

**EXPOSURE DRAFT - FOR COMMENT AND DISCUSSION ONLY**

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**STANDARD PRACTICE STATEMENT**

# Disputes process

Issued: XX XXXX 20XX

**SPS XX/XX**

## About this document

Standard practice statements describe how the Commissioner of Inland Revenue (the Commissioner) will exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

This Standard Practice Statement sets out the rights and responsibilities of both a taxpayer and the Commissioner when either party commences a dispute in respect of an assessment, adjustment to an assessment or other disputable decision.

**START DATE:**

{DD/MM/YYYY}

**REPLACES**

- "[SPS 16/05](#): Disputes resolution process commenced by the Commissioner of Inland Revenue", *Tax Information Bulletin* Vol 28, No 11 (November 2016):14; and
- "[SPS 16/06](#): Disputes resolution process commenced by a taxpayer", *Tax Information Bulletin* Vol 28, No 11 (November 2016): 50.

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## Introduction to this Standard Practice Statement

Standard Practice Statements describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

This statement sets out the rights and responsibilities of a taxpayer and the Commissioner when either party commences a dispute in respect of an assessment, adjustment to an assessment or other disputable decision.

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

This statement has also been published as "Disputes process", *Tax Information Bulletin* Vol x, No XX (XXXX 20XX): page XX.

## Abbreviations

The following abbreviations are used throughout this Standard Practice Statement:

NOPA	Notice of Proposed Adjustment
NOR	Notice of Response
SOP	Statement of Position
TAA	Tax Administration Act 1994
TCO	Tax Counsel Office

## Application of this statement

This Standard Practice Statement applies from XX XXXX 20XX and replaces:

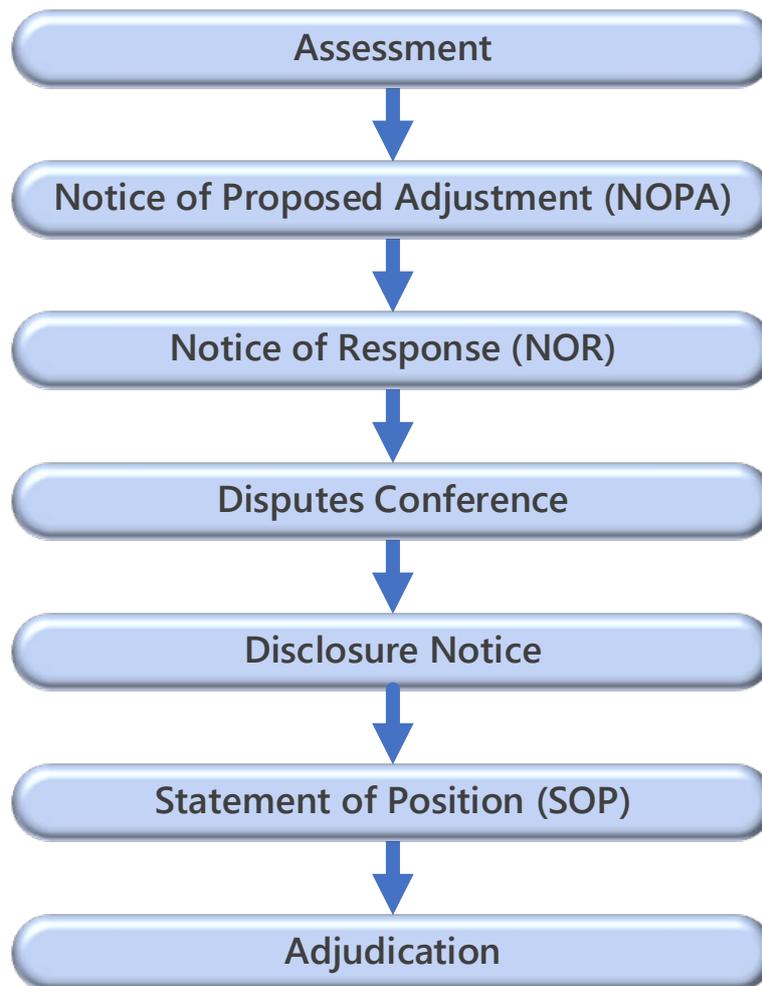
- "[SPS 16/05](#): Disputes resolution process commenced by the Commissioner of Inland Revenue", *Tax Information Bulletin* Vol 28, No 11 (November 2016):14; and
- "[SPS 16/06](#): Disputes resolution process commenced by a taxpayer", *Tax Information Bulletin* Vol 28, No 11 (November 2016): 50.

## How to use this Standard Practice Statement

This Standard Practice Statement allows the reader to follow the path of a dispute they may be involved in. The statement commences at a dispute's starting point, generally the making of an assessment by a taxpayer or the Commissioner (or the making of a disputable decision by the Commissioner) and proceeds through all of the potential stages of a dispute until it is finalised.

This statement is set out in the same order as the phases of the disputes process (as shown in the flowchart below). You don't have to read the statement from beginning to end but can head straight to the phase most relevant to you (which is also linked from the table of contents). We have also linked all the cross-references that appear in the body of the statement in order to make it easier for you to simply click straight through to the further relevant material.

The statement concludes with a short discussion of other matters that might arise during a dispute.



## Background to the disputes process

### Objectives of the disputes process

1. The disputes process was introduced as a result of recommendations in Organisational Review of the Inland Revenue Department (April 1994).<sup>1</sup> The objectives of these recommendations were designed to reduce the number of disputes requiring litigation by:
  - promoting full disclosure;
  - encouraging the prompt and efficient resolution of tax disputes;
  - promoting the early identification of issues; and
  - improving the accuracy of decisions.
2. The disputes process supports full and frank communication between the parties in a structured way and within strict time limits for the legislated phases of the process the TAA.
3. The disputes process is designed to encourage an “all cards on the table” approach and the early resolution of issues without the need for litigation. It encourages, as far as practicable, the disclosure of all relevant issues, facts, evidence and propositions of law before a case proceeds to a court or hearing authority.
4. In accordance with these objectives and unless a statutory exception applies<sup>2</sup>, the Commissioner must go through the disputes process before issuing an assessment.

### Legislative and administrative phases of the disputes process

#### Legislative phases

5. The early resolution of a dispute is intended to be achieved through a series of phases steps specified in the TAA. The main elements of those phases are the issue of the following documents:

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<sup>1</sup> [Organisational Review of the Inland Revenue Department](#) (Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance) from the Organisational Review Committee (Wellington, New Zealand Government, April 1994)).

<sup>2</sup> Sections 89C and 89N(1)(c) of the TAA. See further [323].

- A **notice of proposed adjustment (NOPA)** is a notice the Commissioner or taxpayer issues to the other party, advising the other party that an adjustment is sought in relation to the taxpayer's assessment, the Commissioner's assessment or another disputable decision. The NOPA is the formal document that begins the disputes process. Its prescribed form is the [Notice of Proposed Adjustment \(IR 770\)](#).
- A **notice of response (NOR)** must be issued if the recipient of the NOPA disagrees with it, wholly or in part. The preferred form for the NOR is the [Notice of Response \(IR 771\)](#). A notice rejecting the Commissioner's NOR must be issued by the taxpayer if they disagree with the Commissioner's NOR, wholly or in part.
- A **disclosure notice** is issued by the Commissioner where the taxpayer has initiated the dispute (by issuing a NOPA). This notice triggers the requirement for the taxpayer to provide a statement of position to continue the dispute. Where the Commissioner has initiated the dispute, the Commissioner's SOP will be issued with the disclosure notice.
- Each party's **statement of position (SOP)** must provide an outline of the issues, facts, evidence and propositions of law with sufficient details to support the positions taken. The issues and propositions of law will be binding on the parties to the dispute.<sup>3</sup> Each party must issue a SOP. The preferred form is the [Statement of Position \(IR 773\)](#).

### Administrative phases

6. The disputes process also has two administrative phases: the conference and adjudication phases. If the dispute has not been resolved after the NOR phase, the Commissioner's practice is to hold a conference. A conference can be one or more formal or informal meetings between the parties to clarify and, if possible, resolve the issues that are disputed.
7. If the dispute remains unresolved after the conference phase, the parties prepare and issue their SOPs and, in most circumstances, the dispute is referred to Inland Revenue's Tax Counsel Office (TCO) for adjudication. One circumstance where a SOP is not prepared and the dispute is not referred for adjudication is where the Commissioner and taxpayer agree in writing not to complete the disputes process (that is, they agree to "opt out" of the process).
8. Adjudication involves an independent review of the dispute by the TCO. The TCO provides an internal but impartial review of unresolved disputes. Adjudication is the

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<sup>3</sup> Section 138G of the TAA.

final phase in the disputes process before the taxpayer's assessment is amended (if it is to be amended).

9. In most circumstances an investigation into a taxpayer's tax affairs will have been completed prior to the commencement of the disputes process. However, for the timely progression of disputes through the process the Commissioner may be required to use the Commissioner's information-gathering powers (particularly, s 17B of the TAA).
10. Inland Revenue has a quality assurance review process (separate from any TCO review), to ensure the Commissioner's dispute documents are reviewed before they are issued. Given the importance of the disputes process to the Commissioner and taxpayers, Inland Revenue officers must gain approval from a senior officer before issuing any dispute documents.

## Detailed discussion

### Assessment



11. This section about the assessment phase discusses:
  - Assessments generally;
  - default assessments;
  - certain qualifying taxpayers can have an assessment corrected without a notice of proposed amendment (NOPA);

- ability to shorten the disputes process at the NOPA phase, and
- where prosecution action is being considered during the disputes process.

## Assessments generally

12. If a taxpayer is required to file an income tax return, they must assess their taxable income and income tax liability (or, if applicable, the net loss), terminal tax or refund due.<sup>4</sup> Similar requirements apply to registered persons that are required to file a goods and services tax (GST) return. For a GST return period the person must assess the amount of GST payable under the Goods and Services Tax Act 1985.<sup>5</sup>
13. Taxpayers must also file a return to account for ancillary taxes (for example, fringe benefit tax or resident withholding tax), although they are not required to assess those taxes. The Commissioner may issue an assessment for ancillary taxes.
14. The assessment date for an income tax or GST assessment made by a taxpayer is the date that Inland Revenue receives the taxpayer's tax return.<sup>6</sup>
15. When the taxpayer's assessment is received, the Commissioner's practice is to note and enter the date of receipt into Inland Revenue's computer system. This practice means a clear record of the date an assessment is made always exists.

## Default assessments

16. A taxpayer cannot assess the amount of tax payable for a return period if the Commissioner has previously made an assessment of the tax that is payable for that period.<sup>7</sup> This Commissioner's assessment is known as a "default assessment" and involves the Commissioner estimating the taxpayer's tax liability (and generally occurs where the taxpayer has failed to file their tax return). For further discussion regarding how a taxpayer can dispute a default assessment see [56] to [62] and [370] to [376].

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<sup>4</sup> Section 92(1) of the TAA.

<sup>5</sup> Section 92B(1) of the Goods and Services Tax Act 1985.

<sup>6</sup> Section 92(2) of the TAA and s 92B(2) of the Goods and Services Tax Act 1985.

<sup>7</sup> Section 92(6) of the TAA and s 92B(3) of the Goods and Services Tax Act 1985.

## Certain qualifying taxpayers can have an assessment corrected without a NOPA

17. Certain qualifying taxpayers can have their income tax assessments<sup>8</sup> corrected without the need for them or the Commissioner to issue a NOPA. A “qualifying individual” is one whose income is made up solely of “reportable income”.
18. “Reportable income” is defined in the TAA.<sup>9</sup> It means income Inland Revenue receives regular information about (typically from third parties such as employers) during the income year or by 31 May following the end of the income year. Reportable income includes PAYE income payments, along with resident and non-resident passive income (where third parties have the taxpayer’s IRD number). Further information on how this income is assessed and how errors in these assessments can be corrected is in “SPS 20/03: Requests to Amend Assessments”.<sup>10</sup>

## Ability to shorten the disputes process at the NOPA phase

19. Where a current dispute relates to an earlier dispute started by a taxpayer and for which the Commissioner has issued a challenge notice and court proceedings have been commenced, the current disputes process can be shorted in one of two ways. The process can be shortened where the adjustment being considered:<sup>11</sup>
  - relates to a matter for which the material facts and relevant law are identical to another assessment for the taxpayer (for another period) that is the subject of court proceedings; or
  - seeks to correct a tax position taken by the taxpayer (or an associated person) as a consequence or result of an incorrect tax position being taken by another taxpayer, which is or was the subject of court proceedings.

This process is different from the opt-out process discussed at [326].

20. If the Commissioner agrees that either of the above conditions is met, then a challenge notice is issued in relation to the current dispute, enabling the taxpayer to file a challenge in a hearing authority. Taxpayers should contact Inland Revenue **before their NOPA is issued** to discuss the possibility of using this process.

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<sup>8</sup> Referred to as the individual income tax assessment (IITA) and previously known as the ‘auto-calc’.

<sup>9</sup> Section 22D(3) of the TAA.

<sup>10</sup> “[SPS 20/30: Request to amend assessments](#)” (Standard Practice Statement, Wellington, Inland Revenue, June 2020).

<sup>11</sup> As per s 138B(4) of the TAA. A challenge notice is issued under s 89P of the TAA.

21. Where the adjustment relates to a period other than the one already being disputed, taxpayers should contact Inland Revenue staff who are involved in the existing dispute. Where the parties agree that this process could apply, a NOPA should be able to be issued, cross-referencing the original dispute documents.

