



## **STANDARD INTERPRETATION GUIDELINE 2019-08**

### **TAX ADMINISTRATION (INFRINGEMENT NOTICES) REGULATIONS 2018 – CUSTOMS (INFRINGEMENT NOTICES) REGULATIONS 2018 - EXCISE (INFRINGEMENT NOTICES) REGULATIONS 2018 - INFRINGEMENT NOTICES**

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This Standard Interpretation Guideline (SIG) sets out Fiji Revenue and Customs Service's (FRCS) policy and operational practice in relation to infringement notices for offences under the laws administered by FRCS.

This SIG is not intended to prescribe the circumstances in which FRCS will issue infringement notices nor the manner in which it will use them. However, the SIG should provide broad guidance to taxpayers as to FRCS's approach to the infringement notice provisions.

The SIG is issued with the authority of the Chief Executive Officer (CEO) of FRCS.

All legislative references in this SIG are to its respective Regulations unless stated otherwise

This SIG is in effect from 10<sup>th</sup> April 2019 and may need to be reviewed in the event of any relevant legislative amendments.

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## EXECUTIVE SUMMARY

1. Infringement notices are designed to provide a timely, cost-efficient enforcement outcome in relation to relatively minor contraventions of the laws administered by FRCS<sup>1</sup>.
2. The purpose of the Infringement Notices is to:
  - a. ensure compliance with the Act;
  - b. address breaches of the Act;
  - c. improve self-regulation; and
  - d. ensure the efficient collection of taxes and duties.
3. The penalty amount in each infringement notice will vary, depending on the alleged contravention and the taxpayer's annual gross turnover.
4. An infringement notice can be issued for offences under the following laws:
  - a. Tax Administration Act 2009;
  - b. Value Added Tax Act 1991;
  - c. Stamp Duty Act 1920;
  - d. Gambling Turnover Tax Act 1991;
  - e. Excise Act 1986; and
  - f. Customs Act 1986.
5. It is important to note that before issuing an infringement notice FRCS will have exhausted all other avenues to ensure compliance before the infringement notice is considered.
6. If a taxpayer has been issued with an infringement notice, and he or she intends to request for the matter to be compounded by the CEO, he or she must, in writing, admit to committing the offence and requests the CEO to deal with the offence section 59 of the Tax Administration Act 2009 (tax matters) or section 155 of the Customs Act 1986 (customs matters)

## INTRODUCTION

7. As highlighted in SIG 2018-31, The 2018/2019 National Budget amendments has introduced a new subdivision<sup>2</sup> in the Tax Administration Act 2009 which provides for the issuance of infringement notices and the payment of fixed penalties for certain offences as prescribed by Regulations
8. An infringement notice may be issued to anyone throughout Fiji, irrespective of a person's nationality, citizenship or place or registration or incorporation<sup>3</sup>.
9. The fixed penalty for the infringement notices can be found in the Schedules of the respective Regulations.

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<sup>1</sup> As per first schedule of Fiji Revenue and Customs Service Act 1998

<sup>2</sup> Subdivision 3 of Division 8 of TAA 2009

<sup>3</sup> Regulation 4

10. Examples illustrated in this SIG demonstrates the CEO's interpretation and application of the rules relating to the infringement notices served under the laws administered by FRCS.
11. The full text of the legislative provisions is contained in the appendices.

### **LEGISLATIVE ANALYSIS**

12. FRCS is empowered under section 51 of the Fiji Revenue and Customs Service Act 1998 to conduct prosecution for offences under the laws administered by FRCS in a court of competent jurisdiction.
13. While FRCS has conducted prosecution on a number of matters over the years to ensure compliance, it has been noted that prosecution in a court of competent jurisdiction is not always the practical solution
14. Infringement notices provide a fair, quick and efficient means of ensuring compliance with the law.
15. There has been discussion on whether infringement notices are fair and lawful. In the recent court case of *Data Bureau Ltd v Fiji Revenue and Customs Authority [2016] FJHC 735; HBC64.2016* (19 August 2016) where the provisions of the VAT Act 1991 in relation to the VAT Infringement notice were alleged to be unconstitutional, Justice David Alfred stated:

