child rate from \$4,745 to \$5,412
- Section MD 13 to increase the Family Credit Abatement rate from 25% to 27%
- Section ME 1 to increase the MFTC threshold from \$31,096 to \$32,864
- Section MF 7 to:
 - change the Consumers Price Index (CPI) measure used for the purposes of WFF indexation from the CPI (All groups excluding cigarettes and other tobacco products) to the CPI (All groups) measure; and
 - reset the start date from which future cumulative increases in the CPI are measured to 1 October 2021.
- Section MG 2 to increase the annual BSTC rate from \$3,120 to \$3,388.

Application date

The above changes take effect from 1 April 2022, with the exception of the amendments to section MF 7, which take effect from 26 November 2021, the day after the Act received Royal assent.

Detailed analysis

The Act amends the Income Tax Act 2007.

Section MD 3: Family tax credit rates increased

The Act increases the FTC eldest child rate from \$5,878 to \$6,642 and the subsequent child rate from \$4,745 to \$5,412, from 1 April 2022. These increases combine a scheduled inflation-indexation of the FTC with an additional \$5 per week, per child increase.

The FTC provides financial support to low- and middle-income families with children. FTC rates are indexed to inflation to ensure they maintain their real value over time. An inflation-indexed increase of the FTC rates is triggered when the CPI has a cumulative increase of 5% since the rates were last adjusted. An increase was triggered in the September 2021 quarter when cumulative CPI increases exceeded 5% (ultimately reaching 8.57%) since the last adjustment on 1 July 2018.

The additional \$5 per week, per child increase is intended to help reduce child poverty and alleviate the financial pressure and hardship brought on by COVID-19 restrictions.

Section MD 13: Family Credit Abatement rate increased

The Act increases the Family Credit Abatement rate from 25% to 27% from 1 April 2022.

The Family credit abatement rate determines the rate at which the FTC and In-work tax credit payments reduce once family income exceeds the Family Credit Abatement threshold of \$42,700.

Section ME 1: Minimum Family Tax Credit increased

The Act increases the MFTC guaranteed minimum income level for working families not receiving a main benefit (prescribed amount) from \$31,096 to \$32,864 per year from 1 April 2022.

The change ensures that sole-parent families are financially better off in work, rather than on a benefit. The prescribed amount is adjusted annually in line with increases to main benefits to ensure the policy intent of the MFTC is maintained.

Section MF 7: Remedial amendments to indexation settings

The Act amends the CPI measure used for calculating the inflation indexation of FTC and BSTC rates, changing from the CPI (All groups excluding cigarettes and other tobacco products) measure back to the CPI (All groups) measure.

In 2017, the CPI measure used to calculate inflation indexation of WFF payments changed from CPI (All groups) to CPI (All groups excluding cigarettes and other tobacco products) from 1 April 2018. The change in CPI measure was to prevent increases in tobacco prices, resulting from annual tobacco excise tax increases, flowing through to increases in WFF payments. With annual tobacco excise tax increases ceasing at the end of 2020, the CPI measure used has been amended, reverting back to CPI (All groups).

The Act also resets the start date from which future cumulative CPI increases are measured to 1 October 2021.

Section MG 2: Best Start Tax Credit increased

The Act increases the annual BSTC rate from \$3,120 to \$3,388 from 1 April 2022 to reflect increases in inflation.

The BSTC provides financial support for all families during the first year of their child's life and for low- and middle-income families during the second and third years of their child's life. Like FTC rates, the BSTC rate is indexed to inflation to ensure it maintains its real value over time. An inflation-indexed increase is made to the BSTC rate when the CPI has a cumulative increase of 5% since the rate was last adjusted. An increase was triggered in the September 2021 quarter when cumulative CPI increases exceeded 5% (ultimately reaching 8.57%) since 1 July 2018 when the BSTC was introduced.

BINDING RULINGS

This section of the *TIB* contains binding rulings that the Commissioner of Inland Revenue has issued recently. The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates their tax liability based on it.

For full details of how binding rulings work, see *Binding rulings: How to get certainty on the tax position of your transaction (IR715)*. You can download this publication free from our website at www.ird.govt.nz

BR Prd 22/01: Kiwibank Ltd

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

Name of person who applied for the Ruling

This Ruling has been applied for by Kiwibank Limited.

Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of ss BG 1, CC 7, EW 15, EW 31, RE 1(1) and RF 2(1).

The Arrangement to which this Ruling applies

The Arrangement is a product that Kiwibank offers to its customers. The product is marketed as the “Kiwibank Offset Mortgage” (the Product). The Product allows a customer to elect that interest payable by the customer on a loan made by Kiwibank should be calculated by offsetting the balance of the loan against the aggregate credit balances of certain nominated transaction and savings and investments bank accounts (hereafter referred to as “credit accounts”) held either by that customer or by certain other eligible person(s). Interest is payable on the net notional balance of these combined accounts.

This Ruling does not consider the tax consequences of any arrangement under which a credit account holder agrees to offset his or her credit account balance against another person’s home loan account balance in return for valuable consideration.

Further details of the Arrangement are set out below.

Background

1. The Product is a feature that Kiwibank offers to new and existing customers. The Product is available to both individual customers and business customers, including companies and trusts.
2. The Product is capable of affecting the way in which interest is calculated on loans offered by Kiwibank which had an agreed fixed periodic repayment arrangement (also referred to as the “table portion” of a loan). Kiwibank also offers loans with a revolving credit feature whereby amounts can be repaid or re-borrowed at any time provided the principal, interest, fees and costs on the loans do not exceed the specified maximum credit limit (also referred to as the “revolving portion” of a loan). The Product does not apply to “revolving portion” loans.
3. In overall commercial terms, the economic consequences for a customer of using the Product, or using a revolving portion loan product bearing a variable interest rate, are broadly the same.
4. Prior to the introduction of the Product, customers of Kiwibank could elect for their table portion loan to have one or more of three components: fixed, variable, and construction components.
5. The “fixed component” of the loan is subject to a fixed interest rate for a fixed term. Customers may repay all or part of a fixed component at any time, although in certain circumstances they may be charged with a fixed rate break cost for making any repayment that exceeds an early repayment limit agreed with Kiwibank.
6. The “variable component” of the loan is subject to a variable interest rate. Customers may repay all or part of a variable component of a loan at any time without any break costs.

7. The “construction component” of the home loan is available where the home loan is obtained for the purpose of buying land and building a house on it or renovating a house on land the borrower already owns. The construction component of the home loan is subject to a variable interest rate and can be borrowed in stages (as opposed to a fixed or variable component which must be borrowed in a lump sum).
8. Kiwibank recognises that customers may have a range of accounts, including various deposit and loan accounts. Therefore, Kiwibank introduced the Product, which introduced a new component called an “offset variable component”.
9. When a customer elects that all or part of a loan is to have an offset variable component, interest accruing on that loan, or that portion of the loan, is to be calculated by reference to a notional balance. The notional balance is calculated by offsetting the debit balance of the offset variable component of the loan against the total credit balances multiplied by the existing published Kiwibank “offset ratio” of nominated everyday banking and savings and investments accounts (referred to as the “credit accounts”). This lowers the interest payable and the variable component of the loan. Therefore, it results in a greater proportion of a customer’s regular loan repayments being applied in reduction of the principal of the offset variable component of the loan.
10. This feature effectively treats a group of accounts in a collective or aggregated manner for the purposes of calculating interest accrued on the offset variable component of the loan. This feature is intended to make the Kiwibank overall banking relationship more attractive to current and potential customers.