## **Where prosecution action is being considered during the disputes process**

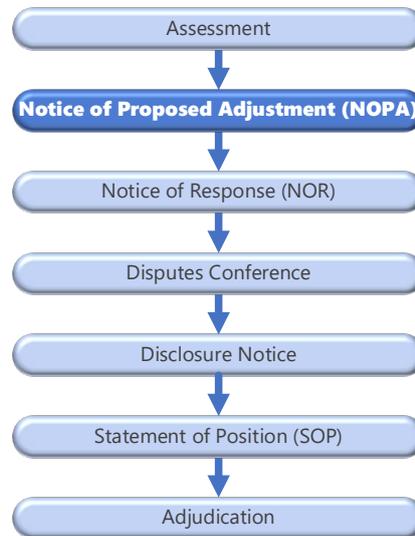
22. Prosecution is one way the Commissioner protects the integrity of the tax and social policy systems for which they are statutorily responsible. It is an enforcement activity, usually of last resort, against those who refuse to comply with their tax or social policy obligations or who abuse entitlements. The sanction of criminal conviction and punishment assures compliant taxpayers, who indirectly bear the burden of others' non-compliance, that the Commissioner will take enforcement action against non-compliers.
23. Everyone who is charged with an offence (including offences under the Inland Revenue Acts) is entitled to a fair trial.<sup>12</sup>
24. The Commissioner has powers, that Inland Revenue officers can exercise to compel a person to provide information. The use of these powers could result in a breach of the taxpayer's right to a fair trial, especially when the taxpayer is required to disclose to the Commissioner what will be their defence to the criminal proceedings.
25. The disputes process also contains provisions that compel a taxpayer to disclose their case with respect to an alleged tax liability. For example, a NOPA requires a taxpayer to set out the facts and the law relied on and to include copies of relevant documents. Where the tax in dispute is also the subject of a criminal prosecution, the compulsory nature of the disputes process may result in a breach of the taxpayer's right to a fair trial.
26. Therefore, the Commissioner recognises that care must be taken in using both the information-gathering powers and the disputes process so as not to compromise the taxpayer's fair trial rights.
27. The Commissioner's general approach is that once prosecution is contemplated, the taxpayer is advised of that position before they are next required to issue a disputes document to commence or continue the disputes process. For example, by issuing a NOPA in response to an assessment.

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<sup>12</sup> Section 25 of the New Zealand Bill of Rights Act 1990.

28. Specifically, the taxpayer will be advised of the following three matters, as relevant:
- **The Commissioner is contemplating taking prosecution action against them.**
  - **The taxpayer can voluntarily choose to continue with the disputes process.**  
However, if they choose to voluntarily continue and issue a disputes document (such as a NOPA, NOR or SOP), the information contained in that document (or one that is subsequently provided by them) could be used against them in any criminal proceedings. Therefore, it is important that, before voluntarily choosing to continue with the disputes process, the taxpayer considers obtaining legal advice. If the taxpayer decides to continue with the disputes process, they can, at any time, change their mind and choose not to proceed.
  - **The Commissioner considers that preserving the taxpayer's rights in current or potential criminal proceedings can be an exceptional circumstance** under s 89K of the TAA (late filing of disputes documents). Further, the Commissioner accepts it is not reasonably practicable for the taxpayer to provide a disputes document until the question of prosecution has been resolved.
29. As a result, the taxpayer can choose to not provide the relevant disputes document until after receiving a letter from the Commissioner advising as appropriate that:
- criminal proceedings have been concluded;
  - criminal proceedings are no longer being contemplated;
  - if the taxpayer intends to rely on the exceptional circumstance and provide a disputes document after the question of prosecution is resolved, they should notify the Commissioner within the applicable response period of their intention;
  - if the taxpayer decides to provide a disputes document despite the exceptional circumstance, they can still use the exceptional circumstance to delay the provision of a subsequent document; or
  - if the dispute has reached the conference phase it is possible to agree to pause the dispute, pending resolution of the question of prosecution, but the impact of the time bar provisions in the TAA need to be considered.

## Notice of proposed adjustment (NOPA)



30. This section about the notice of proposed adjustment (NOPA) phase discusses:
- when Commissioner must issue a NOPA;
  - when a taxpayer can issue a NOPA;
  - the timeframe available to a taxpayer to issue a NOPA;
  - contents of a NOPA;
  - receipt of a taxpayer's NOPA;
  - deficiencies in the contents of a taxpayer's NOPA;
  - the length of the Commissioner's NOPA
  - proposing additional adjustments or an increased liability to tax.

### When Commissioner must issue a NOPA

31. The Commissioner must issue a NOPA before making an assessment unless one of the statutory exceptions to this rule applies.
32. Briefly, the statutory exceptions are:<sup>13</sup>
- the assessment corresponds with a tax return provided by a taxpayer;

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<sup>13</sup> Section s 89C of the TAA.

- where the Commissioner considers there is a simple or obvious mistake or oversight in a taxpayer's return and the assessment merely corrects that simple or obvious mistake or oversight;
- there is agreement to amend a previous tax position taken by a taxpayer;
- the assessment reflects an agreement between the Commissioner and a taxpayer;
- the assessment is being made on material facts and relevant law that are identical to those for an assessment for the taxpayer for another period that is the subject of court proceedings;
- the Commissioner has reasonable grounds to believe a NOPA may cause the taxpayer (or an associated person) to:
  - leave New Zealand; or
  - take steps, in relation to the existence or location of the taxpayer's assets, making it harder for the Commissioner to collect tax from the taxpayer;
- the Commissioner has reasonable grounds to believe that the taxpayer has been involved in fraudulent activity;
- the assessment corrects a tax position taken by a taxpayer that, in the Commissioner's opinion, is vexatious or frivolous;
- the assessment is being made as a result of a direction or determination of a court or the Taxation Review Authority;
- the taxpayer has not provided a tax return (a "default assessment");
- the taxpayer has failed to make or account for tax deductions;
- the taxpayer has already provided a NOPA based on the same grounds of assessment;
- the assessment corrects a tax position taken by the taxpayer or an associated person as a consequence or result of an incorrect tax position taken by another taxpayer;
- the assessment corrects a tax position taken by taxpayer in relation to a tax position taken by a look-through company, where the disputes process between that company and the Commissioner has been completed;
- the assessment is as a result of amending a taxpayer's account for incorrect or missing information;
- the Commissioner is making an amendment before finalising the account of a qualifying individual;
- the assessment of certain penalties;

- the assessment extinguishing all or part of a tax loss;<sup>14</sup>
  - the assessment includes a calculation of Working for Families tax credits
33. Each exception can apply independently or together with others, depending on the circumstances. However, the Commissioner can also choose to issue a NOPA before making an assessment even where one or more exceptions applies.
34. These statutory exceptions are further discussed from [349] under "Circumstances under which the Commissioner is able to issue an assessment without first issuing a NOPA".

### **When the Commissioner can issue a NOPA**

35. In most circumstances an investigation into a taxpayer's tax affairs will have been completed prior to the commencement of the disputes process. However, to ensure that all of the facts have been ascertained and a sustainable position taken in the NOPA and to assist in the timely progression of disputes through the process, the Commissioner may be required to use the Commissioner's information-gathering powers (particularly, s 17B of the TAA). The NOPA is also quality checked for accuracy and completeness before being issued.
36. If the Commissioner decides to issue a NOPA, the responsible Inland Revenue officer will endeavour to advise the taxpayer of this fact at least five working days before the date the NOPA will be issued. This is to allow the taxpayer time to consider their position and seek further advice.
37. A NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties as part of the disputes process. The taxpayer is given the opportunity to agree to the Commissioner's making an adjustment before issuing a NOPA. However, the taxpayer is not precluded from subsequently issuing a NOPA in respect of any amended assessment that the Commissioner issues to reflect an agreed adjustment.
38. A NOPA forms a basis for ensuring the Commissioner does not issue an assessment without some formal and structured dialogue with the taxpayer in respect of the grounds on which the Commissioner proposes to issue an assessment or amended assessment.<sup>15</sup>

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<sup>14</sup> When tax is written off.

<sup>15</sup> *McIlraith v CIR* (2007) 23 NZTC 21,456 (HC).

39. The Commissioner can issue one NOPA for multiple issues, tax types and periods.<sup>16</sup> Alternatively, the Commissioner can issue multiple NOPAs for the same issue and period, consistent with the obligation to correctly make an assessment within the four-year statutory period. However, the Commissioner will endeavour to keep together any issues relating to the same period and tax type in the dispute.
40. If the parties agree on some proposed adjustments and dispute others for the same tax period and type, the Commissioner cannot issue an assessment that reflects the adjustments that have been accepted until all remaining disputed issues are resolved between the parties (even if the Commissioner does not pursue the disputed issue further) or adjudicated by the TCO. That is, the Commissioner will not issue a “partial” or “interim” assessment if the Commissioner is not satisfied that the total assessment is correct.
41. However, where the statutory time bar is about to fall due, the Commissioner can issue an assessment to reflect both the agreed and disputed adjustment, provided that the requirements of s 89N are met. For further discussion on this topic see [282] under the heading “Statutory time bar and exceptions to the time bar”.
42. Where practicable, Inland Revenue officers will contact the taxpayer or their tax agent within 10 working days after the NOPA is issued to check the taxpayer has received it.
43. Unless one of the statutory exceptions applies, the Commissioner cannot make an assessment without first issuing a NOPA to a taxpayer.<sup>17</sup> Although the Commissioner will ensure that an assessment is made in accordance with this statutory requirement, if, on a rare occasion, an assessment was made that breached this requirement, it will still be regarded as being valid.<sup>18</sup>
44. The Commissioner will generally also issue a NOPA before issuing an assessment that involves a disputable decision. Disputable decisions are discussed at [296] under the heading “Disputable decisions”.
45. If the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can issue a NOPA to the Commissioner.<sup>19</sup> However, where the Commissioner issues a NOPA to a taxpayer and the taxpayer accepts the proposed adjustment by written

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<sup>16</sup> Section 89B(1) of the TAA.

<sup>17</sup> Section 89C of the TAA.

<sup>18</sup> Section 114(a) of the TAA.

<sup>19</sup> Section 89D(1) of the TAA.

agreement or is deemed to have accepted the proposed adjustment, then the taxpayer cannot further challenge the assessment.<sup>20</sup>

### Limitations on the Commissioner issuing a NOPA

46. The Commissioner cannot issue a NOPA:<sup>21</sup>
- if the proposed adjustment is the subject of challenge proceedings; or
  - after the statutory time bar has expired.
47. The time bar that arises under ss 108 and 108A prevents the Commissioner from issuing an assessment that increases the amount assessed.<sup>22</sup> The Commissioner can still issue an assessment that decreases the amount of the initial assessment subject to the limitation on refunding overpaid tax under s RM 2(1) of the Income Tax Act 2007 and s 45(1) of the Good and Services Tax Act 1985.
48. However, the Commissioner is not subject to the statutory time bar, if the Commissioner considers that the taxpayer has:
- provided a fraudulent or wilfully misleading tax return<sup>23</sup> or
  - omitted income for which a tax return must be provided that is of a particular nature or source<sup>24</sup> or
  - knowingly or fraudulently failed to make a full and true disclosure of the material facts necessary to determine their GST payable.<sup>25</sup>
49. The time bar and the exceptions to it are further discussed at [282] under “Statutory time bar and exceptions to the time bar”.

### When a taxpayer can issue a NOPA

50. Where a taxpayer issues a NOPA, the NOPA must be issued within the applicable “response period”.<sup>26</sup> Generally, this will be within the four-month period that starts on the date the assessment is issued. The response period is further discussed at [77]

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<sup>20</sup> Sections 89I(1) and 89K of the TAA.

<sup>21</sup> Section 89B(4) of the TAA.

<sup>22</sup> Provided the return is filed.

<sup>23</sup> Section 108(2)(a) of the TAA.

<sup>24</sup> Section 108(2)(b) of the TAA.

<sup>25</sup> Section 108A(3) of the TAA.

<sup>26</sup> Section 89AB of the TAA.

under the heading "Timeframe available for issuing a NOPA". It is also noted that a taxpayer can issue a NOPA and dispute their own self-assessment.

51. A taxpayer can issue a NOPA to the Commissioner where:
- Commissioner issues an assessment without a NOPA
  - Commissioner issues a default assessment without a NOPA
  - Commissioner issues a deemed assessment of "reportable income"
  - Commissioner makes a disputable decision
  - a taxpayer can issue a NOPA in respect of the taxpayer's assessment

### **Where Commissioner issues an assessment without a NOPA**

52. As stated at [31], unless exceptions apply, the Commissioner must issue a NOPA before issuing an assessment. These exceptions are discussed at [349] under the heading "Circumstances under which the Commissioner is able to issue an assessment without first issuing a NOPA".
53. Where the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can dispute the assessment by issuing a NOPA<sup>27</sup> in respect of any of the matters relevant to making the assessment. This could include preliminary decisions that are necessary to make the assessment.<sup>28</sup>
54. Where the Commissioner and taxpayer agree on an adjustment **before** the Commissioner issues a NOPA or makes an assessment, the taxpayer may dispute the Commissioner's proposed adjustment in the NOPA, despite this previous agreement. However, if the agreed adjustment occurs **after** the issuing of a NOPA and the agreed adjustment was one proposed in the NOPA, then the taxpayer cannot dispute that agreed adjustment.<sup>29</sup>
55. Where a taxpayer has made what purports to be a voluntary disclosure, it is the Commissioner's view that a taxpayer cannot make a voluntary disclosure on a matter that they then wish to dispute. The Commissioner considers that a voluntary disclosure can disclose only a tax position the taxpayer believes to be correct. If a taxpayer wishes to dispute a position they agreed to in a voluntary disclosure, then the Commissioner will treat the matter as though the voluntary disclosure had not been

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<sup>27</sup> Section 89D(1) of the TAA.

<sup>28</sup> *MR Forestry (No 1) Trust Ltd v CIR* (2006) 22 NZTC 19,954.

<sup>29</sup> Section 89I of the TAA.

made and consider whether the imposition of shortfall penalties is appropriate. For further information, see "SPS/02: Voluntary Disclosures".<sup>30</sup>

### **Where Commissioner issues a default assessment without a NOPA**

56. If a taxpayer has not filed a tax return, the Commissioner can make a default assessment without first issuing a NOPA to the taxpayer.<sup>31</sup> A default assessment involves the Commissioner estimating the taxpayer's tax liability for a particular income year. Similar rules apply to a NOPA that a taxpayer issues in respect of a GST default assessment.<sup>32</sup>
57. A taxpayer who intends to dispute a default assessment through the disputes process must:
  - provide a tax return for the period to which the default assessment relates, notwithstanding that the tax return cannot include the taxpayer's assessment;<sup>33</sup> and
  - issue a NOPA to the Commissioner in respect of the default assessment within the applicable response period; generally, this will be within the four-month period that starts on the date the Commissioner issues the default assessment.
58. The legislative requirement to provide a tax return in respect of a default assessment made by the Commissioner when issuing a NOPA is an additional requirement of this part of the disputes process. It ensures the taxpayer has provided the necessary statutory information before they dispute the assessment.
59. The taxpayer cannot commence a dispute or challenge proceedings in a hearing authority by simply filing the tax return to which the default assessment relates. The taxpayer must also issue a NOPA.
60. If the Commissioner agrees with taxpayer's tax return and NOPA, the Commissioner will amend the default assessment by exercising the discretion provided under s 113 (subject to the statutory time bar and other relevant limitations on the exercise of that discretion).
61. However, if the Commissioner disagrees with the taxpayer's tax return and NOPA, the Commissioner cannot amend the default assessment. Instead, the Commissioner must issue a NOR to the taxpayer within the relevant response period to continue the

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<sup>30</sup> "SPS19/02: Voluntary Disclosures" (Standard Practice Statement, Wellington, Inland Revenue, March 2019), particularly [44] to [47].