*"A party must not be unable to see the wood for the trees. The Applicant is facing charges not before FRCA but in the Magistrates Court. The Applicant has not lost its right to be presumed innocent nor its right to a fair trial. In the Magistrates Court it will be pleading not guilty, will be defended by Counsel of its choice and the onus of proof that it had contravened the relevant sub sections of section 72A rests throughout on the prosecution and the standard of proof will be beyond a reasonable doubt (the golden rule). I do not see how the principle of "equality of arms" referred to Archbold 2012 para 16-63 can conceivably be breached in the trial before the Magistrate" Para 42*

*"In conclusion, I reiterate the Applicant is not been deprived of a fair trial before the Magistrates Court. The presumption of innocence is preserved intact in the Magistrates Court and if the Applicant pleads not guilty it will then be incumbent on the prosecution to prove the charges to the requisite standard, before the Magistrate can record a conviction and mete out the appropriate punishment." Para 47*

The case law demonstrates that the principles of equity and fairness are maintained when it comes to the use of infringement notices.

16. Infringement notices are meant to be a last resort where the taxpayer has demonstrated a non-compliant behaviour towards the tax, customs and excise laws of Fiji. The CEO of FRCS has acknowledged that there might be instances where taxpayers are willing to comply but are unable to comply due to reasons of their own. In these cases, FRCS will assist these taxpayers to be compliant.

17. For some customs matters, FRCS may pursue resolving the matter under section 155<sup>4</sup> of the Customs Act 1986 or section 59 of the Tax Administration Act 2009 and if unsuccessful then the infringement notice may be considered.
18. An infringement notice is a substitute for court prosecution. This means that other avenues such as awareness and compounding of offences would be exhausted before infringement notices are considered.
19. Once the decision is made for the issuance of an infringement notice, the same would be served on to the taxpayer as per the respective Regulations.

### **SERVICE OF THE NOTICE**

20. An infringement notice may be served to the taxpayer under the following methods<sup>5</sup>:
  - a. Personal service – where the taxpayer is personally served with the infringement notice;
  - b. Registered Mail - through registered mail sent to the person's postal address last recorded by FRCS;
  - c. Registered Office – at the registered office of the taxpayer as per the last known details with FRCS;
  - d. Physical Residential Address – service may also be effect by issuance of the infringement notice to a person (other than the taxpayer) who resides at the person's physical address last recorded by the Service, provided that the first mentioned person is of or over the age of 18 years;
  - e. Electronic Means - through any electronic means as approved by the Service, including by electronic mail to a valid electronic mailing address submitted by the person to the Service and verified by the Service.
21. It is important that the taxpayer keep their details with FRCS updated as out of date details may lead to a situation where service has been effected through the last recorded details, but the taxpayer is unaware of the notice<sup>6</sup>. The infringement notice would still be effective and legally enforceable.
22. Once the infringement notice is served upon the taxpayer, FRCS may notify the taxpayer of the service of the notice through SMS (Short Message System) or through email<sup>7</sup>.

### **THE FIXED PENALTY**

23. A taxpayer who has been issued an infringement notice may undertake:
  - a. to either pay the fixed penalty in a single payment or through instalments;

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<sup>4</sup> Section 155 of the Customs act 1986 allows for compounding of offences under the Act by the Comptroller.

<sup>5</sup> Regulation 5(1)

<sup>6</sup> Failure to update records with FRCS is also an offence under section 38A of TAA 2009

<sup>7</sup> Regulation 5(3)

- b. or elect to dispute the Infringement Notice in court within 30 days from the date the infringement notice is issued.
- 24. The undertaking may be done either through electronic means which has been duly received and acknowledged or through written correspondences.
- 25. Any undertaking to pay must be reasonable and to the satisfaction of the CEO.
- 26. If the taxpayer elects to pay the fixed penalty through instalments, the taxpayer must apply in writing to the Chief Executive Officer for a time to pay arrangement under section 25 of the Tax Administration Act 2009 or Section 101B of the Customs Act 1986.
- 27. The payment or the court dispute may eventuate outside the prescribed 30-day timeline as long as the undertaking is made within the prescribed timeline by the taxpayer<sup>8</sup>.