Interest calculations

Calculations of interest on an offset variable component of a loan

11. Interest payable on an offset variable component of the nominated loan is calculated by reference to a notional balance. This notional balance is determined, for the purposes of that calculation only, by reducing the balance of the offset variable component of the loan by the aggregate of the credit balances of the nominated credit accounts.
12. The rate of interest applicable to the Product is the “offset variable interest rate”. The offset variable interest rate is one of a number of different rates which Kiwibank uses, under the Terms and Conditions of the various loans to which the Product applies. The offset variable interest rate may be above or below Kiwibank’s variable interest rate.
13. Interest is not calculated separately in respect of each account and then offset. Instead, a net notional balance is calculated across all the relevant accounts. The notional balance equals the offset variable component of the loan less (i.e., “offset” against) the credit balances of the nominated credit accounts. Interest is then payable on that net balance at the offset variable interest rate. This is the case as a matter of law (in terms of the terms of contractual relationship under the various Terms and Conditions applicable to eligible loans offered by Kiwibank) and as a matter of practice (in terms of Kiwibank’s computer and accounting systems).
14. The offsetting is solely for the purpose of calculating the notional balance on which interest is calculated. There is no actual transfer of funds, no set-off or “netting” of funds together in an account, and no transfer of any interest in or entitlement to funds. Importantly, the customer has no legal entitlement to interest on credit balances. This is the case even if the customer’s total credit balances exceed the customer’s loan balance.
15. Interest is calculated on a daily basis and is debited to the loan account on a regular basis. Loan repayments are credited periodically into the loan accounts, which will pay the periodic interest and reduce the principal outstanding. Such payments are made from a Kiwibank account that the customer has selected. This account may or may not be another credit account that the customer has nominated to participate in the Product.
16. The offsetting aspect of the Product essentially offers the same economic benefits to customers as a revolving portion loan in terms of reduced interest costs (through a reduced balance on which interest is calculated) and consequently will accelerate loan repayments. With a revolving portion loan, funds that would otherwise be in a savings or cheque account are paid into the loan account (but are available to be redrawn).
17. Kiwibank has made the Product available to business customers. However, business customers do not have the ability to group their accounts with accounts of another entity, as individuals can.

No interest payable on credit accounts

18. Under the terms and conditions that Kiwibank and its customers have agreed for this Product, no interest is payable by Kiwibank on the credit balances of the credit accounts that customers have nominated to participate in the Product. This agreement applies regardless of whether those credit balances exceed the debit balance of the loan facility. This means that if the debit balance of a loan facility is less than the aggregate of the credit balances of the nominated credit accounts, no interest is paid or payable by Kiwibank.

Eligibility requirements

19. The product is only available to:
 - An individual who holds an eligible loan with Kiwibank;
 - Two individuals who are married, in a civil union, or in a de facto relationship and who hold an eligible loan with Kiwibank;
 - A company which holds an eligible loan with Kiwibank; and
 - A trust which holds an eligible loan with Kiwibank.
20. "Eligible loans" will be the following loan products currently offered by Kiwibank:
 - Business loans secured by residential property; and
 - Home loans.
21. The following additional persons can elect to "offset" their Kiwibank credit account against the loan of an individual customer or two individual customers who are married, in a civil union, or in a de facto relationship:
 - (a) a child or children of the customer (or one of the customers); or
 - (b) a parent or parents of the customer (or one of the customers).
22. Children and parents of individual customers can have a registered address with Kiwibank that is different from that of the customer's.
23. An offset variable component of a loan can be "offset" against nominated accounts of the customer(s) or other eligible persons (in the case of individual customers).

Other features of an offset variable component

24. The offset variable component is not an independent product; it is a component of a loan. The following features (amongst others) apply to the offset variable component along with the other components of a table portion loan:
 - Interest is calculated on a daily basis, and is debited to the loan account on each specific payment date.
 - Customers may repay all or part of an offset variable component of a loan at any time without any break costs.
 - The interest and principal of an offset variable component are repayable by way of regular payment cycles over the term of the offset variable component, except in relation to any applicable interest-only period. Only interest payments are required to be made during an interest only period. "Repayment holidays" are also available, where no interest or principal is payable during a specific period.
 - All amounts owing under the table portion (including any offset variable component and other components) must be repaid in full on the last day of the loan term.
 - The offset variable interest rate can vary at any time. Kiwibank will give the customer notice before changing the rate:
 - If the offset variable interest rate increases, the customer's regular payments for the offset variable component will automatically increase if this is necessary to enable the customer to pay off the offset variable component over the agreed term.
 - If the offset variable interest rate decreases, the customer's regular payments for the offset variable component will remain the same, so the term of the loan will shorten. However, the customer can elect to reduce the amount of the regular payment so that the offset variable component can be repaid over the same term.
 - If an existing customer elects to convert a part or all of an existing variable rate table portion loan to have an offset variable component, the customer must agree that Kiwibank's applicable terms and conditions for the Product will apply.
 - A customer may have more than one loan account to which the terms and conditions of the Product apply, but each such loan account is treated separately. In the case of individual customers only, they may group their loan and credit accounts with the credit accounts of other eligible individuals.
 - A transaction or deposit account (e.g., everyday banking, savings and investments accounts) may be nominated to link to one or more loan accounts under the Product terms and conditions. If the outstanding balance of the various loan accounts exceeds the balance of the deposit account, the order of offsetting is determined by the "priority" ranking of each loan, as designated by the customer.
 - Interest cannot be capitalised on any loan to which the Product applies, except to the extent of any interest component on a defaulted payment which may be capitalised by adding it to the daily balance of the relevant loan. The defaulted interest does not become part of the outstanding principal loan balance and will remain an outstanding interest payment.

