



6 May 2022

[Redacted]
[Redacted]

Dear [Redacted]

Thank you for your request made under the Official Information Act 1982 (OIA), received on 5 April 2022. You requested:

In early 2013, Geof Nightingale and Struan Little presented a flowchart at an IFA session. The flowchart outlined a framework for how tax legislators should approach retrospective tax legislation. I'm requesting any documents or information that the IRD might have pertaining to this.

The flowchart you mention was presented by Struan Little as a think-piece at the International Fiscal Association (IFA) session you refer to in your request. Please note that it was never formally adopted by Inland Revenue or the Treasury (the joint advisors on tax policy), or by Ministers.

There are two documents in the scope of your request. The first, *Taking a fixed tax position in a changing world – a personal perspective*, is published on Inland Revenue's tax policy website. The document is therefore withheld under section 18(d) of the OIA, as it is publicly available. You can read it here:

<https://taxpolicy.ird.govt.nz/en/publications/2003/2003-other-oliver-speech-nzica>.

The second document, *Retrospective Legislation – Guiding Principles Flowchart – For discussion only*, is an expanded version of the flowchart that was presented at the IFA session. The document did not go further as an official document, and has not been updated since 2015. The document is released to you in full and is attached.

Rights of review

If you disagree with my decision on your OIA request, you can ask an Inland Revenue review officer to review my decision. To ask for an internal review, please email the Commissioner of Inland Revenue at: CommissionersCorrespondence@ird.govt.nz.

Alternatively, under section 28(3) of the OIA, you have the right to ask the Ombudsman to investigate and review my decision. You can contact the office of the Ombudsman by email at: info@ombudsman.parliament.nz.

Publishing of OIA responses

Please note that Inland Revenue regularly publishes responses to OIA requests that may be of interest to the wider public on its website. If this response is published, your personal details or any information that would identify you will be removed beforehand.

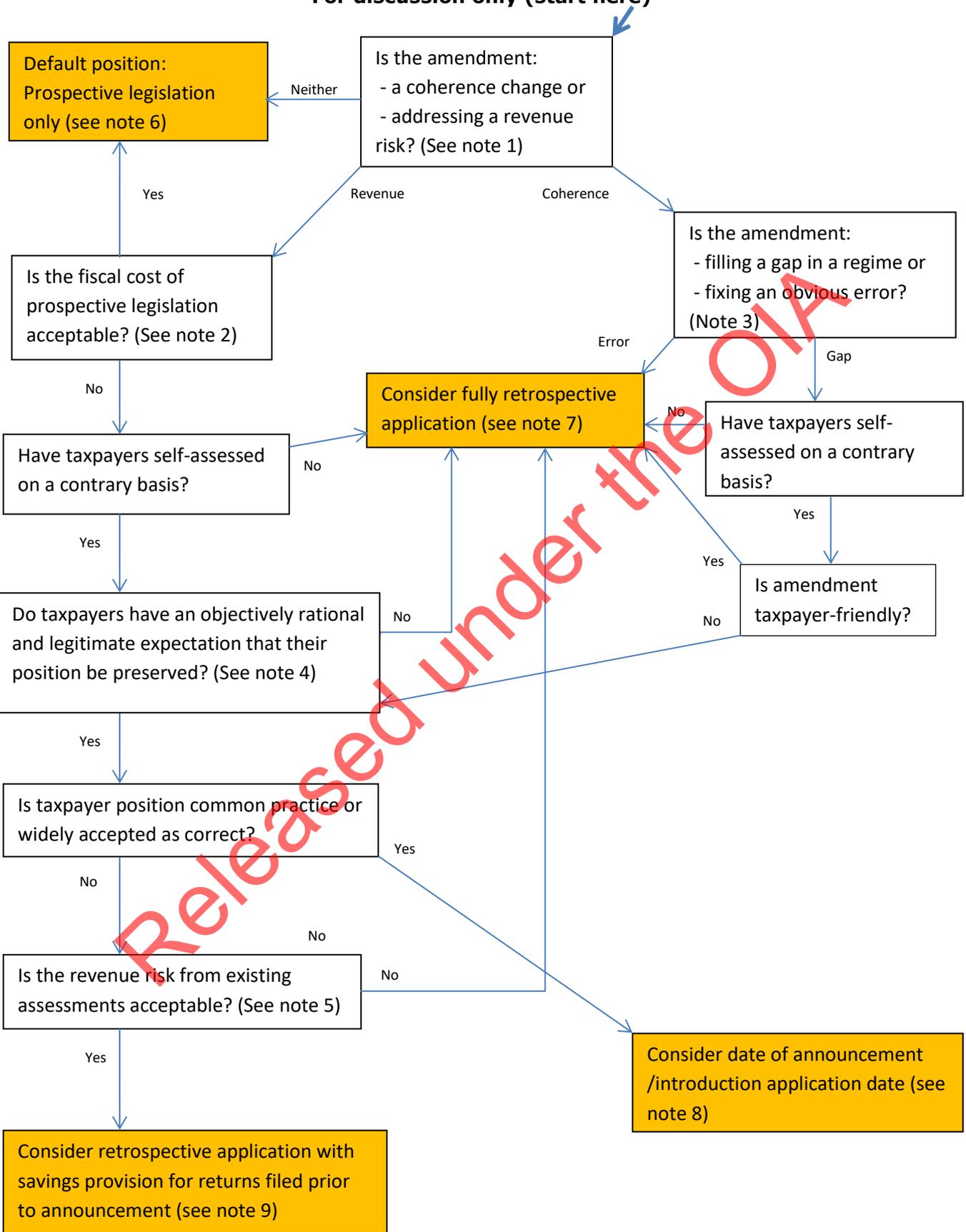
Thank you again for your request. I trust that the information provided is of assistance.