#### **FAILURE TO GIVE UNDERTAKING WITHIN THE 30 DAYS<sup>9</sup>**

- 28. If a taxpayer who has been served with an infringement notice fails to give an undertaking within the prescribed timeline which is 30 days, the taxpayer is liable to a late payment fee in addition to the fixed penalty. The late payment fee is 50% of the fixed penalty.
- 29. Once the late payment fee is applicable the taxpayer may undertake:
  - a. to either pay the fixed penalty including the late payment fee in a single payment or through instalments;
  - b. or elect to dispute the fixed penalty and the late payment fee under the Infringement Notice in court.
- 30. A taxpayer may also elect to pay (in protest) the fixed penalty and the late payment fee (as applicable) and subsequently choose to dispute the matter in court. In such cases, the taxpayer must notify FRCS of his or her intention to dispute the matter in court.
- 31. In addition to the late payment fee, a Departure Prohibition Order (DPO) will be issued to the individual (including partners in a partnership or trustees of trusts) or to all the directors of a company in Fiji, preventing the taxpayer from leaving the country.
- 32. The DPO will not be issued if the taxpayer undertakes to pay the fixed penalty and the late payment fee in a single payment or instalments, or elects to dispute the Infringement Notice in court.
- 33. If the taxpayer fails to undertake any of the actions above, FRCS will notify the Director of Immigration for the issuance of the DPO after the expiration of the 30 day prescribed period. The Director of Immigration will then issue a notice to the taxpayer with the following information:
  - a. the reasons for the issuance of the departure prohibition order;

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<sup>8</sup> Refer to Para 23

<sup>9</sup> Regulation 7

- b. the fixed penalty and late payment fee that the person is required to pay; and
- c. that the departure prohibition order may be revoked if the person undertakes any of the actions listed in para 31.

34. The DPO will be revoked if the taxpayer pays the fixed penalty and late payment fee in full. The payment may be made at an international airport in Fiji to the Director of Immigration if the taxpayer intends to leave the country<sup>10</sup>.

#### **DISPUTING THE MATTER IN COURT**

35. As stated above, the taxpayer who has been issued with an infringement notice may elect to dispute the matter in court.

36. This is quite distinct from the usual court process. Under the usual circumstances, the fixed penalty notices inherently institute proceedings in the Magistrates Court, and the same is dismissed when the penalty has been paid as per the instructions within the notice.

37. For the infringement notices issued under the laws administered by FRCS, the taxpayer has to institute proceedings in a court of competent jurisdiction. This is usually done by filing and serving a Notice of Motion and Supporting Affidavit(s). However, for more guidance on the matter it is advisable to contact the respective court registries.

38. FRCS will refund any payment of the fixed penalty and the late payment fee (if applicable) if the court makes a final determination in the taxpayer's favour.

#### **THE CONVICTION**

39. If a taxpayer has failed to provide an undertaking to pay or to elect to dispute the matter in court within 3 months from the date from which the infringement notice was issued, the same takes effect as a conviction.

40. In such an event, FRCS may seek the maximum penalty that has been prescribed for the offence from a court of competent jurisdiction.

For example;

A taxpayer has been issued an infringement notice for failing to file a tax return under section 49(1) of the Tax Administration Act.

The maximum penalty for the offence is \$25,000

His gross annual turnover is below \$500,000 therefore his fixed penalty is \$5000.

The taxpayer fails to give an undertaking to pay or to dispute the matter in court within the 30 day prescribed timeline.

Consequence: Late Payment fee would apply (50% of \$5000) \$2500

DPO will be issued against the taxpayer preventing him from leaving the country.