Terms and conditions for the Product

25. Each Kiwibank loan is documented under a collection of documents:

- (a) In respect of home loans:
 - i) The Home Loan Terms and Conditions, which are contained in a booklet that Kiwibank issues (as amended and updated from time to time) and which set out the generic provisions applicable to all Kiwibank home loan facilities.
 - ii) The Home Loan Agreement, which contains specific provisions about the home loan facility that is being made available to a specific customer, including the amount and timing of regular payments calculated on a basis that will repay the loan over the applicable term.
- (b) In respect of other loans:
 - i) The Lending Terms and Conditions for Business and Rural Banking – effective December 2012, which set out the generic provisions applicable to all of Kiwibank’s business lending facilities.
 - ii) The Loan Agreement, which contains particular and specific provisions in relation to the business loan facility that is being made available to a specific customer including the amount and timing of regular payments, calculated on a basis which will repay the loan over the applicable term.
- (c) In respect of all loans:
 - i) The General Terms and Conditions, that contains the terms that govern the general banking relationship between Kiwibank and its customers. The General Terms and Conditions may also contain specific terms and conditions that apply to particular accounts and services.
 - In the event that there is any conflict between any part of the General Terms and Conditions and the Home Loan Terms and Conditions, the Home Loan Terms and Conditions will apply.
 - In the event that there is any conflict between any part of the General Terms and Conditions and the Lending Terms and Conditions for Business and Rural Banking, the Lending Terms and Conditions for Business and Rural Banking apply.

Groups of accounts

26. The product is based on a group of participating accounts. The following rules explain which accounts can be included in the group:

- (a) The accounts of an individual, or the individual and joint accounts of married, de facto and civil union couples, any of their children, and any of their parents may be combined as part of one group.

To illustrate, Sarah and Peter have a home loan facility with Kiwibank. If Sarah and Peter and their child, Michael, each have a savings account with Kiwibank, the home loan facility could be offset by the credit balances of the various accounts held by them.
- (b) Borrowers of the home loan facility and owner of other transaction accounts nominated for the “offset” feature must be either:
 - i) all residents of New Zealand for tax purposes; or
 - ii) all non-residents of New Zealand for tax purposes.
- (c) Companies, trusts and sole traders are eligible to participate in the product. Companies, trusts, and sole traders may group their transaction and eligible loan accounts for the purposes of the product. However, a company, trust, or sole trader may not group their accounts with the accounts of any other individual or entity.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

- (a) All interest rates related to the Product are arm's length market interest rates.
- (b) The "offset ratio" as described in the updated August 2021 "Kiwibank Home Loan and Conditions" shall not exceed one, when applied to credit accounts.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- (a) No consideration is paid, or payable, by virtue of the offset feature of the Product for the purposes of calculating income and expenditure under ss EW 15 or EW 31.
- (b) No income arises under s CC 7 for Kiwibank's customers in relation to the Arrangement
- (c) For the purposes of the "resident withholding tax rules" (as defined in s RE 1(1)) and the "non-resident withholding tax rules" (as defined in s RF 1(1)), there is no payment of, or entitlement to, interest in relation to the credit accounts participating under the Arrangement, that would give rise to an obligation to deduct resident withholding tax or non-resident withholding tax or pay an approved issuer levy.
- (d) Section BG 1 does not apply to the Arrangement.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 June 2021 and ending on 31 May 2026.