<sup>31</sup> Section 106(1) of the TAA.

<sup>32</sup> Section 89D(2C) of the TAA.

<sup>33</sup> Section 89D(2) and (2A) of the TAA. For GST, see s 89D(2C) and (2D) of the TAA.

disputes process. If the Commissioner does not issue a NOR within the response period, the Commissioner will be deemed to accept the taxpayer's NOPA.<sup>34</sup>

62. If a NOPA is not issued, the Commissioner cannot be compelled to amend the default assessment on receipt of the taxpayer's tax return. However, where the Commissioner agrees with the taxpayer's tax return, the assessment will be amended under s 113.<sup>35</sup>

### **Where Commissioner issues a deemed assessment of "reportable income"**

63. As stated at [17], a qualifying individual (one whose income in an income year is made up solely of "reportable income") can have their individual income tax assessment corrected without the need for them or the Commissioner to issue a NOPA.
64. Generally, where the taxpayer considers their pre-populated account is incorrect, they must advise the Commissioner of the reasons and provide the relevant information to correct the pre-populated account.<sup>36</sup> This must be done within the statutory time limit; that is, by their terminal tax due date. While the taxpayer can change their automatically issued income tax assessment at any time before this date, the Commissioner does not have to accept the change if the Commissioner has reason to believe the amendment is incorrect.<sup>37</sup>
65. If the taxpayer does not provide the relevant information within the statutory time limit, they are treated as having filed a tax return<sup>38</sup> and made an assessment.<sup>39</sup> This is known as an "automatically issued individual income tax assessment". Because the taxpayer is treated as having filed a tax return and made an assessment, they can issue a NOPA to the Commissioner if they disagree with the correctness of the automatically issued income tax assessment.
66. If a taxpayer wants to dispute this assessment, they must issue a NOPA (with the amended figures) to the Commissioner in respect of the assessment within the applicable response period (that is, four months after the date that the assessment is finalised).<sup>40</sup>

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<sup>34</sup> Section 89H(2) of the TAA.

<sup>35</sup> For further information, see "[SPS 20/03: Requests to Amend Assessments](#)" (Standard Practice Statement, Wellington, Inland Revenue, June 2020).

<sup>36</sup> Sections 22G and 22H of the TAA.

<sup>37</sup> Section 22G(4) of the TAA.

<sup>38</sup> Section 22I(1)(a) of the TAA.

<sup>39</sup> Section 22(1)(b) of the TAA.

<sup>40</sup> Section 89AB(3)(a) of the TAA.

## Where Commissioner makes a disputable decision

67. A taxpayer can issue a NOPA in respect of a disputable decision that is not an assessment.<sup>41</sup>
68. A disputable decision is defined as including “a decision of the Commissioner under a tax law”.<sup>42</sup> A decision of the Commissioner under a tax law generally refers to a tax law that specifically confers a discretion or power on the Commissioner.
69. However, some decisions made by the Commissioner are specifically excluded from being disputable decisions.<sup>43</sup> Although a taxpayer is unable to dispute these decisions specifically, if the Commissioner subsequently issues an assessment that includes that disputable decision, a taxpayer can challenge the correctness of the assessment in the usual way.<sup>44</sup> Additionally, any decision made by the Commissioner that is not a disputable decision is amenable to judicial review.
70. If a taxpayer wishes (and is permitted) to challenge a disputable decision, the taxpayer must issue the NOPA to the Commissioner within the applicable response period. Generally, this will be within the four-month period that starts on the date that the Commissioner issues the notice of disputable decision or notice revoking or varying a disputable decision that is not an assessment, unless the Commissioner allows a late NOPA.
71. It is important to note that issuing a NOPA is not the only way a taxpayer can raise concerns about a disputable decision they consider incorrect. They are entitled to engage with Inland Revenue to raise concerns about a disputable decision that has been reached or to provide additional information.
72. However, it is only by issuing a NOPA that a taxpayer can dispute a disputable decision through the disputes process. Disputable decisions are discussed further at [296].

## Where a taxpayer can issue a NOPA in respect of the taxpayer’s assessment

73. A taxpayer can issue to the Commissioner a NOPA in respect of the taxpayer’s own tax assessment.<sup>45</sup>

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<sup>41</sup> Section 89D(3) of the TAA.

<sup>42</sup> Section 3 of the TAA.

<sup>43</sup> These are mostly found in s 138E of the TAA.

<sup>44</sup> *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

<sup>45</sup> Section 89DA(1) of the TAA.

74. The taxpayer's NOPA must be issued within the applicable response period. Generally, this will be within the four-month period that starts on the date that the Commissioner receives the assessment made by the taxpayer, unless the Commissioner is prepared to accept a late NOPA.
75. The date that the Commissioner receives the taxpayer's assessment, or their NOPA is determined by the wording of s 14F. For instance, a communication to the Commissioner by post is treated as having been given at the time the communication would have been delivered in the ordinary course of the post. If the communication is by electronic means, then it is treated as given at the time it was received electronically by the Commissioner.<sup>46</sup>
76. A taxpayer is limited in their ability to issue a NOPA to the Commissioner where there has been an amended assessment. In this circumstance, the taxpayer is limited to disputing only the amount of the increased liability imposed by the amended assessment.<sup>47</sup>

### **Timeframe available to a taxpayer to issue a NOPA**

77. The taxpayer must issue their NOPA within the applicable "response period".<sup>48</sup> Generally, this will be within the four-month period that starts on the date the assessment is issued, unless the Commissioner accepts a late NOPA.<sup>49</sup>
78. It is the Commissioner's view that where a due date exists for a response in the disputes process, then the response must be received by the recipient by that due date.<sup>50</sup> Taxpayer responses received after the due date are further discussed at [308] under "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".
79. The Commissioner is able to accept a taxpayer's late dispute documents (NOPA, NOR or SOP) only where an exceptional circumstance exists, or the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.

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<sup>46</sup> Section 214 of the Contract and Commercial Law Act 2017.

<sup>47</sup> Section 89D(1B)(b) of the TAA.

<sup>48</sup> Section 89AB. of the TAA.

<sup>49</sup> Section 89K(1) of the TAA.

<sup>50</sup> Sections 14, 14C, 14F and 14G of the TAA.

## Contents of a NOPA

80. A NOPA is the document that starts the disputes process, so is intended to identify the points of contention and explain the legal or technical aspects of the issuer's position in relation to the proposed adjustment in an understandable manner. This assists all information relevant to the dispute being made available to the parties.
81. With two exceptions, the content requirements for a NOPA are identical for both the Commissioner and taxpayers.<sup>51</sup> All NOPAs must:
- contain sufficient detail of all the following requirements to identify the issues arising between the parties;
  - be in the prescribed form;
  - identify the adjustment or adjustments proposed to be made to the assessment;
  - provide a statement of the facts and the law in sufficient detail to advise the grounds for the proposed adjustment or adjustments (the Commissioner has the added requirement of concisely stating this information);
  - state how the law applies to the facts.
82. Taxpayers have an added requirement – to include copies of the documents they are aware of at the time the NOPA is issued that are significantly relevant to the issues arising in the dispute.

### Be in the prescribed form

83. The NOPA should be in the prescribed form, [Notice of Proposed Adjustment \(IR 770\)](#) found on Inland Revenue's website ([www.ird.govt.nz](http://www.ird.govt.nz)). However, a NOPA will not be treated as being invalid just because it contains minor differences from the prescribed form, as long as the form still has the same effect and is not misleading. This is further discussed at [106] under "Deficiencies in the contents of a taxpayer's NOPA".

### Identify the adjustment(s) proposed to be made to the assessment

84. The NOPA must include, in respect of each proposed adjustment, the income amount or impact of the adjustment, and the tax year or period to which the proposed adjustment relates.
85. In addition, as well as indicating whether use-of-money interest will apply to the proposed adjustment, a NOPA issued by the Commissioner will also consider whether

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<sup>51</sup> Section 89F(1)–(3) of the TAA.

shortfall penalties apply. That is, where sufficient evidence is held to support the imposition of the penalties, and this can be justified (by reference to any relevant guidelines). For further discussion on the imposition of shortfall penalties, see [305] under “Shortfall penalties”.

### **Provide a statement of facts and law in sufficient detail to advise the grounds for the proposed adjustment**

86. The NOPA must state the key facts and law concisely and in sufficient detail to advise the recipient of the grounds relied on by the disputant. The term “sufficient detail” means the document must contain adequate analysis of the law and facts relevant to the dispute – it should state how the law applies to the facts. This is further discussed at [91]. There should be sufficient discussion of the law to enable the recipient of the NOPA to clearly understand the proposed adjustment.
87. The document should be relatively brief and simple, so the parties can quickly progress the dispute without incurring substantial expenses or excessive preparation time. However, it must also be detailed enough to explain all the issues relevant to the dispute. NOPAs should be accurate, coherent, and logically presented.
88. The NOPA should identify (but not necessarily reproduce in full) the relevant legislation and legal principles derived from relevant cases. These references should be in sufficient detail to clarify the grounds for the proposed adjustment. However, unnecessarily lengthy quotations from cases should be avoided.
89. The Commissioner has the added legislative requirement that this information should be stated concisely. In doing so, Inland Revenue officers should avoid the unnecessary use of legalistic language.
90. Although candid and complete exchanges of information are implicit in the spirit and intent of the disputes process, the Commissioner’s practice is to ensure their NOPA is, within those limits, as brief as practicable. For further discussion about the length of NOPAs issued by the Commissioner, see [110] under “Length of the Commissioner’s NOPA”.

### **State how the law applies to the facts**

#### ***Key facts***

91. To provide a concise statement of key facts, the NOPA should focus on the material factual matters relevant to the legal issues. This includes, for each proposed adjustment, the facts relevant to proving all arguments made in support of the

adjustment. This should also include facts that are inconsistent with any arguments that have been raised previously by either party.

92. The NOPA should briefly state all the material facts. However, where the parties both know the background to the disputed issues, a summary of the facts in the NOPA will suffice. Where possible, the NOPA should refer to and/or append any documents that have previously set out the facts that are relied on.
93. Fully disclosing the background and facts at the NOPA phase helps to resolve the dispute earlier. However, these should be concisely stated, without irrelevant detail or repetition.
94. Although every attempt should be made to concisely state the key facts, the Commissioner accepts that the NOPA's explanation of the material facts should be relative to the complexity of the issues.

### ***The law***

95. The NOPA should state the law by including an outline of the relevant legislative provisions and principles derived from relevant cases that affect the proposed adjustment. It is sufficient that the NOPA explains the nature of the legal arguments without providing lengthy quotations from the legislation or case law.
96. It is important that the NOPA includes enough analysis of the applicable legal principles or tests to inform the recipient of the rationale underpinning the proposed adjustment. If possible, these should be supported by case authorities with full citations. However, it is not necessary to describe large numbers of precedent cases on the same issue or include extracts from each.
97. The NOPA must apply the legal arguments to the facts that support the proposed adjustment, so the argument is not a statement that appears out of context. The application of the law to the facts should be stated concisely and logically support the proposed adjustment.
98. The NOPA must outline all relevant materials and arguments (including alternative arguments) being relied on. If more than one argument supports the same or a similar outcome, the NOPA must include all the arguments.
99. For each proposition of law, it is recommended that the NOPA makes a clear link to an outline of the supporting facts.

***Include copies of all relevant documents that support the adjustment(s)***

100. The taxpayer must provide full copies of the documents they know are significantly relevant to the dispute and in existence when they issue the NOPA. This ensures the Commissioner has all the relevant information necessary to respond to the NOPA. Two examples illustrate this:
- A taxpayer proposes an adjustment to GST input tax credits in their NOPA. The taxpayer should provide copies of the relevant tax invoices as documentary evidence.
  - A taxpayer's dispute involves a sale of land. The taxpayer should provide a copy of the sale and purchase agreement and other relevant correspondence between the vendor and the purchaser (or their agents and/or lawyer) as documentary evidence.
101. If documentary evidence emerges as the dispute progresses that the taxpayer was unaware of when the NOPA was issued, the taxpayer should provide this new evidence once it is known or available.
102. Where a taxpayer is aware of a particular document that is significantly relevant to their dispute, but cannot obtain a copy of it, the taxpayer should include in their NOPA the:
- nature of the document and its relevance to the dispute
  - reasonable steps the taxpayer has taken to obtain a copy of the document; and
  - expected date the document will be made available to the Commissioner.

In this circumstance, the Commissioner expects the taxpayer to send copies of the documents as soon as they are available.

**Receipt of a taxpayer's NOPA**

103. Inland Revenue will usually assign a taxpayer's NOPA to the responsible officer within five working days after it is received.
104. After receiving the NOPA, that responsible officer will determine and record the:
- date on which the NOPA was received by the Commissioner, whether the NOPA has been received within the applicable response period and the date by which the Commissioner's response must be issued; and
  - NOPA's salient features, including any deficiencies in its content.
105. Within 10 working days of receipt, Inland Revenue will advise the taxpayer (or their tax agent), by telephone or in writing, that it has received the NOPA.

## Deficiencies in the contents of a taxpayer's NOPA

106. Although, ideally, a NOPA should be in the prescribed form, as long as the document the taxpayer uses includes a heading clearly identifying it as a NOPA, it specifies the adjustments proposed and contains the required information in sufficient detail so the objective of the prescribed form is achieved, the Commissioner will accept it as a valid NOPA.
107. If the Commissioner receives a NOPA that has insufficient detail, practice is to advise the taxpayer and provide an opportunity for the taxpayer to include the required information. If this occurs on the last day of the response period, the Commissioner will consider any resubmitted NOPA received after the response period ends as able to be accepted, because an exceptional circumstance has arisen or the taxpayer can prove a demonstrable intention to enter into or continue the disputes process. See [308] for further discussion under the heading "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".
108. The Commissioner does not have the power to determine the validity of a taxpayer's NOPA. This can be determined only by the courts in challenge proceedings.<sup>52</sup> Where the Commissioner believes a taxpayer's NOPA is invalid, then, unless the taxpayer's NOPA is incomprehensible or provides no argument to which the Commissioner can respond, the NOPA will be accepted as valid. The fact the Commissioner believes it to be invalid will form part of the Commissioner's response in the NOR and later in the SOP, if the disputes process progresses into that phase.
109. The Commissioner cannot treat a tax return provided by the taxpayer as a NOPA because it will not satisfy these statutory requirements.