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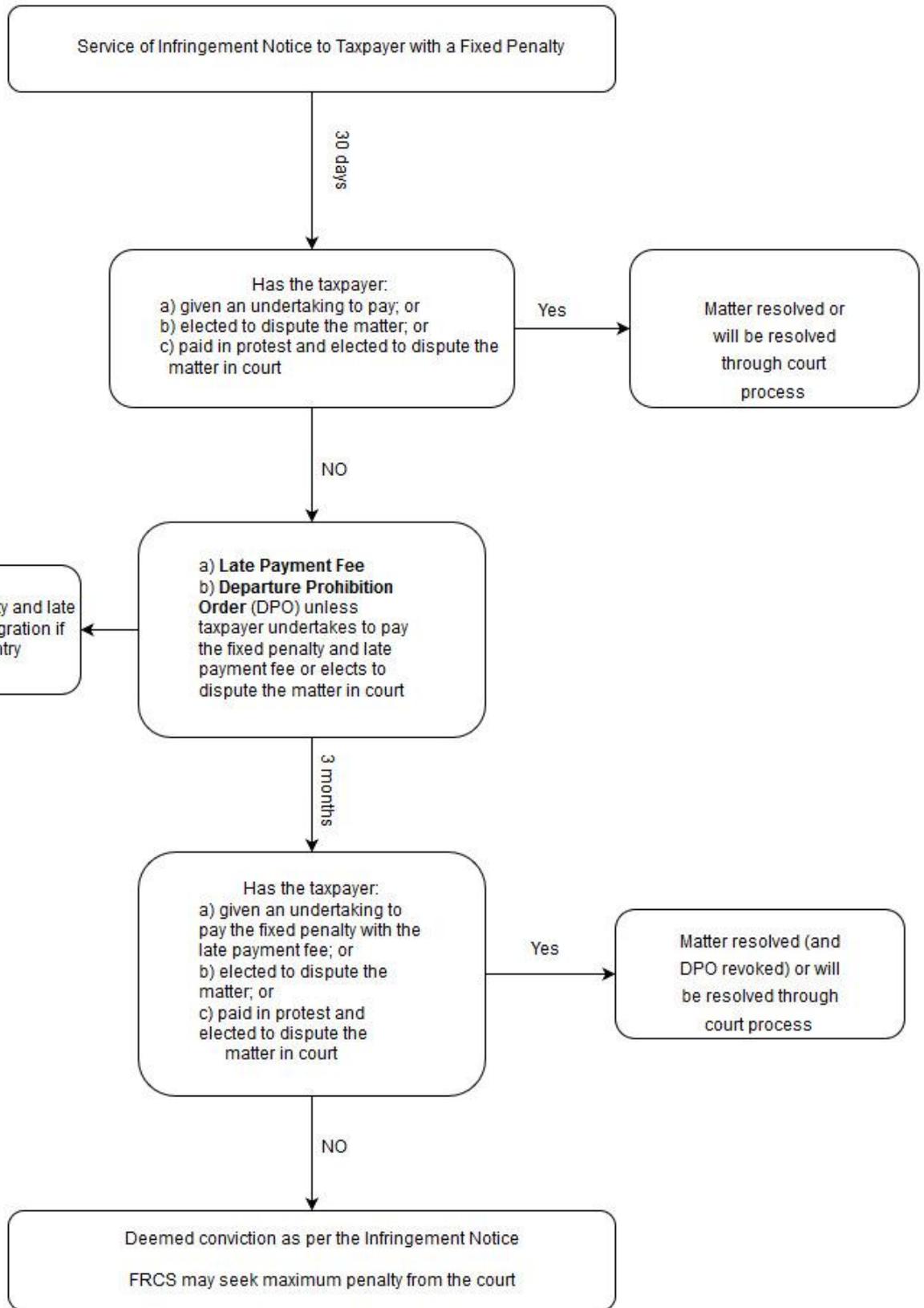
<sup>10</sup> Regulation 7(6) and (7)

The taxpayer fails to give an undertaking to pay or to dispute the matter in court within 3 months.  
Consequence: The Infringement Notice is deemed to be a conviction  
FRCS may make an application in court for the maximum penalty of \$25,000

#### **COMPOUNDING OF THE OFFENCE**

41. As stated earlier, any taxpayer who has been issued with an infringement notice may at any time prior to the hearing request for the matter to be compounded by the CEO.
42. This means that the taxpayer is allowing the CEO to settle the offence whereby the CEO will order, by notice in writing, the taxpayer to pay such sum of money, not exceeding the amount of the fine to which the offender would have been liable if convicted of the offence, as the CEO may think fit.
43. It is important to note that compounding of the offence is only available where the taxpayer in writing, admits committing the offence and requests the CEO to deal with the offence under:
  - a. Section 59 of TAA 2009 for tax matters; or
  - b. Section 155 of the Customs Act 1986 for customs matters.
44. If the CEO compounds an offence under this section, the offender is not liable for prosecution or penalty in respect of same act or omission the subject of the compounded offence.
45. For further information and clarification in regard to this SIG, please email us at [tipu@frcs.org.fj](mailto:tipu@frcs.org.fj)

**Appendix One: FLOWCHART**



## Appendix Two: LEGISLATION

### TAX ADMINISTRATION ACT 2009

#### *Subdivision 3—Infringement Notices* *Interpretation of this Subdivision*

60A. In this Subdivision, unless the context otherwise requires—

“fixed penalty” means a penalty specified in, and payable on receipt of, an infringement notice;

“infringement notice” means a notice prescribed by regulations and issued by a tax officer under section 60B; and

“prescribed offence” means an offence under any tax law for which a fixed penalty is payable as prescribed by regulations.