This Ruling is signed by me on the 4th day of February 2022.



Sonya Duncan

Group Lead, Customer Compliance Services, Significant Enterprises

About this document

Product Rulings are issued by the Tax Counsel Office and Customer and Compliance Services. Product Rulings set out the Commissioner's view on how tax laws apply to a particular "product" – which is an arrangement that a specified taxpayer is likely to enter into with a number of people on identical terms. Taxpayers who enter into the arrangement described in a Product Ruling may apply the ruling but are not obliged to do so. Product Rulings are binding on the Commissioner. This means that if you are entitled to apply a Product Ruling and you have calculated your tax liability in accordance with the ruling, the Commissioner must accept that assessment. A Product Ruling applies only to the taxation laws and arrangement set out in the ruling, and only for the period specified in the ruling. It is important to note that a general similarity to an arrangement covered by a Product Ruling will not necessarily lead to the same tax result.

TECHNICAL DECISION SUMMARIES

Technical decision summaries (TDS) are summaries of technical decisions made by the Tax Counsel Office. As this is a summary of the original technical decision, it may not contain all the facts or assumptions relevant to that decision. A TDS is made available for information only and is not advice, guidance or a “Commissioner’s official opinion” (as defined in s 3(1) of the Tax Administration Act 1994). **You cannot rely on this document as setting out the Commissioner’s position more generally or in relation to your own circumstances or tax affairs.** It is not binding and provides you with no protection (including from underpaid tax, penalty or interest).

TDS 22/01: Disputes resolution process – adjustments in notice of response

Technical decision summary – Adjudication

Decision date: 8 October 2021

Issue date: 14 February 2022

Subjects | Ngā kaupapa

Dispute process: adjustment in notice of response

Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

Assessment	Computer generated Notice of Assessment from CCS
CCS	Customer and Compliance Services, Inland Revenue
CNOR	Notice of Response issued by CCS
Commissioner or CIR	Commissioner of Inland Revenue
NOPA	Notice of Proposed Adjustment
NOR	Notice of Response
TAA	Tax Administration Act 1994
TCO	Tax Counsel Office, Inland Revenue
TNOPA	Notice of Proposed Adjustment issued by the Taxpayer
TRA	Taxation Review Authority

Taxation laws | Ngā ture take

All legislative references are to the Tax Administration Act 1994 (TAA) unless otherwise stated.

Facts | Ngā meka

1. The Taxpayer is an incorporated company. The company's business activities are land ownership and management.
2. The Taxpayer filed its income tax return for the disputed period, which included a deduction for business expenditure. The return resulted in losses being carried forward.
3. Subsequently, a computer-generated notice of assessment (the Assessment) for the disputed period was issued to the Taxpayer by Customer and Compliance Services of Inland Revenue (CCS). The Assessment recorded an amount of tax to pay, as opposed to a loss.
4. The Taxpayer issued a Notice of Proposed Adjustment (TNOPA) upon receipt of the Assessment. The TNOPA stated that the Assessment was incorrect. It responded to the errors in the Assessment and maintained that it had no profit-making activities and the losses recorded in the self-assessment were correct. The exact reasons for these errors were unclear, but it appears to have been a result of Inland Revenue's system pulling figures from the return that were entered incorrectly by the Taxpayer or by the system.
5. In response, CCS issued a Notice of Response (CNOR). In its CNOR, CCS did not dispute any of the issues raised in the TNOPA. However, CCS asserted that the Taxpayer had not proven it was carrying on a business and was, therefore, not entitled to a deduction for its expenditure.
6. The Taxpayer asserted that the CNOR was unlawful by retrospectively justifying the Assessment on the basis that the Taxpayer was not in business, rather than addressing the errors raised in the TNOPA.

Issues | Ngā take

7. The issues considered in this dispute were:
 - whether CCS was entitled to propose an adjustment in the CNOR regarding the Taxpayer's entitlement to the expenditure claimed without issuing a further Notice of Proposed Adjustment (NOPA); and
 - if so, whether the Taxpayer has proven it was in business and, therefore, was entitled to the deductions claimed in its return.