## Length of the Commissioner's NOPA

110. Although the length of a Commissioner's NOPA will necessarily vary from case to case, it should generally not exceed 30 pages. The 30-page limit excludes any discussion on shortfall penalties (if included in the same Commissioner's NOPA as the substantive issues), the last page of instructions on "What to do next", and schedules that show complicated calculations and diagrams. The application of the 30-page limit is subject to the following further restrictions:
  - For disputes involving less than \$5,000 of tax (excluding evasion and tax avoidance issues), the Commissioner's NOPA should generally not exceed five pages.

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<sup>52</sup> *CIR v Alam* [2009] NZCA 273 and *Riccarton Construction Ltd v CIR* (2010) 24 NZTC 24,191.

- Where the dispute concerns only one issue (for example, the imposition of shortfall penalties), the Commissioner's NOPA should generally not exceed 10 pages.
111. A longer Commissioner's NOPA may be appropriate where the dispute concerns multiple issues or the issue is very complex and involves a substantial amount of tax.
112. The Commissioner strives to keep NOPAs as short as possible, but this is balanced with the need to achieve the objective of issuing the NOPA (that is, sufficiently communicating to the recipient the proposed adjustments and the reasons for them).

### **Proposing additional adjustments or an increased liability to tax**

113. What is included in a NOPA (or NOR) is not conclusive as between the parties because they can introduce further grounds or information or adjust the amount of the proposed adjustments later in the disputes process.<sup>53</sup> Wherever practicable, all adjustments proposed should be included in one NOPA.
114. However, if either party wishes to propose another adjustment or the Commissioner wishes to propose a fresh or increased liability after a NOPA has been issued, this can be done only by including the proposed adjustment in a further NOPA; it cannot be done by one party simply including the additional adjustment in a subsequent disputes document (a NOR or SOP, for instance).
115. Where a taxpayer wishes to propose an adjustment that increases their liability, they may do so at any time. However, the Commissioner will treat this as a voluntary disclosure. How to make a voluntary disclosure and how the Commissioner treats them are dealt with in Standard Practice Statement "SPS 19/02: Voluntary disclosures".<sup>54</sup>
116. If the Commissioner does not agree with the adjustment the taxpayer proposes in their NOPA, the Commissioner must issue a NOR within the response period. However, if in addition, the Commissioner wishes to propose an additional adjustment that increases the taxpayer's liability, the Commissioner must issue a NOPA in relation to that new proposed adjustment. The Commissioner cannot include the proposed adjustment in relation to the assessable income by simply including that proposal in the Commissioner's NOR.
117. For example, a taxpayer files their 2020 income tax return and subsequently issues a NOPA to the Commissioner proposing an adjustment in relation to additional expenditure the taxpayer believes to be deductible. While considering the taxpayer's

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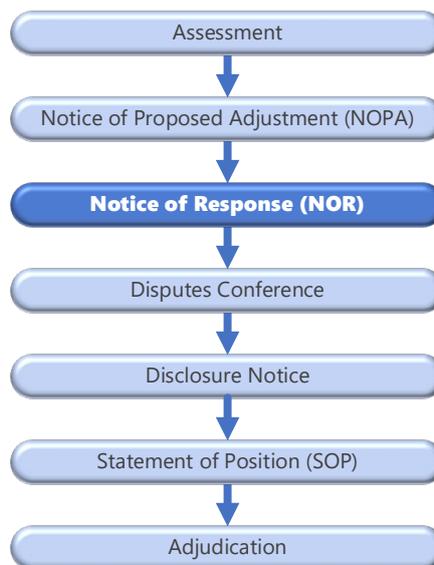
<sup>53</sup> *CIR v Zentrum Holdings Ltd* (2006) 22 NZTC 19,912 (CA).

<sup>54</sup> "[SPS 19/02: Voluntary disclosures](#)" *Tax Information Bulletin* Vol 31, No 4 (May 2019): 157.

proposed adjustment, Inland Revenue staff find that income the taxpayer has treated as exempt in that 2020 return is, in their view, assessable to the taxpayer. In this circumstance, the Commissioner must issue a NOR that responds to the taxpayer’s NOPA (if the Commissioner wishes to dispute that proposed adjustment) and, in addition, issue a NOPA in relation to the proposed adjustment that increases the amount of the taxpayer’s assessable income.

118. In this example two disputes will be being progressed simultaneously in the short term. However, it is expected that, if the parties are still in dispute after the conference phase (discussed from [159]) then the proposed adjustments contained in the multiple NOPAs may be combined into one SOP. Combining multiple issues into one dispute has the benefit of reducing compliance costs and should reduce the time taken in the disputes process.

## Notice of response (NOR)



119. This section about the notice of response (NOR) phase discusses:
- NORs generally;
  - timeframe for issuing a NOR;
  - contents of a NOR;
  - the taxpayer’s rejection of a NOR;
  - timeframe to complete the disputes process.

## NORs generally

120. If the recipient of a notice of proposed adjustment (NOPA) disagrees with the adjustments proposed by the other party, they must advise the other party which of their proposed adjustments are rejected. The statutory requirement is for the party that is rejecting the proposed adjustment to notify the issuer (of the NOPA) that the adjustment is rejected by issuing a notice of response (NOR).<sup>55</sup>
121. They do this by issuing a NOR within the applicable response period; that is, within two months starting on the date that the NOPA is issued. The Commissioner interprets this to mean that the party receiving the NOR must receive it within this period. For example, if a taxpayer issues a NOPA to the Commissioner on 9 April 2021 the Commissioner must advise the taxpayer of its rejection by issuing a NOR to the taxpayer and the taxpayer must receive that NOR on or before 8 June 2021.
122. Although a NOR has no prescribed form, it is the Commissioner's view that, given the wording of the statutory requirement (to issue a response "notice"), a NOR must be provided in writing.
123. Where the taxpayer has issued a NOPA, the Commissioner will make reasonable efforts to contact the taxpayer or their tax agent within 10 working days before the response period expires to advise whether the Commissioner intends to issue a NOR to them in response to their NOPA. Such contact may be made by telephone, letter, email or web message.
124. When Inland Revenue receives a NOR it will record the date it was received and attempt to advise the taxpayer or their agent that the NOR has been received.
125. If a taxpayer has not responded to a NOPA issued by the Commissioner, Inland Revenue will make reasonable efforts to contact the taxpayer or their tax agent two weeks before the response period expires to ascertain whether the taxpayer will issue a NOR. Such contact will be by telephone, letter, email or web message.
126. The Commissioner must issue the NOR to the taxpayer or a representative authorised to act on their behalf.<sup>56</sup> In respect of the latter, it is a question of fact whether the recipient is authorised to receive the NOR on the taxpayer's behalf. The taxpayer's NOPA must stipulate the name of the person or agent they have nominated to receive any NOR the Commissioner issues.<sup>57</sup>

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<sup>55</sup> Section 89G(1) of the TAA.

<sup>56</sup> Section 14F(5)(a) and (b) of the TAA.

<sup>57</sup> *CIR v Thompson* (2007) 23 NZTC 21,375.

127. If a tax agent sends a NOPA to the Commissioner, although the tax agent appears to have authority to receive the Commissioner's NOR, the Commissioner's practice is to contact the tax agent to confirm the agent can accept receipt of the NOR.

### Timeframe for issuing a NOR

128. As stated at [121], the recipient of a NOPA (whether the Commissioner or a taxpayer) must issue a NOR within the applicable "response period"<sup>58</sup> if they wish to continue with the disputes process. Generally, this will be within the two-month period that starts on the date the NOPA is issued and ends on the date the recipient is notified of the NOR (that is, the date of receipt). In the case of a taxpayer's NOR, the exception to this period is where the Commissioner accepts a late NOR.<sup>59</sup>
129. The Commissioner may accept a taxpayer's late dispute documents (NOPA, NOR or statements of position (SOP)) only where:
- an exceptional circumstance exists; or
  - the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.

This is further discussed at [308] under the heading "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".

130. Where either party to the dispute issues a NOR outside the response period (and, in the case of a taxpayer's NOR, the Commissioner is unable to accept it), the issuer of the NOR is deemed to have accepted the adjustments set out in the originating NOPA.<sup>60</sup>

### Deemed acceptance by the Commissioner

131. If the Commissioner issues a NOR outside the two-month response period, the Commissioner is generally deemed to have accepted the adjustment proposed in the taxpayer's NOPA. This finishes the dispute, and the Commissioner must usually issue an assessment or amended assessment to the taxpayer. However, the Commissioner can apply to the High Court for an order that a NOR can be issued outside the two-month response period.<sup>61</sup> This applies if the Commissioner considers that an exceptional circumstance applies or has prevented the Commissioner from issuing an

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<sup>58</sup> Section 89AB of the TAA.

<sup>59</sup> Section 89K(1) of the TAA.

<sup>60</sup> Section 89H of the TAA.

<sup>61</sup> Section 89L(1) of the TAA.

NOR to the taxpayer within the response period. This is further discussed at [322] under the heading “Exception to the response period for a Commissioner’s NOR”.

132. Where the Commissioner is deemed to have accepted a taxpayer’s proposed adjustment, then the relevant assessment or amended assessment is issued to the taxpayer. However, the Commissioner does not have to issue this assessment if it is considered that, in relation to the adjustment, the taxpayer:
- was fraudulent; or
  - willfully misled the Commissioner.<sup>62</sup>
133. If the Commissioner considers that either of these circumstances applies, then, while the Commissioner cannot resume the earlier disputes process, a new NOPA in respect of any of the adjustments proposed in the earlier disputes process can subsequently be issued.
134. Any opinion the Commissioner forms that an adjustment was fraudulent or wilfully misleading must be honestly held, based on a correct understanding of the relevant grounds and reasonably justifiable on the basis of the facts and available law. Any opinion formed by the Commissioner in this regard is a disputable decision.

### **Deemed acceptance by a taxpayer**

135. If a taxpayer issues a NOR outside this response period, they are deemed to have accepted the adjustment proposed by the Commissioner. This finishes the dispute, and the Commissioner will issue the appropriate assessment to the taxpayer. As stated at [130], this is because the NOR must be received by the Commissioner before the end of the response period.
136. However, the Commissioner is not precluded from later exercising the discretion under s 113 and issuing an amended assessment that reflects another adjustment in the same tax period, but for a different issue to that which was subject to the original dispute.

### **Contents of a NOR**

137. A NOR is the document that responds to a NOPA. It is intended to identify those matters the recipient of the NOPA rejects as being incorrect and to explain the legal or technical aspects of the issuer’s position in relation to those rejected matters .

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<sup>62</sup> Section 89J(2) of the TAA.

138. As stated at [113], if either party wishes to propose another adjustment or the Commissioner wishes to propose a fresh or increased liability after a NOPA has been issued, this can be done only by including the proposed adjustment in a further NOPA; it cannot be done simply by including it in a subsequent disputes document such as an NOR or SOP.
139. The information an NOR is required to contain is specified in s 89G(2). **The content requirements for a NOR are identical for the Commissioner and taxpayers.** In the spirit of openness, any previously undisclosed relevant document should be included.
140. All NORs must state concisely:
- the facts or legal arguments in the NOPA that the issuer of the NOR considers are wrong;
  - why the issuer considers those facts and arguments to be wrong;
  - any facts and legal arguments relied on by the issuer;
  - how the legal arguments apply to the facts; and
  - the quantitative adjustment to any figures proposed in the NOPA that results from the facts and legal arguments relied on by the issuer.

### Facts and legal arguments

141. The issuer of a NOR must specify the facts and legal arguments on which they are relying. They can refer to legislative provisions, case law and legal arguments raised in the NOPA they received. To a large extent, these requirements mirror the content requirements for a NOPA (discussed from [80]) and to the extent possible should be read as being applicable for the contents of a NOR.
142. Any NOR the Commissioner issues to reject the adjustment proposed in the taxpayer's NOPA must be relatively brief but sufficiently detailed to explain all the relevant facts, quantitative adjustments, issues and law.

### Quantitative adjustments

143. The requirement for a quantitative adjustment establishes the extent to which the issuer considers that the adjustment in the NOPA is incorrect. This amount need not be exact, although, every attempt should be made to calculate it accurately.

## Deficiencies in the contents of a taxpayer's NOR

144. This section discusses the implications when a taxpayer's NOR does not strictly meet the statutory requirements or has insufficient detail. It also notes that the Commissioner cannot determine the validity of a taxpayer's NOR.

### *Taxpayer's NOR does not strictly meet the statutory requirements*

145. Where a taxpayer's NOR does not strictly meet the statutory requirements, the Commissioner will accept it so long as the taxpayer's document:

- includes a heading clearly identifying it as a NOR; and
- contains the required information in sufficient detail so the objective of the legislation is achieved.

### *Taxpayer's NOR has insufficient detail*

146. If the Commissioner receives a NOR that has insufficient detail, the Commissioner's practice is to advise the taxpayer of the deficiency in the NOR and give them an opportunity to include the required information within the remaining response period.

147. If the taxpayer does not have enough time within the response period to rectify the deficiency, the Commissioner will allow them a limited period to rectify the deficiency. However, the taxpayer should not use the potential of receiving this limited extension to delay issuing their NOR.

### *Commissioner cannot determine the validity of a taxpayer's NOR*

148. The Commissioner does not have the power to determine the validity of a taxpayer's NOR.<sup>63</sup> Validity can be determined only by the courts in challenge proceedings.

149. Where the Commissioner believes a taxpayer's NOR is invalid, then, unless the taxpayer's NOR is incomprehensible or provides no argument to which the Commissioner can respond, the Commissioner must accept the NOR. The fact the Commissioner believes it to be invalid will form part of the Commissioner's SOP.

