

CONFIDENTIAL AND LEGALLY PRIVILEGED**CLIENT INFORMATION ONLY****LEGAL ALERT****FRCS grows more teeth****New changes to penalty provisions are now even more challenging****Introduction**

1. National Budgets come and go. Most of us focus on changes in taxation or duty rates, new taxes or new tax breaks. But Budget changes also include administrative changes in laws. Those changes may have serious consequences for taxpayers. The most recent Budget is no different.
2. In recent years FRCS has begun charging heavy administrative penalties for claimed breaches of Customs and tax laws. Many of these laws are poorly drafted and unclear. FRCS uses infringement notices to demand payment of *fixed penalties* of up to F\$200,000. Sometimes taxpayers only learn about the laws they have allegedly broken when they run afoul of them.
3. FRCS has become increasingly aggressive in demanding fixed penalties. The fines imposed – or the sums demanded for “compounding” Customs offences – are sometimes the maximum penalty a taxpayer must pay on conviction. Because courts generally do not impose maximum penalties on first offenders or for minor errors, it may now be more economical to go to Court than to pay a fixed penalty.

Laws which are amended

4. Changes have been made to
 - the Tax Administration Act (which covers *tax laws* including the laws relating to income tax, VAT and STT)
 - the Customs Act and
 - the Excise Act.

Some amendments have been in force since the day after the Budget announcement (29 June 2018). Others took effect from 1 August 2018.

Everyone must have a TIN

5. *Every Fijian citizen or resident*, whether liable for tax or not, must now apply for a Taxpayer Identification Number (“**TIN**”). One of the relevant definitions of *resident* is a person who is in Fiji for more than 183 days in any 12 month period. So the obligation would appear to extend, for example, to expatriate family members in Fiji who are not in the workforce (including infant and minor children, who are not excluded).

Every taxpayer who conducts a business must notify FRCS of changes in the business

6. Every taxpayer who *conducts a business* must, within 21 days, notify the CEO of FRCS of any prescribed changes, including:
 - (a) any change in *controlling interest* of the business or
 - (b) any other change or information required in the approved form.
7. There are no definitions of what is *conducting a business* or what is a *controlling interest*. At this point there is no prescribed form; so we do not know what information changes are caught by the law. Since one would not normally look at the form unless one knew of the need to complete the form, we can expect further complications.
8. Failure to apply for a TIN or to notify the CEO of changes as required can attract a fine not exceeding \$25,000 or to imprisonment of up to 10 years or both (it is unclear who would be liable for the failure to register a minor).

Omitting any matter or thing in a tax return

9. It is now an offence, carrying a fine of up to \$250,000, to omit from any tax return or declaration, *any matter or thing required to be made in the tax return*.
10. As usual, the language is broad and general. We understand that it is principally aimed at “business and commercial taxpayers” and to enforce the new requirement that taxpayers declare all their assets (as well as their income) when filing a tax return by making the declaration a requirement in the tax return. But the provision is not restricted to this. It is capable of use in a wide range of situations – and resorting to use in that broader range of situations tends to occur over time.

Failing to charge tax correctly

11. It is now an offence under the Tax Administration Act (with penalties of up to F\$25,000 in fines and up to 10 years’ imprisonment, or both) for a taxpayer to *charge incorrect tax or fail to charge tax* as required by law. It appears that this provision is aimed at taxpayers required to on-charge STT and ECAL.

Tax agents preparing “false and misleading” documents

12. It is now an offence (with penalties of up to F\$50,000 in fines and up to 10 years’ imprisonment, or both) for a **tax agent** to:
 - (a) prepare a document, make an entry, make an oral declaration or make a written declaration which is false or misleading in a material particular or
 - (b) to omit from a statement any matter or thing without which the statement is false or misleading in a material particular.
13. This provision appears to indulge FRCS’s long-held suspicions that accountants and tax agents conspire with taxpayers to avoid or evade tax. FRCS appears not to understand that tax agents are not *de facto* tax auditors of taxpayers’ financial statements; rather they prepare tax returns and schedules based on client-generated information. So it is likely to result in risk-averse tax agents taking steps to avoid responsibility even for preparing their clients’ accounts. This is a backwards step in improving tax compliance.

FRCS can issue more infringement notices

14. FRCS's favourite administrative weapon appears now to be the "infringement notice". Amendments to each of the Tax Administration Act, Customs Act and the Excise Act now enhance the process by which FRCS may issue them.
15. Infringement notices are fixed penalty orders. If a taxpayer is served with an infringement notice, the taxpayer can elect to pay a fixed penalty and thereby avoid court proceedings. As FRCS personnel have suggested to us, the process employed is similar to parking tickets – except that these "parking tickets" carry fines of up to F\$200,000 and may affect your freedom of movement.
16. Under the Regulations giving the right to issue infringement notices:
 - (a) a taxpayer or its directors (if the taxpayer is a corporate) will suffer a departure prohibition order (DPO) if the taxpayer has not within 21 days paid the fixed penalty or elected to defend the infringement notice in court
 - (b) an additional "late payment fee" of 50% of the fixed penalty applies if the fixed penalty is not paid in time (although this would not apply if you elect to defend the charge).

The Tax Administration Act does not authorise Regulations to be made for the issue of DPOs or the imposition of late payment fees. This in our view affects the legality of those measures.

17. There is a misconception that fines on infringement notices must be paid if the taxpayer does not want to defend the charge. It may in fact be more economical for the taxpayer to *dispute the infringement notice in court* [as the infringement notice form provides], even if a defence is unsuccessful, or even if the taxpayer pleads guilty – because a Court can always be asked to impose a lower fine than the maximum for a first offender or where there are compelling circumstances.

Conclusion

18. FRCS has clearly moved to an enforcement strategy aimed at imposing large fines for taxpayers where it believes they have not complied with the law. The aim appears to be to maximise FRCS's revenue for minimum effort while "detering" law-breaking.
19. However many of these monetary penalties are disproportionate and imposed for technical breaches involving little or no loss of revenue; and FRCS's own interpretation of what breaches a law is sometimes at a considerable distance from reality. Taxpayers need to take account of these changes – and adjust their own legal strategies accordingly.

If you have any questions, please contact either [Richard Naidu](#) or [Rajnil Krishna](#).

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