Decisions | Ngā whakatau

8. The Tax Counsel Office (TCO) decided that:
 - The CNOR did not meet the requirements of a Notice of Response (NOR) under s 89G and the dispute should be discontinued. A new NOPA is required if the CCS wishes to dispute the Taxpayer's entitlement to the expenditure.
 - In light of the conclusion to issue one, it was not appropriate for TCO to consider whether the Taxpayer is in business.

Reasons for decisions | Ngā take mō ngā whakatau

Issue 1 | Take tuatahi: Adjustments in notice of response

9. The main issue is whether CCS is entitled to propose an adjustment in the CNOR regarding the deductibility of expenses claimed by the Taxpayer without first issuing a NOPA.
10. The Taxpayer argued that CCS acted inconsistently with the requirements for a NOR in s 89G because the CNOR did not address the issues raised in the TNOPA but instead took a statement regarding profitability in the TNOPA and used this as an admission that the Taxpayer is not carrying on a business. Alternatively, it can be inferred that the Taxpayer was arguing that CCS was acting inconsistently with s 89C by proposing these adjustments without issuing a NOPA.

NOR requirements

11. Section 89G sets out the requirements of a NOR. A NOR must notify the issuer of the NOPA that the adjustment proposed is rejected and must state concisely the facts or legal arguments in the NOPA that is considered wrong and state why they are wrong.
12. Additionally, s 89G(2)(e) provides a NOR must state the quantitative adjustment to any figure in the NOPA that results from the arguments relied on by the issuer of the NOR, i.e., state concisely by how much they consider an adjustment in the NOPA is incorrect.
13. The purpose of a quantitative adjustment in a NOR in a taxpayer-initiated dispute is to establish the extent to which the Commissioner agrees or does not agree with the proposed adjustments in a TNOPA. While the arguments in a dispute may

be refined or changed over the course of the dispute, there is nothing to suggest a NOR can operate as a vehicle to propose a separate adjustment involving new grounds outside the scope of the NOPA.¹

14. This is consistent with the purpose of the dispute procedures more generally, as set out in s 89A. This is to reduce the likelihood of disputes by encouraging open and full communication and early identification of the basis for a dispute concerning a disputable decision.²
15. There is no case law directly relating to the Commissioner's ability to raise new issues during the NOR stage of a dispute but the case *CIR v Delphi Fishing Ltd* considered the Commissioner's ability to provide additional information under s 89M(8) in response to a taxpayer's Statement of Position (SOP).³ Section 89M(8), which has parallels with s 89G, has a constraining feature in that the additional information must be in response to the other party's material.⁴
16. The *Delphi Fishing* case found that there must be limits on the Commissioner's ability to raise new matters as otherwise it would be unfair to a taxpayer. Further, this would limit the time the taxpayer has, and the avenues through which they are able, to respond to the arguments raised by the Commissioner. Having restrictions on the Commissioner's ability to raise new matters in the course of a dispute is consistent with the purpose of the disputes process in s 89A.
17. The CNOR in this dispute did not meet the requirements of s 89(2). It did not state any of the facts or legal arguments in the TNOA that CCS thought were wrong; CCS agreed with the Taxpayer that there were errors in the Assessment. Instead, the CNOR raised the argument that the Taxpayer has failed to provide evidence it was entitled to the deduction for the expenditure incurred.
18. TCO considered a possible argument that CCS had disallowed the expenditure in the Assessment by virtue of recording a profit figure rather than a loss, and it would follow that the adjustments sought in the TNOA was about expenditure and the CNOR was responding to those adjustments.
19. However, this argument did not accord with the facts. The Assessment does not show a breakdown of expenditure or income and there is nothing to suggest that the Assessment reflected Inland Revenue's belief that the Taxpayer was not in business.
20. It was considered that the adjustments proposed in the TNOA did not concern expenditure, and the adjustments proposed in the CNOR are separate adjustments from those proposed in the TNOA.
21. Further, the adjustments proposed in the CNOR cannot be categorised as a quantitative adjustment under s 89G(2)(e). It does not state the extent to which CCS disagrees with the TNOA. It raised a different issue.
22. The inclusion of the proposed adjustments in the CNOR limited the Taxpayer's ability to address the arguments. It is unlikely that Parliament intended the Commissioner to be able to use a NOR to raise a separate issue regarding deductibility of expenditure when the dispute concerned errors in an assessment which both parties agreed were errors.