## Taxpayer's rejection of a NOR

150. If a taxpayer wishes to reject a Commissioner's NOR and continue with the disputes process, they must notify the Commissioner of this fact within the applicable response

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<sup>63</sup> *CIR v Alam* [2009] NZCA 273, *Riccarton Construction Ltd v CIR* (2010) 24 NZTC 24,191.

period. That is, within two months, starting on the date the NOR was issued. Otherwise, the taxpayer is deemed to have accepted the NOR and the dispute finishes.<sup>64</sup>

151. The Inland Revenue officer responsible for administering the dispute will make reasonable efforts to contact the taxpayer (or their tax agent) two weeks before the response period for the Commissioner's NOR expires to determine whether the taxpayer will reject the NOR. Contact will be made by telephone, email, webmail through MyIR, or in writing.
152. There is no prescribed document for rejecting a NOR issued by the Commissioner, and the taxpayer does not have to expressly reject each matter set out in the Commissioner's NOR. Where appropriate, simply rejecting the Commissioner's NOR in total will suffice. Despite there being no prescribed document, it is the Commissioner's practice to ask the taxpayer to notify the Commissioner in writing of their rejection of the Commissioner's NOR. This document is referred to the responsible Inland Revenue officer within five working days after Inland Revenue has received it and acknowledged as received within 10 working days.
153. If the taxpayer has not rejected the Commissioner's NOR within the response period (that is, deemed acceptance has occurred), the Commissioner will make reasonable efforts to advise the taxpayer of this within two weeks after the response period to the Commissioner's NOR has expired.

### **Timeframe to complete the disputes process**

154. Where the dispute remains unresolved, the responsible officer, where practicable, should negotiate a timeframe with the taxpayer, so the dispute can be progressed in a timely and efficient way.
155. Although not statutorily required, both parties agreeing to a timeframe is critical for demonstrating they are committed to progressing the dispute in a timely manner. The Commissioner will manage delays in the progress of a dispute.
156. If the negotiated timeframe cannot be achieved, the Commissioner enters into a continuing discussion with the taxpayer to:
  - arrange a new timeframe; or
  - advise them when the disclosure notice and SOP will be issued.

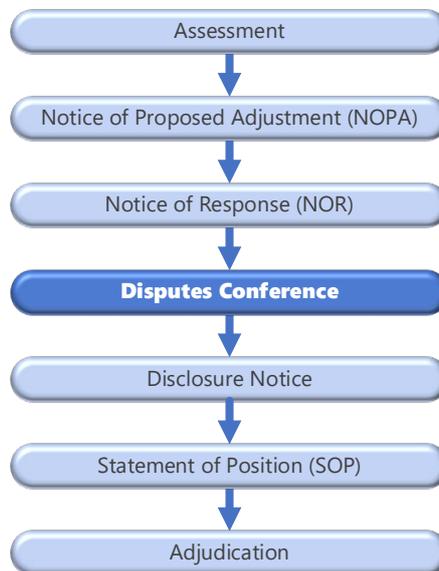
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<sup>64</sup> Section 89H(3) of the TAA.

This is consistent with the purpose of the disputes process: to promote the prompt and efficient resolution of disputes. However, the failure to negotiate or adhere to an agreed timeframe will not necessarily prevent a case from progressing through the disputes process in a timely manner.

- 157. In addition to the above administrative practice, the Commissioner is bound by s 89P. This section provides that where the taxpayer-initiated NOPA is issued after 29 August 2011<sup>65</sup> and issues remain in dispute, the Commissioner must issue a challenge notice to the taxpayer within four years of the issue of the taxpayer’s NOPA. If the Commissioner fails to meet the four-year timeframe, then the Commissioner is deemed to have accepted the adjustments proposed in the taxpayer’s NOPA.<sup>66</sup>
- 158. The Commissioner is also bound by s 89N(2). Under that provision, if a NOPA has been issued and the parties cannot agree on the proposed adjustment, the Commissioner cannot amend an assessment without completing the disputes process unless one of the exceptions in s 89N applies. These exceptions are further discussed at [323] under the heading “Commissioner’s ability to amend an assessment without completing the disputes process”.

## Disputes Conference



<sup>65</sup> This being the date of enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011.

<sup>66</sup> Section 89H(4) of the TAA.

159. This section about the conference phase discusses:

- the objective of the conference phase;
- starting and progressing through the conference phase;
- ending the conference phase;
- opting out of the rest of the disputes process;
- progressing disputes through the disputes process where the dispute affects multiple taxpayers.

### **Objective of the conference phase**

160. The conference phase of the disputes process allows the taxpayer, taxpayer's representatives and Inland Revenue officers directly involved in the dispute to exchange material information, if this has not already been done. Importantly, it is an opportunity for all parties to attempt to resolve the differences in their understanding of facts, the law and legal arguments.
161. The word "resolve" in this context is not limited to a final resolution of the dispute. Although resolution is a possibility, it is not the only objective of the conference phase. The parties may resolve part of the dispute by agreeing on some facts and clarifying some legal arguments, while agreeing to disagree on other matters, which become the focus in the later phases of the disputes process. The conference phase may assist to clarify and narrow those matters that remain in dispute.
162. The conference phase is an administrative (rather than a legislative) process that aims to clarify and, if possible, resolve the dispute.
163. The conference phase does not have legislated completion timeframes. Despite this lack of timeframes, neither party should use this phase to delay completion of the disputes process.
164. The conference phase can involve more than one meeting between the parties. For example, the parties may need further information or to consider further submissions made at an initial meeting.

### **Starting and progressing through the conference phase**

165. The conference phase commences with Inland Revenue issuing a conference facilitation letter, offering to meet with the taxpayer and their agents. The conference facilitation letter is issued within one month from the date of the issue of the

taxpayer's rejection of the Commissioner's notice of response (NOR) or the receipt of the taxpayer's NOR by the Commissioner (as the case may be).

166. The taxpayer is expected to respond within two weeks from the date of the conference facilitation letter (see further from [171]).

### **Facilitation of conference meetings**

167. Meetings are a feature of the conference phase. Inland Revenue will offer the services of a facilitator to promote and encourage structured discussion between its officers and the taxpayer on an informed basis and with the genuine intention of resolving the dispute. Although a facilitator is recommended, a taxpayer is under no obligation to agree to this service being provided, but Inland Revenue will always offer facilitation to taxpayers. (For more information about facilitated meetings, see from [180] and unfacilitated meetings from [189].)
168. The meeting facilitator will be a senior Inland Revenue officer who has not been involved in the dispute and has not given advice on the dispute. The facilitator is independent of the investigation and dispute to date, although they will have sufficient technical knowledge to understand and lead the meeting.
169. The facilitator is not an arbitrator or mediator, so is not responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end. In particular, it is not the facilitator's role to resolve the dispute. If the possibility of resolution arises, it is the responsibility of the taxpayer and Inland Revenue officers directly involved in the dispute to conclude matters.

### **Format of conference meetings**

170. The format of the meetings need not be limited to face to face. For instance, the parties may agree to hold a telephone or video conference. For reasons of simplicity, in this Standard Practice Statement the term "meetings" includes all possible formats.

### **Taxpayer must respond within two weeks**

171. The taxpayer is expected to respond within two weeks from the date of the conference facilitation letter. The taxpayer should indicate whether they will attend the meeting, whether they accept the facilitation offer, whether they have special requirements or needs for the meeting and who else will be attending the meeting.

172. If the taxpayer does not respond within the two-week timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer about their response to the conference facilitation letter.
173. Parties to the dispute can obtain expert legal or other advice during the conference phase in addition to any advice previously obtained. Legal or other advisers may attend any meetings in relation to the dispute.

### **Preparation for the meeting**

174. When a taxpayer agrees to attend a meeting in the conference phase, Inland Revenue will contact the taxpayer within two weeks from the taxpayer's agreement to establish a timeframe and agree how the meeting will be conducted. Both parties should provide details of who will be attending the meeting.

### ***Exchange of information***

175. Parties may agree to exchange information relevant to the dispute before the meeting and provide this information to the facilitator. In addition, Inland Revenue will give the taxpayer a list of the information it has given to the facilitator. The taxpayer may seek a copy of any information on that list if it is not already in their possession. It is particularly important that the parties exchange this information before the meeting if the agreed format is a telephone or video conference.

### ***Timeframe***

176. The conference phase is generally completed within three months, although this varies depending on the facts and complexities of the dispute as well as the potential impact of the time bar provisions. A longer conference phase may be justified in disputes where the parties are engaged in meaningful discussions and actively seeking resolution.

### ***Meeting agenda***

177. An agenda is useful for both parties at any meeting. The Commissioner recommends that the agenda divides the meeting into two parts. The first part of the meeting involves an exchange of material information and discussion of contentious facts and issues relating to the dispute. Also discussed will be any procedural matters such as the timeframe for completing the disputes process, the adjudication process, time bar waivers and the possibility of opting out of the disputes process. The second part of the meeting involves discussing the possible resolution of the dispute. Any

communication made and any materials provided for the purpose of this discussion will be treated as being on a “without prejudice” basis.

178. Where no agenda has been agreed and it is a facilitated meeting, it is up to the facilitator to guide the taxpayer and Inland Revenue officers in discussing the matters noted at [177].
179. Where the taxpayer has declined facilitation, it is up to the parties to the dispute to work out an appropriate meeting structure, bearing in mind that the aim of the meeting is to reach agreement on some or all the facts and issues and resolve the dispute.

### **Role of the facilitator**

180. During facilitated conference meetings, the facilitator will take the following actions:
- Use the agreed agenda and explain the objectives of the meeting.
  - Remind the parties of the rules they have agreed to relation to the meeting.
  - Clarify who the parties are at the meeting and the capacity they are attending in (for instance, whether they are authorised tax advisors or have authority to resolve the dispute at the meeting).
  - Ask whether the parties agree to record the meeting using audio or video technology.<sup>67</sup>
  - Promote constructive discussion of contentious tax issues and, where possible, encourage both parties to explore the issues and resolve the dispute.
  - Encourage the parties to present evidence in support of the facts as they perceive them (this can be done at a later time if the evidence cannot be provided at the time of an initial meeting).
    - The parties will be encouraged to reach agreement on all of the facts of the disputed adjustments.
    - If agreement cannot be reached, the parties will be encouraged to establish common ground and attempt to address matters where they agree to disagree.
    - Agreements will be recorded in writing and later sent to the taxpayer to verify and sign-off as being correct by a specified date.

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<sup>67</sup> See “[SPS 12/01](#): Recording Inland Revenue Interviews” (Standard Practice Statement, Wellington, Inland Revenue, April 2012) or any replacement Standard Practice Statement.

181. If the contentious tax issues cannot be resolved, the facilitator will ask the parties to do one or more of the following:
- end the phase or hold another meeting;
  - agree a timeframe for completing the process;
  - indicate whether a “without prejudice” basis holds for communications and documents prepared for negotiating potential settlement or resolution;
  - ask the taxpayer to consider whether the opt-out process applies.
182. At the end of the meeting, the facilitator will ask the parties to consider whether the conference phase should come to an end. This means considering whether another meeting is needed. This can be justified if both parties need to exchange further information in support of their arguments or believe another meeting may result in the dispute’s resolution. Continuous meetings are discouraged if they are being used as a delaying tactic.
183. Where the parties agree to end the conference phase and the facilitator considers the objectives of the conference phase have been achieved, the facilitator can clearly signal the end of the conference phase to the parties.
184. The parties may agree on the timeframe for completing the disputes process and submitting the dispute to the next step in the disputes process; the statement of position (SOP) phase. This could, for instance, include the timeframe for taxpayers to meet outstanding information requests or Inland Revenue officers undertaking to provide copies of information relevant to the dispute. The agreed timeframe will also factor in time bar waivers (if given by the taxpayer) and the time required for any court challenge relating to documents claimed to be protected by professional legal privilege and tax advice documents claimed to be protected by non-disclosure rights. Further, the facilitator will ask the taxpayer whether a time bar waiver will be given if the time bar applicable to the assessment in dispute is imminent.
185. The facilitator will indicate clearly whether communications made and/or documents prepared for the purpose of negotiating potential settlement or resolution of the dispute will be treated as being on a “without prejudice” basis.
186. The facilitator will ask the taxpayer to consider whether the opt-out process applies and advise the taxpayer of their right to seek the Commissioner’s agreement to opt out within the required timeframe.<sup>68</sup>

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<sup>68</sup> The requirements a taxpayer must meet to opt out of the rest of the disputes process are discussed at [326].

187. Any agreement between the parties must be recorded in writing and signed at the meeting by both parties or on a later date if either party requires time to verify the correctness of the agreement.
188. At all times, the Inland Revenue officers directly involved in the dispute, and not the facilitator, remain the taxpayer's first point of contact during the dispute.

### ***Unfacilitated meetings***

189. An unfacilitated meeting should proceed in a similar way to a facilitated meeting with Inland Revenue officers performing the tasks the facilitator would have performed.
190. At the end of the meeting, it is important for the parties to discuss whether they consider that the conference phase has come to an end and, if it has, to record any agreement in writing.

## **Ending the conference phase**

191. The conference phase does not necessarily end because the final meeting has been held. It may be, for instance, that one or both parties require additional time to consider matters raised during the meeting. Care should be taken that progress through the conference phase is not delayed unduly.

### **Facilitated meetings**

192. If the facilitated meeting has not ended the conference phase or the disputes process, then after the meeting the facilitator will follow up on any matters agreed during the meeting; for instance, any agreed timeframe for the exchange of information. Although the facilitator will follow up any agreed matters, they will not enforce any agreement made between the parties directly involved in the dispute. They will also consider whether a further meeting might be beneficial.
193. The facilitator may suggest that the conference phase has come to an end where:
  - the taxpayer and Inland Revenue officers have exchanged all the material information relevant to the dispute, have fully discussed the issues and have not resolved the dispute;
  - there is no agreement and the parties' reasons for continuing the conference phase are considered to be insufficient.

The facilitator will notify the parties of the decision to end the conference phase.

194. Strong indicators that the conference phase has come to its end include the:

- taxpayer and/or tax advisors stopping their contact with the Inland Revenue officers directly involved in the dispute for a few weeks;
  - parties not exchanging information that was agreed during the meeting to be exchanged, thus leading to the exercise of the Commissioner's powers (for example, notices under s 17B);
  - parties agreeing to disagree with each other and expressing interest in progressing to the SOP phase; and
  - taxpayer appearing to use delaying tactics in the conference phase.
195. Where the facilitator is concerned about the parties' decision to end the conference phase before achieving the meeting's objectives, the facilitator may discuss their concerns with the parties separately to determine whether the conference phase should come to an end. This is expected to be a rare occurrence. The facilitator will seek the parties' agreement to ending, or not, the conference phase.