#### *Infringement notices*

60B.— (1) Subject to this Subdivision, where a tax officer has reason to believe that a person has committed a prescribed offence, the tax officer may institute proceedings in respect of the alleged commission of the offence by issuing upon that person an infringement notice.

(2) An infringement notice issued under subsection (1) must—

- (a) name the person to whom the infringement notice is issued;
- (b) specify the particulars of the offence;
- (c) specify the fixed penalty that the person named on the infringement notice is required to pay; and
- (d) specify any other information prescribed by regulations.

(3) A fixed penalty payable under this Act or any regulations made under this Act is a debt due to the State that—

- (a) is to be collected by the Fiji Revenue and Customs Service in the manner and form prescribed by regulations;
- (b) following the collection of the fixed penalty under paragraph (a), is to be paid by the Fiji Revenue and Customs Service into the Consolidated Fund; and
- (c) ceases to be due—
  - (i) at the time the fixed penalty is paid; or
  - (ii) on acquittal or conviction of the prescribed offence or on the

determination of the proceedings by the court or tribunal in which the proceedings were instituted.

#### *Regulations for issuance of infringement notices*

60C. The Minister may make regulations prescribing matters that are required to be prescribed or are necessary or convenient to be prescribed for the issuance of infringement notices under this Subdivision, including—

- (a) the offences for which infringement notices may be issued;
- (b) the fixed penalties for prescribed offences;
- (c) the manner, form and time frames for which infringement notices are to be issued;
- (d) the actions a person may undertake on receipt of an infringement notice; and
- (e) the penalties that a person to whom an infringement notice has been issued may be liable to.

## REGULATIONS<sup>11</sup>

### **Tax Administration (Infringement Notices) Regulations 2018**

IN exercise of the powers conferred on me by section 60C of the Tax Administration Act 2009, I hereby make these Regulations—

#### PART 1—PRELIMINARY

##### *Short title and commencement*

- 1.—(1) These Regulations may be cited as the Tax Administration (Infringement Notices) Regulations 2018.
- (2) These Regulations come into force on 1 August 2018.

##### *Interpretation*

- 2. In these Regulations, unless the context otherwise requires—
  - “Act” means the Tax Administration Act 2009 and includes the tax laws specified in Schedule 2 to the Act;
  - “court” means a court of competent jurisdiction;
  - “fixed penalty” means a penalty prescribed in column 4 of Schedule 1;
  - “fixed penalty offence” means an offence prescribed in columns 1 and 2 of Schedule 1;
  - “Infringement Notice” means the notice issued under regulation 5;
  - “late payment fee” means 50% of the fixed penalty a person is liable to pay;

<sup>11</sup> The same regulations have been adapted/adopted into the Customs and Excise Regulations

“revoked Regulations” means the Value Added Tax (Infringement) Regulations 2016;

“Service” means the Fiji Revenue and Customs Service; and

“VAT Infringement Notice” means the notice prescribed in Schedule 1 to the revoked Regulations.

#### *Objectives*

3. The objectives of these Regulations are to—

- (a) ensure compliance with the Act;
- (b) address breaches of the Act;
- (c) improve self-regulation; and
- (d) ensure the efficient collection of taxes.

#### *Application*

4. These Regulations apply throughout Fiji irrespective of a person’s nationality, citizenship or place of registration or incorporation.

### PART 2—PROCEEDINGS FOR INFRINGEMENT NOTICES

#### *Issuance of Infringement Notice*

5.—(1) A tax officer may issue an Infringement Notice to a person alleged to have committed a fixed penalty offence by serving the Infringement Notice—

- (a) personally upon the person;
- (b) through registered mail sent to the person’s postal address last recorded by the Service;
- (c) at the registered office of the person;
- (d) upon a person who resides at the person’s physical address last recorded by the Service, provided that the first mentioned person is of or over the age of 18 years; or
- (e) through any electronic means as approved by the Service, including by electronic mail to a valid electronic mailing address submitted by the person to the Service and verified by the Service.