Yours sincerely



Paul Kilford
Programme Lead
Policy and Regulatory Stewardship | Kaupapa me te Tiaki i ngā Ture

Retrospective Legislation – Guiding Principles Flowchart For discussion only (start here)



General Note

This flowchart contains guiding principles only and is not designed to be prescriptive. It is recognised that the facts and circumstances of each case are likely to be unique - and variations between cases may legitimately prompt a response that differs from the "standard". However, it is intended to be a helpful tool for ensuring that the right questions are asked when retrospective application dates for law changes are being considered.

Note 1 – Coherence

For the purposes of this note "coherence" means a change that supplements the legislation - in particular a relatively newly enacted regime. It either "fills gaps" in such a regime or confirms well-documented policy intent. In theory, such changes will include those covered by the Income Tax Act rewrite project.

Note 2 – Acceptable fiscal cost

Whether the anticipated fiscal cost of a prospective amendment is "acceptable" will need to factor in contingencies such as whether the amendment could result in taxpayers trying to amend existing assessments or cause a behavioural shift between announcement and enactment. It may be that a behavioural shift is viewed in retrospect after the GTTP has commenced (see note 8).

Note 3 – Obvious error

An "obvious error" is one that effectively renders the legislation unworkable – a defect that needs to be remedied, such as a cross-referencing error. It is not legislation that, on its face, can have two possible interpretations.

Note 4 – Legitimate and rational expectations

Does the person have a legitimate and rational expectation that the result they achieve through their interpretation was intended or is it a windfall gain at the expense of the tax base? An indicator may be whether the interpretation adopted accords with or contradicts the published policy behind the legislation.

Note 5 – Risk of existing assessments

The revenue risk represented by existing assessments will require legal input. Some taxpayers may have filed returns based on weak legal analysis. If the Department is confident of winning a dispute based on existing legislative wording, the combined effect of a savings provision and a Department judicial victory will effectively be the same as fully retrospective legislation. This will generally be more palatable than fully retrospective legislation. On the other hand, if the Department's legal position is weak, but the revenue risk posed is substantial, fully retrospective legislation may still be considered.

Note 6 – Prospective legislation

In "prospective legislation" is included some legislation that may be strictly retrospective but, because of the delay in the passage of a bill through Parliament, takes effect shortly before Royal Assent. For example, an income tax change that takes effect on 1 April 2013 may not be enacted until June 2013. Because the returns for the 2013/14 year do not have to be prepared until 2014, the change can reasonably be regarded as prospective in substance.

However, this should be avoided where possible and, in particular, should not leave taxpayers in a position where they have to file returns without the benefit of settled law.

This legislation is subject to the full generic tax policy process.

Note 7 – Fully retrospective legislation

“Fully retrospective” means retrospective without exception. The actual application date will be fact specific, but can include: the date a particular regime or Act came into force, the date of a previous amendment that created the issue, or the date before which taxpayers cannot seek to amend existing assessments. “Fully retrospective” also includes legislation that has the same effect – for example, legislation that requires taxpayers to reverse out advantages accrued under existing legislation.

These amendments will not follow the full GTTP, but will be subject to public scrutiny at the select committee phase, where any anomalies with the details can be addressed.

Note 8 – Date of government announcement/introduction

This note treats announcement and introduction as synonymous on the understanding that either will be the first time the proposed amendment is announced to the taxpaying community. It may be that consultation on an issue has raised the possibility of an unacceptable behavioural shift. A ‘date of announcement’ change may therefore come after the first consultation stage of the GTTP and what was to be a prospective change becomes a date of introduction amendment to mitigate the risk resulting from the behavioural shift.

Date of announcement/introduction changes will ideally:

- Follow the GTTP as to the detail, while recognising that the select committee phase might be the most appropriate forum for debate
- Be backed by Ministerial statement
- Provide business certainty to the extent possible by setting out the scope of the change and transactions/parties affected (proposed legislation for complex issues will be present for date of introduction changes but should also be considered for announcement amendments)
- Be enacted as soon as possible to avoid taxpayers having to file returns on uncertain legal position (i.e., having to choose between existing legislation and announced amendment).

Note 9 – Savings provisions for returns filed before announcement

This category presupposes that announcing a change will prompt a behavioural shift that is undesirable from a revenue and/or efficiency perspective. Where this behavioural shift is not considered likely or to have adverse consequences, a savings provision for returns filed before enactment can be considered instead.

As mentioned above (note 5), saving filed returns also allows the Department to pursue taxpayers through the tax disputes process if it is considered that their position is legally questionable.

Similar rules should apply as for date of announcement amendments (note 8, above).

Two variations on this type of amendment are:

- When an amendment affects an agreement, “returns filed” can be modified to “agreements entered into”. However, grand-parenting existing arrangements should only be used when the affected arrangements are relatively short. This keeps the period when two sets of rules are running in parallel to a minimum.
- When the revenue risk is greater, “returns filed” can be modified to taxpayers that have commenced dispute proceedings in respect of a particular interpretation.