### **Unfacilitated meetings**

196. In the case of unfacilitated meetings, the Inland Revenue officer performs the role of a facilitator. They may suggest to the taxpayer that the conference phase has ended after all the material information relating to the dispute has been exchanged and all the contentious facts and issues have been discussed. The parties will then agree in writing on the date on which the conference phase has ended.
197. If the parties cannot agree when to end the conference phase, then a senior Inland Revenue officer who is unconnected with the case will be responsible for making the decision about ending the conference phase. They will make this decision after considering the parties' reasons and concerns.

### **What happens when the conference phase ends?**

198. The conference phase may have ended with the taxpayer and the Commissioner resolving the issues between them. Where a taxpayer has agreed with all the Commissioner's proposed adjustments then the Commissioner issues the required assessments. As stated in [40] where some of the proposed adjustments remain in dispute, the Commissioner cannot issue a partial assessment.
199. When a dispute remains unresolved after the conference phase, then the:
- Commissioner and taxpayer may agree to the taxpayer opting out of the rest of the disputes process and the matters being resolved with a hearing authority; or

- full dispute process continues with the Commissioner issuing a disclosure notice (see further at [209] under the heading “Disclosure Notice”).

## Opting out of the rest of the disputes process

200. The Commissioner and a taxpayer can enter into an agreement to not complete the disputes process if they are satisfied the dispute can be more efficiently resolved by a hearing authority. This is known as “opting out”.<sup>69</sup>
201. The Commissioner will not agree to the taxpayer opting out of the rest of the disputes process unless a conference meeting has taken place. Once the meeting has been held, the Commissioner will agree to a taxpayer opting out when certain conditions are met. These conditions are discussed at [326] under “Taxpayer requirements when wanting to opt out of the disputes process after the conference phase”.

## Issuing an assessment where the Commissioner has agreed to opt out

202. Where the Commissioner has agreed to the taxpayer’s request to opt out, the Commissioner will make an amended assessment and issue a notice of assessment to the taxpayer. The assessment takes into account the information and legal arguments raised in the dispute documents considered to date as well as during the conference phase.
203. However, in making an amended assessment (and issuing a challenge notice where the originating notice of proposed adjustment (NOPA) was issued by the taxpayer), the Commissioner is not bound by the facts, evidence and propositions of law stated in the NOPA and notice of response (NOR),<sup>70</sup> and the Commissioner is able to consider information and arguments raised during the conference phase.<sup>71</sup> The Commissioner’s administrative practice is that grounds of assessment that have not previously been referred to in the Commissioner’s NOPA and taxpayer’s NOR will not be relied on unless the new grounds have been notified to the taxpayer and discussed with them during the conference phase.
204. Where the parties have agreed to opt out, the Commissioner will send the taxpayer at or near the time of the assessment, a brief letter confirming the grounds of assessment

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<sup>69</sup> Section 89N(1)(c)(viii) of the TAA.

<sup>70</sup> For information about the requirement to issue a NOPA when adding any new adjustments to a dispute, see [113] under the heading “Proposing additional adjustments or an increased liability to tax”.

<sup>71</sup> *CIR v Zentrum Holdings Ltd* (2006) 22 NZTC 19,912 (CA).

and, in the case of the issue of a challenge notice, a brief letter confirming the reasons the Commissioner has not accepted the adjustment the taxpayer proposed.

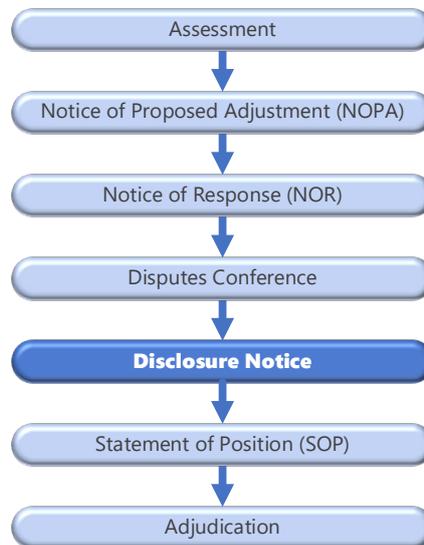
### **Challenge notice where the Commissioner has agreed to opt out**

205. In addition to issuing an assessment, in agreeing to the taxpayer's preference to opt out the Commissioner will issue a challenge notice under s 89P to the taxpayer where the taxpayer issued the NOPA. A challenge notice is not required if the Commissioner issued the NOPA. In doing so, the Commissioner will have taken account of the relevant information and legal arguments raised in the dispute documents considered to date as well as during the conference phase. The taxpayer can then challenge the assessment by commencing proceedings in a hearing authority within two months of receipt of the challenge notice.

### **Progressing disputes through the disputes process where the dispute affects multiple taxpayers**

206. Sometimes it is necessary for Inland Revenue to deal with multiple taxpayers who are affected by the same disputed matter. This can arise where:
- the taxpayers are all investors in a particular scheme;
  - the taxpayers have entered into similar arrangements and have the same promoter;
  - the taxpayers have entered into similar arrangements and have the same agent;
  - there exists a widespread but well-defined common problem involving many unrelated taxpayers (for example, several taxpayers claiming non-deductible expensive such as fines for overloading).
207. Given Inland Revenue's limited resources and bearing in mind taxpayer compliance costs, it may not be appropriate for all the cases to proceed through the full disputes process.
208. The Commissioner's approach to the different situations that arise where multiple taxpayers are all affected by the same disputed matter is outlined at [\[338\]](#) under the heading "Progressing disputes through the disputes process where the dispute affects multiple taxpayers".

## Disclosure notice



209. If the dispute remains unresolved at the end of the conference phase, the next phase in the disputes process is the issue of the disclosure notice by the Commissioner.

210. This section discusses the:

- purpose of a disclosure notice;
- issue of a disclosure notice.

### Purpose of a disclosure notice

211. The Commissioner must issue a disclosure notice unless they:<sup>72</sup>

- do not have to complete the disputes process because any of the exceptions under s 89N(1)(c) applies;<sup>73</sup> or
- do not have to complete the disputes process because the High Court has made an order that the dispute resolution process can be truncated pursuant to an application made by the Commissioner;<sup>74</sup> or

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<sup>72</sup> Section 89M(1) of the TAA.

<sup>73</sup> The application of s 89N(1)(c) of the TAA is further discussed at [232], under the heading “Commissioner’s ability to amend an assessment without completing the disputes process”.

<sup>74</sup> Section 89N(3) of the TAA.

- have already issued to the taxpayer a notice of disputable decision that includes or takes account of the adjustment proposed in the notice of proposed adjustment (NOPA).<sup>75</sup>
212. A disclosure notice refers the taxpayer to the issues and propositions of law exclusion rule.<sup>76</sup> The effect of this rule is to limit both parties to only those issues and propositions of law raised in their respective statements of position (SOPs). This rule is further discussed at [239]. The issue of a disclosure notice will always trigger the evidence exclusion rule and the response period for the issue of the taxpayer's SOP.
213. Where the Commissioner initiated the dispute by issuing a NOPA, the Commissioner's SOP will accompany the disclosure notice.
214. If the taxpayer initiated the dispute by issuing a NOPA, the Commissioner will issue a disclosure notice to the taxpayer. The taxpayer's SOP must be issued to the Commissioner within the allowed two-month response period after the issue of a disclosure notice to the taxpayer. The Commissioner must then issue a SOP in response within the response period.
215. The Commissioner will usually advise the taxpayer two weeks before a disclosure notice is issued that it is about to be issued. The Commissioner will also contact the taxpayer shortly after the disclosure notice is issued (together with the Commissioner's SOP where this has been issued with the disclosure notice) to ascertain whether the taxpayer has received the notice.

## Issue of a disclosure notice

216. This section covers:
- the timeframe for issuing a disclosure notice
  - when the Commissioner issues a SOP with the notice

## Timeframe for issuing the notice

217. Because there is no statutory timeframe for issuing a disclosure notice, the Commissioner can issue a disclosure notice at any time on or after the date that either party issues their NOPA.

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<sup>75</sup> Section 89M(2) of the TAA.

<sup>76</sup> Set out in s 138G of the TAA.

218. The Commissioner's usual practise is to issue a disclosure notice following the conference phase and in accordance with the timeframe agreed with the taxpayer.
219. Where a disclosure notice is issued earlier by the Commissioner (for example, when the facts are clear, the taxpayer has agreed the disputed issues and both parties agree a conference meeting is not required), the reasons will be documented and explained to the taxpayer.

### **When the Commissioner issues a SOP with the notice**

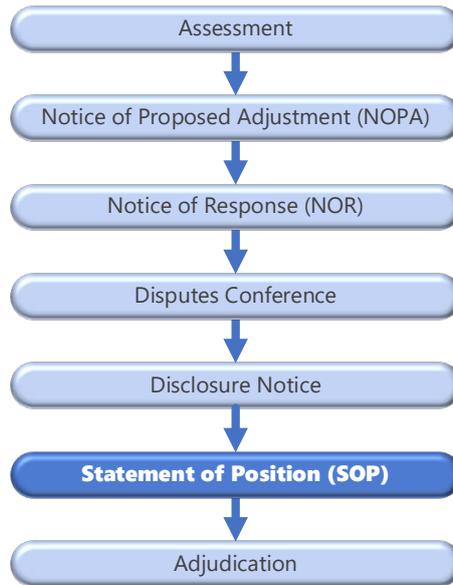
220. Where a dispute commenced by the Commissioner (that is, Inland Revenue issued the NOPA) remains unresolved after the conference phase, it is the Commissioner's administrative practice to issue a SOP along with the disclosure notice within **three months** from the:
- end of the conference phase;<sup>77</sup> or
  - date when the Commissioner declined the taxpayer's request to opt out.
221. However, even with good planning and the best endeavours of the Inland Revenue officers involved, the disclosure notice and the Commissioner's SOP may not always be issued within this three-month timeframe. For instance, this might occur when the:
- facts, issues and law are complex;
  - case involves an important issue of precedent and/or Inland Revenue's legal services or external advisors are involved in advising on the Commissioner's SOP; or
  - Commissioner is waiting for information to be provided under a request using a statutory power; in which case the Commissioner will defer issuing a disclosure notice so any information the taxpayer or a third party provides can be included in the Commissioner's SOP.
222. While the Commissioner is able to extend the three-month timeframe, extensions will be rare. In most disputes, the timeframe is sufficient for Inland Revenue officers to complete and issue to the taxpayer a disclosure notice and the Commissioner's SOP.
223. Additionally, if it is considered that an extension of the timeframe is needed:
- approval will first be obtained from a senior Inland Revenue officer; and

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<sup>77</sup> This three-month timeframe will exclude any statutory holidays. If the last day of the three-month timeframe falls on a weekend, Inland Revenue must issue the disclosure notice and SOP by the next working day.

- the taxpayer will be advised of the estimated date for issue of the Commissioner’s disclosure notice and SOP, and, where the estimated date cannot be met, Inland Revenue will use its best endeavours to keep the taxpayer informed of the progress made in the completion of the Commissioner’s SOP.

## Statement of position (SOP)



224. This section about the statement of position (SOP) phase discusses:

- issuing and receiving SOPs;
- contents of a SOP;
- deficiencies in the contents of a taxpayer’s SOP;
- including additional information.

### Issuing and receiving SOPs

225. Where the Commissioner has initiated the dispute by issuing a notice of proposed adjustment (NOPA), the Commissioner’s SOP will accompany the disclosure notice. If the Commissioner wishes to continue with the disputes process, then the taxpayer must issue their SOP within the two-month response period.

226. If the taxpayer initiated the dispute by issuing a NOPA, then the taxpayer needs to issue a SOP to the Commissioner if they wish to continue the dispute. The taxpayer’s SOP needs to be issued within the response period (that is, within two months commencing on the date the Commissioner issues the disclosure notice to them). If

the Commissioner wishes to continue the dispute process, then the Commissioner's SOP must be issued to the taxpayer within the same two-month response period.

227. The Commissioner cannot consider a document the taxpayer purports to issue as a SOP before the Commissioner has issued the disclosure notice, because the document would have been issued before the response period. If this occurs, the taxpayer needs to submit a SOP after the disclosure notice is issued.<sup>78</sup>
228. Similarly, if the Commissioner is required to issue a SOP in response to the taxpayer's SOP, then the Commissioner must meet this same two-month response period. Failure to do so will result in the Commissioner being deemed to have accepted the taxpayer's position as put forward in the taxpayer's SOP.
229. A taxpayer can apply to the High Court for more time to reply to a Commissioner's SOP. To be successful, a taxpayer must apply within their response period and show that they had not previously discussed the disputed issue with the Commissioner and, thus, it is unreasonable to reply to the Commissioner's SOP within the legislative response period.<sup>79</sup>
230. The Commissioner will make a reasonable effort to contact the taxpayer or their tax agent two weeks before the response period expires to determine whether the taxpayer will issue a SOP in response to the disclosure notice. Such contact can be made by telephone, electronically (by email or webmail through MyIR) or in writing.
231. Where a taxpayer's SOP is issued outside the applicable response period, the taxpayer can apply for consideration of exceptional circumstances or that they had a demonstrable intention to continue the dispute (for further discussion, see [308] under the heading "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period". The responsible officer must notify the taxpayer of the decision to accept the application in writing within one month after Inland Revenue has received the taxpayer's application. Where the application is rejected, the responsible officer must notify the taxpayer by issuing a refusal notice within one month of the taxpayer issuing the application. A refusal notice is a disputable decision.<sup>80</sup>
232. When the dispute may become subject to the statutory time bar, the parties can agree to a time bar waiver if both parties have issued their SOPs and there is insufficient time

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<sup>78</sup> Section 89M(5) of the TAA.

<sup>79</sup> Section 89M(11) of the TAA.

<sup>80</sup> Section 89K(6) of the TAA.

to complete the adjudication process. Time bars are further discussed at [282] under the heading “Statutory time bar and exceptions to the time bar”.

233. If the parties cannot agree to a time bar waiver, the Commissioner may complete the disputes process by issuing assessments to the taxpayer using the discretion in s 113.<sup>81</sup> This is further discussed at [232] under the heading “Commissioner’s ability to amend an assessment without completing the disputes process”.
234. The Commissioner can complete the disputes process in this circumstance only if they have considered the taxpayer’s SOP. Whether the Commissioner has adequately considered a taxpayer’s SOP depends on what is a reasonable length of time and level of analysis for that SOP given the circumstances of the case (for example, the length of the SOP and the complexity of the legal issues). If the statutory time bar is imminent, then the responsible Inland Revenue officer will give an appropriate level of urgency to considering the taxpayer’s SOP.
235. On receipt by the Commissioner, the taxpayer’s SOP will be referred to the responsible officer who will then ascertain and record:
- the date on which the SOP was issued;
  - whether the SOP was issued within the relevant response period; and
  - the SOP’s salient features, including any deficiencies in its content when compared with the statutorily required content in s 89M(6).
236. Where practicable, the Commissioner will acknowledge receipt of the taxpayer’s SOP within 10 working days after it is received. The responsible officer will also advise the taxpayer or their agent of any deficiencies in the SOP’s content as soon as they become aware of the deficiency. The taxpayer will be further advised that those deficiencies must be rectified before the response period expires and whether the Commissioner intends to provide any additional information to the taxpayer.