(2) In these Regulations, service of the Infringement Notice is deemed to have been effected if the Infringement Notice is—  
(a) in the form prescribed in Schedule 2; and  
(b) served in accordance with this regulation.

(3) The Service may notify a person to whom an Infringement Notice is issued of the person’s alleged commission of a fixed penalty offence and such notification may be made by—

- (a) Short Message Service (SMS) messaging to a registered mobile phone contact; or
- (b) electronic mail to a valid electronic mailing address, submitted by the person to the Service and verified by the Service.

#### *Fixed penalty*

6. A person to whom an Infringement Notice is issued is liable to a fixed penalty and must, within 30 days from the date the Infringement Notice is issued, undertake one of the following actions—

- (a) pay the fixed penalty in a single payment or by instalments; or
- (b) elect to dispute the Infringement Notice in a court.

#### *Failure to pay fixed penalty*

7.—(1) If a person to whom an Infringement Notice is issued does not undertake any of the actions in regulation 6 within the prescribed period, the person is liable to pay the late payment fee in addition to the fixed penalty and where the person is—

- (a) an individual, the individual shall be issued a departure prohibition order preventing the individual from leaving Fiji; or
- (b) a company, all the directors of the company in Fiji shall be issued a departure prohibition order preventing the directors from leaving Fiji, unless the person undertakes one of the following actions—

- (i) pays the fixed penalty and late payment fee in a single payment or by instalments; or
- (ii) elects to dispute the Infringement Notice in court.

(2) If a person to whom an Infringement Notice is issued pays the fixed penalty and late payment fee, if applicable, and also elects to dispute the Infringement Notice in a court, the person must notify the Service, on or before the payment of the fixed penalty and late payment fee, if applicable, of the person’s intention to dispute the Infringement Notice.

(3) If a person to whom an Infringement Notice is issued pays the fixed penalty and late payment fee, if applicable, and also elects to dispute the Infringement Notice and the court subsequently makes a final determination in the person’s favour, including the determination of any appeal in any appellate court, the Service must refund the fixed penalty and late payment fee, if applicable, to that person.

(4) If a person to whom an Infringement Notice is issued does not undertake any of the actions in regulation 6 within the prescribed period, the Service must notify the Director of Immigration immediately after the expiration of the prescribed period.

(5) Upon receipt of the notification from the Service under subregulation (4), the Director of Immigration must issue to—  
(a) where the person is an individual, the individual; or  
(b) where the person is a company, all the directors of the company in Fiji,

- a departure prohibition order stating—
  - (i) the reasons for the issue of the departure prohibition order;
  - (ii) the fixed penalty and late payment fee that the person is required to pay; and
  - (iii) that the departure prohibition order may be revoked if the person undertakes any of the actions listed in subregulation (1)(i) and (ii).

(6) If a departure prohibition order is issued to a person under this regulation, the person to whom the departure prohibition order is issued may pay in full the fixed penalty and late payment fee that the person is liable to, to the Service or, if the person intends to leave Fiji, to the Department of Immigration at an international airport in Fiji.

(7) Pursuant to subregulation (6), if a person pays in full the fixed penalty and late payment fee that the person is liable to, the departure prohibition order is deemed to have been

revoked and the person must not be prevented from leaving Fiji on the basis of the departure prohibition order issued under this regulation.

*Failure to take action within 3 months*

8. If a person to whom an Infringement Notice is issued does not undertake any of the actions provided in regulation 7(1)(i) and (ii) within 3 months from the date the Infringement Notice is issued, the Infringement Notice takes effect as a conviction and the Service may seek the maximum penalty for the prescribed offence from a court.

*Evidence of matters in certificate*

9. A certificate signed by a tax officer stating that the fixed penalty was or was not paid must, unless the contrary is proved, be conclusive evidence of the matters stated in the certificate.

PART 3—MISCELLANEOUS

*Revocation*

10. The Value Added Tax (Infringement) Regulations 2016 is revoked.

*Transition*

11. The provisions of the revoked Regulations continue to apply to any VAT Infringement Notice issued by the Service prior to the commencement of these Regulations until such time that—  
(a) the fixed penalty specified in the VAT Infringement Notice is paid to the Service; or  
(b) the registered person specified in the VAT Infringement Notice is required to appear before the Magistrates Court to answer to the charge specified in the VAT Infringement Notice.