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## Transfers of overpaid tax to a period of nil liability – proposed amendment

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The Revenue Minister Michael Cullen announced today that the Government would introduce legislation to remove uncertainty over one aspect of the law relating to transfers of overpaid tax to future periods.

### **Background**

When taxpayers overpay tax in relation to a period, they can request the Commissioner to transfer the excess to another period or another taxpayer. However, there is currently uncertainty about certain aspects of the law relating to such transfers of excess tax. The Government is developing a set of proposals which will expand on the existing provisions in section MD 1 of the Income Tax Act 1994. These will be included in the forthcoming discussion document on the compliance and penalties legislation to be released in the middle of this year. The new rules will set out to whom transfers of excess tax may be made, and the effective date of the transfer.

The Government intends as soon as possible, however, to address one issue which is causing taxpayers great concern. The issue is the Commissioner's ability to transfer excess tax to a period in which there is no outstanding liability for tax.

Inland Revenue has in the past sometimes arranged with taxpayers to transfer excess tax to a period in which there was no outstanding tax liability. It recently doubted its ability to do this and has obtained a Crown Law opinion which states that the Commissioner has no authority to transfer in these circumstances. Some in the private sector disagree with this view.

The Commissioner's ability to transfer affects a taxpayer's right to use-of-money interest on the overpaid tax. The transfer of excess tax to a nil period affects use-of-money interest in three situations.

First, under the use-of-money interest rules in effect before the 1997-1998 income year a taxpayer could obtain use-of-money interest on overpaid tax only until the terminal tax date in relation to the year in which the tax was overpaid. Based on previous practice, many taxpayers understood that the Commissioner would roll over such excess tax to the next period so that use-of-money interest would continue to be payable by the Commissioner beyond the terminal tax date and for so long as he retained the tax. Following the Crown Law opinion, the Commissioner has advised taxpayers that he has no power to transfer the excess to a period in which there is no liability, and therefore use-of-money interest will be payable only until the terminal tax date for the year of excess.

This issue also arises when a taxpayer is reassessed in relation to an income year before 1997-98 and the taxpayer requests the Commissioner to roll forward excess tax through intervening years, even though no tax is outstanding in those years.

A third situation relates to the payment of provisional tax. The Commissioner has taken the view that if a taxpayer pays its estimated provisional tax liability, or pays on the basis of last year's provisional tax plus the required uplift, that amount constitutes the liability. The Commissioner considers, on the basis of the Crown Law opinion, that he cannot transfer overpaid tax from a previous year in excess of that amount. If it turns out that the provisional tax is underpaid, the Commissioner considers he has no ability to apply the excess tax in satisfaction of the underpayment. A taxpayer can therefore receive use-of-money interest (currently at 5.74%) on the excess tax retained and simultaneously be charged use-of-money interest (at 12.62%) in relation to the underpaid provisional tax liability.

## **Summary of proposed amendment**

The Government is proposing a pragmatic legislative solution to address the uncertainty over transfers of excess tax to periods of no liability. In essence, the amendment will authorise transfers to such periods, and will do so retrospectively when certain criteria are satisfied. These criteria are aimed at removing opportunities for taxpayers who, in the past, did not request roll-forward to future periods to do so now. The Government is also concerned to minimise the fiscal costs of such an amendment. Finally, any solution must be able to be administered and impose administration costs that are as low as possible.

Broadly, the proposed amendment will provide that:

- In relation to past income years, and requests made in the past, if Inland Revenue has transferred tax to a period of no liability, and has paid use-of-money interest on that basis to a taxpayer, the amendment will enable the taxpayer to retain the use-of-money interest. In addition, the Commissioner will be required to transfer overpaid tax to a period of no liability if, by 21 April 2001, taxpayers had requested a transfer in writing, or the Commissioner had notified the taxpayer in writing that he had received a request. (The latter would refer to an oral request, since written requests are already catered for.) The 21 April date is the date following the circulation of the proposal to the Tax Committee of the Institute of Chartered Accountants of New Zealand.
- In relation to past income years and current or future requests, a transfer would be made only if there is an assessment or reassessment on or after 21 February 2001 which gives rise to excess tax in the prior year. An operative date of 21 April 2001 in this case would have meant that taxpayers who were assessed just before that date may have had no opportunity to request the Commissioner to transfer any excess. Putting the date back two months to 21 February overcomes this problem.
- In relation to the current income year (2001/02) and current year requests, the taxpayer need simply request the Commissioner to transfer the excess.

The detailed proposals are set out below.

The proposed amendment is not a comprehensive solution to the issue – it is a pragmatic solution to a difficult problem. In particular, the retrospective amendment would not apply if taxpayers have made an oral request that has been declined orally by Inland Revenue. A rule which attempts to address these cases would be unadministrable, as there is no means of checking whether requests have been made.

The amendment will not set out the effective date of transfer, or the persons to whom the transfer will be made. To be retrospectively prescriptive about this could create more problems than the amendment solves.

### **Detail of proposed amendment**

The Commissioner will be empowered and required to transfer excess tax paid by a taxpayer to a period in which there is no tax liability if:

- (a) in relation to an excess arising in or before the 2000/2001 year:
- prior to 21 April 2001, the taxpayer requested the Commissioner in writing to transfer the excess tax to the period of no liability, or
  - prior to 21 April 2001, the Commissioner notified the taxpayer in writing (other than by the issue of a statement of account) that he declined the taxpayer's request to transfer the excess tax to the period of no liability, or
  - prior to 21 April 2001, the Commissioner issued to the taxpayer a statement of account, or other notice in writing, which reflects or records the transfer to the period of no liability (whether or not the transfer was subsequently reversed), or
  - on or after 21 February 2001, the Commissioner makes an assessment or reassessment in relation to an income year prior to the 2001/2002 income year which gives rise to excess tax, and the taxpayer requests the Commissioner to transfer the excess;
- (b) in relation to an excess arising in the 2001/2002 year, the taxpayer requests the Commissioner to transfer the excess.

### **Legislative process**

The amendment will be introduced into Parliament at the earliest possible opportunity, and will take effect when it is enacted.