## Contents of a SOP

237. A SOP must:
- be issued in the prescribed form ([Statement of position \(IR 773\)](#)); and
  - include sufficient detail to fairly advise the recipient of the facts, evidence, issues, and propositions of law on which the party issuing the SOP wishes to rely.<sup>82</sup>

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<sup>81</sup> Section 89N(2) of the TAA.

<sup>82</sup> Section 89M(4) and (6) of the TAA.

238. As stated at [114], if either party wishes to propose another adjustment or the Commissioner wishes to propose a fresh or increased liability after a NOPA has been issued, this can be done only by including the proposed adjustment in a further NOPA; it cannot be done simply by including it in a subsequent disputes document.

### **Issues and propositions of law exclusion rule**

239. The issues and propositions of law exclusion rule generally confine both the taxpayer and the Commissioner to argue in any subsequent challenge proceedings only those issues and propositions of laws that were disclosed in their respective SOPs.<sup>83</sup>
240. The only exception to this rule is where a court order is obtained to the effect that either the applicant could not, with due diligence at the time the SOP was delivered, have discerned those propositions of law or issues, or the hearing authority considers that the raising of those propositions of law or issues is necessary to avoid manifest injustice to either party.<sup>84</sup>
241. A mistaken description of facts, evidence, issues or propositions of law and submissions made in a SOP can later be amended, if the parties agree to include additional information in the SOPs.<sup>85</sup>

### **Minimum content requirements**

242. The minimum content requirement for a SOP is an outline of the relevant facts, evidence, issues and propositions of law. An outline that consists of a frank and complete discussion of the issues, law, arguments and evidence supporting the argument is implicit in the spirit and intent of the disputes process. In very complex cases, a full explanation of the relevant evidence and summary of less relevant evidence will be accepted.
243. The disputes process does not require that relevant documents are discovered or full briefs of evidence or an exhaustive list of documents exchanged; rather, providing an outline of relevant evidence in the SOP will ensure both parties appreciate the availability of evidence in respect of the factual issues in dispute. The Commissioner will include an outline of any available expert evidence on which they intend to rely in the SOP.

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<sup>83</sup> Section 138G(1) of the TAA.

<sup>84</sup> Section 138G(2) of the TAA.

<sup>85</sup> Section 89M(13) of the TAA.

244. Only documentary evidence needs to be listed in the SOP, not potential witnesses.<sup>86</sup> Identities of witnesses will continue to be protected without undermining the effect of the issues and propositions of law exclusion rule.
245. If a Commissioner's SOP discusses shortfall penalties, it must also discuss any other appropriate penalties of lesser percentages and any shortfall penalty reductions (for example, voluntary disclosure or previous behaviour reductions) as alternative arguments. This ensures appropriate penalties are assessed in all cases. The Commissioner cannot propose shortfall penalties at the SOP phase that have not previously been proposed in the Commissioner's NOPA.
246. Submissions made in the NOPA can be concisely stated but must provide sufficient detail to inform the other party of the disputed issues. However, at the SOP phase, full complete and detailed submissions should be made. This recognises that the issues are unresolved at this phase and are likely to proceed to the Tax Counsel Office for adjudication and, potentially, to a court for resolution. This is especially so given the limitations imposed by the previously discussed issues and propositions of law exclusion rule (at [239]).

### **Deficiencies in the contents of a taxpayer's SOP**

247. Where a taxpayer's SOP does not meet the statutory requirements, it is generally the practice of the Commissioner to accept the SOP so long as it includes a heading clearly identifying the document as a SOP and provides sufficient detail to fairly inform the Commissioner of the issues and propositions of law that are being relied on, so the objective of the legislation is achieved.
248. If the Commissioner receives a SOP that does not use the prescribed form or is otherwise deficient, it the Commissioner's practice is to advise the taxpayer of these deficiencies and ask them to resubmit the SOP.
249. The Commissioner does not have the power to determine the validity of a taxpayer's SOP. This can be determined only by the courts in challenge proceedings. Where the Commissioner believes a taxpayer's SOP is invalid, then, unless the taxpayer's SOP is incomprehensible or provides no argument to which the Commissioner can respond, the Commissioner will accept the SOP as validly constituted. The fact the Commissioner believes the SOP is deficient will form part of the Commissioner's SOP or additional response, as appropriate. (For further discussion see [308] under the

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<sup>86</sup> Section 89M(6B) of the TAA.

heading "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period.)"

## Including additional information

250. Within the period a taxpayer has to provide their SOP, the Commissioner can provide the taxpayer with further information.<sup>87</sup> This information needs to be provided in the same format as the Commissioner's SOP (as far as possible) and forms part of that SOP.<sup>88</sup>
251. If there is insufficient time to provide a SOP in response, the Commissioner can apply to the High Court for further time to reply to the taxpayer's SOP, but only where that application is made within the response period and the Commissioner considers it is unreasonable to reply within the response period because of the number, complexity or novelty of matters raised in the taxpayer's SOP. Such applications are expected to be rare.
252. In addition, both the taxpayer and the Commissioner can agree for the other party to include additional information in their SOP. This may be done at any time, including when the dispute has already progressed to the adjudication phase.<sup>89</sup>
253. Before agreeing to a taxpayer including additional information, the Commissioner will consider the taxpayer's prior conduct and whether they could have provided the information earlier through the application of due diligence.
254. The Commissioner will usually also consider the materiality and relevance of the additional information and its ability to help resolve the dispute and may decide to take it into account in coming to an assessment. In this circumstance, both parties will be expected to cooperate in resolving the relevance and accuracy of any such material.
255. If the Commissioner declines a taxpayer's request to include additional information in their SOP, the reasons must be documented with detailed reference to the taxpayer's conduct, level of cooperation before the request was made, and why the information was not provided earlier. The responsible officer will advise the taxpayer or their tax agent of the reasons their request was declined. A decision to decline under s 89M of the TAA is not a disputable decision.
256. The Commissioner's agreement to add further information to a taxpayer's SOP will always be made subject to the taxpayer agreeing that the Commissioner can include a

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<sup>87</sup> Section 89M(8) of the TAA.

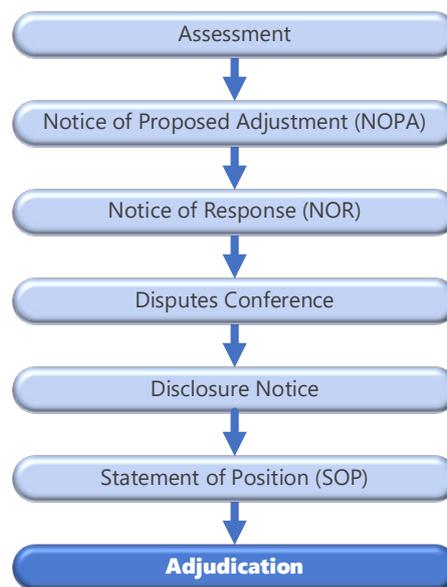
<sup>88</sup> Section 89M(8) and (9) of the TAA.

<sup>89</sup> Section 89M(13) and (14) of the TAA.

response to the additional information to the SOPs, if required, within an agreed timeframe.

257. Any additional information that the parties agree can be provided by the other party is deemed to form part of the providing party's SOP.<sup>90</sup> Because this additional information forms part of the provider's SOP, the **issues and propositions of law exclusion rule** at [239] applies to it.

## Adjudication



258. This section about the adjudication phase discusses:

- the role of the adjudicator;
- what happens before the dispute is sent for adjudication;
- the adjudication decision.

### Role of the adjudicator

259. The adjudication phase is the final phase of the disputes process and involves an independent review of the dispute by an adjudicator from Inland Revenue's Tax Counsel Office (TCO).

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<sup>90</sup> Section 89M(14) of the TAA.

260. The adjudicator's role is to review those disputes that remain unresolved after the conference phase. The adjudicator's mandate is to:
- act in an impartial and independent manner;
  - take a fresh look at the application of law to the facts of a dispute; and
  - provide a comprehensive and technically accurate decision.
261. Generally, the adjudicator will make such a decision within 10 weeks after the case is referred to the TCO. The length of time taken to complete the adjudication depends on the number of disputes before the TCO at any one time, any allocation delays, and the technical, legal and factual complexity of those disputes.
262. Judicial comments have been made indicating that, as a matter of law, it is not strictly necessary for Inland Revenue officers to send all disputes to the TCO for review and Inland Revenue officers are not necessarily bound by the TCO's decisions.<sup>91</sup>
263. Notwithstanding these judicial comments, it is the Commissioner's policy and practice to follow the decision of the TCO adjudicator, even where that decision finds against the Commissioner. Further, if the parties have not agreed on all the issues at the end of the conference, disclosure and statement of position (SOP) phases or have not agreed to truncate the disputes process, it is the Commissioner's policy and practice that all disputes will be sent to the TCO for review. This is so irrespective of the complexity or type of issues or amount of tax involved.
264. The only times disputes would not be sent to the TCO are when:
- the Commissioner has considered the taxpayer's SOP and referred the dispute to the TCO for its preliminary consideration and the TCO has determined it has insufficient time to reach a decision in respect of the dispute before a statutory time bar prevents the Commissioner from subsequently increasing the assessment (for further discussion see [282] under the heading "Statutory time bar and exceptions to the time bar");
  - any of the legislative exceptions specified in s 89N(1)(c) applies (for further discussion see [323] under the heading "Commissioner's ability to amend an assessment without completing the disputes process"); or
  - the High Court has made an order that the disputes process can be truncated pursuant to an application made by the Commissioner.<sup>92</sup>

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<sup>91</sup> See for instance, *CIR v Zentrum Holdings Ltd, Ch'elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,618 and *ANZ National Bank Ltd v CIR (No 2)* (2006) 22 NZTC 19,835.

<sup>92</sup> Section 89N(3) of the TAA.

265. Any decision not to send the dispute to the TCO must be made by a senior Inland Revenue officer. In those rare instances where the dispute does not progress to the TCO for adjudication, the responsible Inland Revenue officer will adequately consider the facts and legal arguments in the taxpayer's SOP before deciding whether to amend the assessment.
266. Whether the Commissioner has adequately considered a SOP will depend on what constitutes a reasonable length of time and level of analysis for that SOP given the circumstances of the case (for example, the length of the SOP and complexity of the legal issues).
267. Where the TCO has insufficient time before the statutory time bar arises or the further time allowed to fully consider a matter submitted to it expires, the matter will be returned to the responsible officer to decide whether to issue an assessment or amended an assessment or to accept the taxpayer's position. Section 89N of the TAA allows the Commissioner to amend an assessment at any time after the Commissioner has considered the taxpayer's SOP in relation to the particular period.
268. If the dispute is to be referred to the TCO, the Commissioner should not issue an assessment, amended assessment or challenge notice before the adjudication process is completed unless a time bar is imminent.

### **What happens before the dispute is sent for adjudication**

269. Before the dispute is referred to the TCO, the responsible officer prepares a cover sheet that records the documents that must be sent to the TCO. These documents will include (as appropriate) copies of all notices of proposed adjustment (NOPAs), notices of response (NORs), notices rejecting the NOR, conference notes (and any recordings of discussions held during the conference), both parties' SOPs, as well as any other relevant additional information and evidence (including expert opinions), and a schedule of all evidence held.
270. The responsible Inland Revenue officer will issue a letter together with a copy of the cover sheet to the taxpayer before sending the submissions, notes and evidence to the TCO. The cover sheet and letter are usually completed within one month after the date that the Commissioner's reply to the taxpayer's SOP is issued or the response period for the taxpayer's SOP expires (whichever is the later).
271. The purpose of this letter is to seek the taxpayer's agreement on the material to be sent to the TCO adjudicator; that is, agreement on what documentary evidence has been disclosed at the SOP phase. This letter will allow no more than 10 working days for a response from the taxpayer.

272. Once the taxpayer has agreed (or the taxpayer has failed to respond within the timeframe) the material is sent to the TCO. The TCO may then contact the parties if further information is required.
273. Where the dispute has covered several issues, the cover sheet will outline any issues the parties are agreed on as well as the issues still in dispute. The adjudicator will consider only the disputed issues and not those issues that have been agreed on.
274. Although an adjudicator is not strictly limited to considering the issues and propositions of law set out in the parties' SOPs, it would be inappropriate to direct an assessment on grounds other than those set out in the SOPs.
275. Generally, the adjudicator will consider only the material the parties have submitted. They do not usually seek out or consider further information unless they consider it relevant. When additional information is supplied, the adjudicator may consider it despite the parties not agreeing that the provider of that information could include it in their SOP.

## Adjudication decision

276. Once a conclusion is reached, the TCO will advise the taxpayer and responsible Inland Revenue officer of the decision. The responsible officer will implement the TCO's recommendations, including issuing any notices of assessments to the taxpayer where this is required. The final adjudication report is admissible in a court as evidence in support of the act of assessment.
277. If the TCO decides against the Commissioner:
- the Commissioner cannot challenge that decision;
  - the dispute comes to end; and
  - the Commissioner issues any assessment to the taxpayer to reflect the decision.
278. If the TCO decides against the taxpayer, the taxpayer may file challenge proceedings in the Taxation Review Authority or High Court as long as they do so within the applicable two-month response period, and they meet any of the following conditions:
- The Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed, and the Commissioner rejected within the applicable response period and the Commissioner has later issued an amended assessment to the taxpayer.<sup>93</sup>

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<sup>93</sup> Section 138B(2) of the TAA.