Dispute should be discontinued

23. If a taxpayer disputes the validity of a dispute document issued by the Commissioner, the Commissioner may form the view that the dispute document is valid and continue with the dispute and the taxpayer can contest the validity of the document before the TRA or a court if the matter proceeds to challenge stage. However, if the Commissioner forms the view that one of the Commissioner's dispute documents is invalid it would be open to the Commissioner to discontinue the dispute.⁵
24. On the basis that TCO considers the CNOR to be invalid, the dispute should be discontinued.

NOPA required

25. For completeness, TCO considered the requirement to issue a NOPA by the Commissioner.

¹ See the Official's Report to the Finance and Expenditure Committee on Submissions on the Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions) Bill 2004 (August 2004) and the Commissioner's standard practice statement SPS 16/06: *Disputes resolution process commenced by a taxpayer* at para 136.

² See also *Allen v CIR* (2005) 22 NZTC 19,473 (CA) at [15] and *Vinelight Nominees Ltd v CIR* (2012) 25 NZTC 20,155 (HC) at [29]. "Disputable decision" is defined in s 3 as an assessment or a decision of the Commissioner under a tax law, with a number of specified exceptions.

³ *CIR v Delphi Fishing Ltd* (2004) 21 NZTC 18,525 (HC).

⁴ *CIR v Delphi Fishing Ltd* at [58].

⁵ This approach is consistent with case law that considered the approach to be taken when the validity of a taxpayer's dispute document is in question. See *CIR v Alam and Begum* [2009] NZCA 273, (2009) 24 NZTC 23,564 (CA) and *Riccarton Construction Limited v CIR* (2010) 24 NZTC 24,191 (HC).

26. Inland Revenue's published position is that a new NOPA may be needed if a new adjustment is proposed or the basis for the original adjustment has fundamentally changed.⁶ Further, if the Commissioner decides to increase the quantum of any proposed adjustments after the NOPA is issued the Commissioner must issue a new NOPA.⁷
27. This requirement is supported by s 89B(1), which allows the Commissioner to issue one or more NOPAs in respect of a tax return or an assessment; and by s 89C, which requires a NOPA to be issued before the Commissioner can make an assessment, unless an exception applies.
28. In this dispute, none of the exceptions apply in s 89C to enable CCS to issue an assessment as proposed in the CNOR without acting in breach of s 89C. It is further noted that s 114 would not operate to enable the Commissioner to knowingly issue an assessment in breach of s 89C or any other provision of the TAA.⁸
29. Therefore, if CCS wishes to pursue a dispute regarding the expenditure incurred by the Taxpayer, it will need to issue a new NOPA.

Issue 2 | Take tuarua: Whether taxpayer in business

30. In light of the conclusion to issue one, it was not appropriate for TCO to consider whether the Taxpayer is in business. If CCS wishes to pursue a dispute regarding expenditure, it will need to issue a new NOPA proposing new adjustments for this issue.

⁶ This was explained in the Tax Information Bulletin item "Introduction to the new disputes resolution process", Tax Information Bulletin Vol 8, No 3 (August 1996) at page 12.

⁷ The Commissioner's Standard Practice Statement: SPS 16/05 *Disputes resolution process commenced by the Commissioner of Inland Revenue*, para 60 and 62. This SPS concerns Commissioner-initiated disputes and these paragraphs concern the ability to propose adjustments at the SOP phase. However, it is considered the same principles apply to the Commissioner's ability to propose another adjustment outside the scope of the issues in a TNOPA.

⁸ Under s 114, an assessment made by the Commissioner is not invalidated through a failure to comply with a provision of the TAA or another Inland Revenue Act. However, this provision is designed to prevent administrative error invalidating an assessments and case law indicates that it may not protect the Commissioner in cases of "conscious maladministration" or "abuse of power". See *Westpac Banking Corp v CIR* (2009) 24 NZTC 23,340 and *Accent Management Ltd v CIR* (2010) 24 NZTC 24,126.

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

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