- The Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed, and the Commissioner rejected within the applicable response period by a NOR; and the Commissioner then issued a challenge notice to the taxpayer.<sup>94</sup>
- The Commissioner or taxpayer has issued an assessment that is the subject of an adjustment notified to the Commissioner where the Commissioner has issued a challenge notice<sup>95</sup> and the adjustment:
  - relates to a matter for which the material facts and relevant law are identical to another assessment for the taxpayer (for another period) which is the subject of court proceedings; or
  - seeks to correct a tax position taken by the taxpayer (or an associated person) as a consequence or result of an incorrect tax position taken by another taxpayer, which is or was the subject of court proceedings.
- The Commissioner or taxpayer has issued a disputable decision (that is not an assessment) that was the subject of an adjustment that the taxpayer proposed, and the Commissioner rejected within the applicable response period.<sup>96</sup>

279. To challenge an assessment, a taxpayer must file proceedings with the Taxation Review Authority or High Court within the two-month response period that starts on the date that the Commissioner issues:

- an amended assessment;<sup>97</sup>
- a challenge notice,<sup>98</sup> or
- the written disputable decision rejecting the taxpayer's proposed adjustment if the challenge proceedings are filed.<sup>99</sup>

280. At the end of the court process, the responsible Inland Revenue officer will implement any decision made by the hearing authority including issuing a notice of assessment or amended assessment to the taxpayer, if applicable.

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<sup>94</sup> Section 138B(3) of the TAA. Applies only to taxpayers who issued a NOPA to the Commissioner after 29 August 2011.

<sup>95</sup> Section 138B(4) of the TAA.

<sup>96</sup> Section 138C of the TAA.

<sup>97</sup> Section 138B(2) of the TAA.

<sup>98</sup> Section 138B(3) or (4) of the TAA.

<sup>99</sup> Section 138C of the TAA.

## Other matters that may arise during a dispute

281. This section discusses a variety of matters that may arise during a dispute:

- statutory time bar and exceptions to the time bar (from [282]);
- time bar waivers (from [290]);
- exceptions under s 89N of the Tax Administration Act 1994 (TAA) (from [294]).
- disputable decisions (from [296])
- shortfall penalties (from [305])
- dispute documents (notices of proposed amendment (NOPAs), notices of response (NORs) or statements of position (SOPs)) a taxpayer has issued outside the applicable response period (from [308])
- the Commissioner's ability to amend an assessment without completing the disputes process (from [323])
- taxpayer requirements when wanting to opt out of the disputes process after the conference phase (from [326])
- progressing disputes through the disputes process where the dispute affects multiple taxpayers (from [338])
- circumstances under which the Commissioner may issue an assessment without first issuing a NOPA (from [349]).

## Statutory time bar and exceptions to the time bar

282. Sections 108 and 108A generally limit to four years the Commissioner's ability to issue an assessment that increases a taxpayer's tax liability following an investigation or in certain other circumstances.

283. In respect of a dispute, the assessment will be amended (if necessary) after the disputes process is completed. The Commissioner will endeavour to complete the disputes process within four years.

284. This four-year statutory time bar does not apply to the same extent to limit the Commissioner's ability to issue an assessment that decreases the amount of the initial

assessment and issue a refund of a taxpayer's overpaid tax<sup>100</sup> or when dealing with certain tax credits.<sup>101</sup>

285. When increasing a taxpayer's liability, the Commissioner is not subject to the statutory time bar,<sup>102</sup> if the Commissioner considers the taxpayer has:

- provided a fraudulent or wilfully misleading income tax return;
- omitted income for which an income tax return must be provided that is of a particular nature or source; or
- knowingly or fraudulently failed to make a full and true disclosure of the material facts necessary to determine their GST payable.

286. When considering whether these exceptions apply, the Commissioner disregards omissions of relatively small amounts of income.<sup>103</sup>

287. The time bar ensures finality in relation to assessments and is a key protection for most taxpayers. Therefore, any exclusions from the time bar's protection must occur only where an adequate basis exists in fact and law to support this action. The Commissioner must decide whether any of the above exceptions to the time bar apply before determining whether a NOPA can be issued.

288. Any opinion that the Commissioner forms about the application of the exceptions to the time bar must be honestly held and reasonably justifiable on the basis of the evidence available and the relevant law. The decision must be clearly documented and include reference to the grounds and reasoning on which it is based.

289. Any NOPA where the Commissioner is proposing an adjustment on the basis that the exception to the time bar in either s 108(2)(a)–(b) or s 108A(3) applies, will set out the reasons the Commissioner does not consider the time bar applies.

## Time bar waivers

290. If it is contemplated that the disputes process cannot be completed before the statutory time bar period for amending an assessment commences, the parties can agree in writing<sup>104</sup> to waive the time bar for an initial 12 months to enable the full

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<sup>100</sup> Subject to the limitation on refunding overpaid tax under s RM 2(1) of the Income Tax Act 2007 and s 45(1) of the Good and Services Tax Act 1985.

<sup>101</sup> Section LA 6 of the Income Tax Act 2007.

<sup>102</sup> Sections 108(2) and 108A(3) of the TAA.

<sup>103</sup> *Babington v CIR* [1957] NZLR 861.

<sup>104</sup> Section 108B(1)(a) of the TAA.

disputes process to be applied. A statutory time bar waiver must be agreed in writing on the prescribed form ([Notice of Waiver of Time Bar \(IR 775\)](#)) and delivered to the Commissioner before the relevant four-year period expires.

291. The taxpayer can then agree to waive the time bar for a further six months after the end of that 12-month period. This notice must be given, in writing, to the Commissioner within the initial 12-month period.
292. The statutory time bar waiver applies only to those issues the parties have identified and understood before the initial statutory time bar occurring. Issues not identified at that time remain subject to the original statutory time bar unless any of the statutory exclusions from the time bar apply to them. (The exclusions are discussed from [\[284\]](#).)
293. If a NOPA has been issued and the disputes process cannot be completed before the statutory time bar period expires, the Commissioner can apply to the High Court for more time to complete the process.<sup>105</sup>

## Exceptions under s 89N of the TAA

294. As stated at [\[158\]](#), when a NOPA has been issued, the Commissioner follows the disputes process unless an exception under s 89N applies. The application of s 89N is discussed at [\[323\]](#) under the heading “Commissioner’s ability to amend an assessment without completing the disputes process”.
295. The Commissioner must obtain and document administrative approval for any departure from the full disputes process.

## Disputable decisions

296. As discussed at [\[67\]](#), a taxpayer can issue a NOPA in respect of a “disputable decision” that is not an assessment.
297. The term “disputable decision” is widely defined and includes not only an assessment but also a decision of the Commissioner under a tax law.<sup>106</sup> For the purposes of the definition of disputable decision, the word “decision” is also defined to include “... the making, giving, or exercising of a discretion, judgment, direction, opinion, approval, consent, or determination by the Commissioner”.<sup>107</sup>

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<sup>105</sup> Section 89N(3) of the TAA.

<sup>106</sup> Section 3(1) of the TAA.

<sup>107</sup> Section 3(1) of the TAA.

298. As can be seen from these definitions, disputable decisions generally refer to those tax laws that confer a discretion or power on the Commissioner. However, even where the tax law does not confer such a discretion or power, the decision may still be a disputable one where the Commissioner's decision is one that will affect a taxpayer's rights and obligations under those tax laws.
299. This same definition then excludes some types of decisions the Commissioner makes. Excluded are decisions:
- to decline to issue a binding ruling under the binding rulings regime;<sup>108</sup>
  - that cannot be the subject of an objection under Part 8;
  - that cannot be challenged under Part 8A;
  - to issue a Commissioner's NOPA, a disclosure notice or a Commissioner's SOP, or a challenge notice;
  - to issue or decline to issue a Commissioner's COVID-19 response variation;<sup>109</sup>
  - to grant or not grant a loan under the small business cashflow scheme;<sup>110</sup> and
  - to make or decline to make a grant under the COVID-19 resurgence support payments scheme or another COVID-19 support payment scheme.<sup>111</sup>
300. For example, if the Commissioner decides not to exercise the discretion under s 113 to amend a taxpayer's income tax assessment, then because a decision is made under Part 8A, they fall within the exclusion to the definition of disputable decision and the taxpayer cannot challenge them.<sup>112</sup>
301. Although a taxpayer cannot dispute these decisions specifically, if the Commissioner subsequently issues an assessment that includes these decisions, a taxpayer can challenge the correctness of the assessment in the usual way.<sup>113</sup> Additionally, any decision the Commissioner makes that is not a disputable decision is amenable to judicial review.
302. Similarly, a decision the Commissioner makes to increase an assessment is not of itself, and in the absence of an assessment, a disputable decision. Any challenge to the

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<sup>108</sup> Part 5A of the TAA.

<sup>109</sup> Section 6I of the TAA.

<sup>110</sup> Section 7AA of the TAA.

<sup>111</sup> Section 7AAB of the TAA.

<sup>112</sup> Section 138E(1)(e)(iv) of the TAA.

<sup>113</sup> *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

correctness of the decision must also be brought in the context of a challenge to the assessment itself.<sup>114</sup>

303. As stated at [299], the definition of disputable decision excludes a decision to issue a Commissioner's NOPA, a disclosure notice or a Commissioner's SOP, or a challenge notice. However, a taxpayer may challenge the Commissioner's refusal to accept a late NOPA, NOR or SOP in the Taxation Review Authority.<sup>115</sup> In this circumstance, the Commissioner's refusal notice is treated as a notice of disputable decision and subject to direct challenge to the Taxation Review Authority, without the taxpayer needing to start an additional dispute with a NOPA.
304. The following examples illustrate what is and is not a disputable decision:
- A taxpayer who is a natural person can dispute the Commissioner's decision made under s YD 1 of the Income Tax Act 2007 that the taxpayer is a New Zealand resident for taxation purposes.
  - The Commissioner can determine whether and to what extent a payment is subject to PAYE (under s RD 3(5) of the Income Tax Act 2007). Taxpayers are expressly excluded from challenging this determination under part 8A of the TAA, so it is excluded from the definition of disputable decision.
  - Where the Commissioner implements a disputable decision and makes an assessment, an employer or employee can dispute that assessment of tax deductions on the basis that the s RD 3(5) determination on which it is founded is wrong in fact or law.

## Shortfall penalties

305. Shortfall penalties are treated separately to the underlying adjustments on which they have been imposed. The Commissioner must explain and support their imposition in the same manner as the underlying tax shortfall, and they must be assessed in the same way as the underlying tax.<sup>116</sup> Even though assessments of shortfall penalties relate to the underlying tax, they are not subject to the time bars. (Time bars are discussed from [282].)
306. Where sufficient evidence exists to suggest that shortfall penalties should be imposed, it is the Commissioner's practice to propose the shortfall penalties in the same NOPA

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<sup>114</sup> *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

<sup>115</sup> Section 89K(6) of the TAA.

<sup>116</sup> Section 94A(2) of the TAA.

as the substantive issues. However, this practice can be dispensed with if any of the following exceptions apply:

- The evidence supporting the imposition of shortfall penalties does not become available until after the Commissioner has issued the NOPA on the substantive issues. In such circumstances, a separate NOPA may be issued in respect of the shortfall penalties later.
- Before entering the disputes process, a taxpayer has accepted the proposed adjustment in relation to the substantive issues, but not accepted the imposition of the shortfall penalties. In this circumstance, the Commissioner may still issue a NOPA to the taxpayer for the proposed penalties.
- The taxpayer makes a voluntary disclosure of the substantive issues to the Commissioner and the only disputed issue relates to the imposition of the shortfall penalties.
- If prosecution action against the taxpayer is being considered and shortfall penalties also apply, then, in most instances<sup>117</sup> the Commissioner must complete the prosecution action before the shortfall penalties can be imposed.<sup>118</sup>

307. The Commissioner cannot propose shortfall penalties at the SOP phase if they were not first proposed in a Commissioner's NOPA.

### **Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period**

308. The Commissioner's view is that where a response has a due date in the disputes process, then the recipient must receive the response by that due date.<sup>119</sup>

309. The Commissioner cannot accept a dispute document that a taxpayer issues outside the applicable response period, unless that lateness has arisen:

- because of an exceptional circumstance; or
- the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.

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<sup>117</sup> Unless the shortfall penalties are imposed under s 141ED (penalty for unpaid amounts of employer's withholding payments).

<sup>118</sup> Section 149(5) of the TAA.

<sup>119</sup> Sections 14, 14C, 14F and 14G of the TAA.

## Exceptional circumstances

310. Although s 89K defines exceptional circumstances very narrowly, case law provides some guidance about when the courts would hold that an exceptional circumstance arises.<sup>120</sup> For instance:

- a taxpayer's misunderstanding or erroneous calculation of the applicable response period will usually not be regarded as an event or circumstance beyond the taxpayer's control, so is **not an exceptional circumstance**.
- an agent's failure to advise their client they have received a notice of assessment or other relevant documents that has caused the taxpayer to respond outside the applicable response period will **not generally be considered an exceptional circumstance**.
- if the taxpayer has relied on misleading information the Commissioner has given them that causes the taxpayer to respond outside the applicable response period, **an exceptional circumstance can arise**.

311. Further examples of situations considered exceptional circumstances beyond a taxpayer's control are in [Tax Information Bulletin](#) Vol 8, No 3 (August 1996).<sup>121</sup>

312. An exceptional circumstance may also arise where the lateness was minimal or results from one or more statutory holidays falling in the response period. Generally, the Commissioner will accept that a dispute document received within two days of the end of the response period as being received in time where the lateness is minimal.

For example:

The response period ends on a Saturday and the taxpayer provides an NOR on the following Tuesday. In this circumstance, the Commissioner would treat the response period as ending on the Monday<sup>122</sup> and then accept that the lateness of the NOPA (one day) was minimal. If the response period ended on Friday and the taxpayer provided the NOR on the following Monday, the Commissioner would also accept that the lateness is minimal.

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<sup>120</sup> See, for instance, *Treasury Technology Holdings Ltd v CIR* (1998) 18 NZTC 13,752, *Milburn NZ Ltd v CIR* (1998) 18 NZTC 14,005, *Fuji Xerox NZ Ltd v CIR* (2001) NZTC 17,470 (CA), *Hollis v CIR* (2005) 22 NZTC 19,570 and *Balich v CIR* (2007) 23 NZTC 21,230.

<sup>121</sup> The item in the online *Tax Information Bulletin* has no title but is about the new disputes resolution process that came into effect in October 1996.

<sup>122</sup> On the basis of s 35(6) of the Interpretation Act 1999.

313. This general acceptance of two days should not be viewed as an extension of the response period in all circumstances. Besides the degree of lateness, the Commissioner, when exercising this discretion, will objectively consider the:
- real event, circumstance or reason why the taxpayer did not issue the NOPA within the applicable response period; and
  - taxpayer's compliance history in relation to the tax types under consideration (for example, the taxpayer may have a history of paying tax late or filing late tax returns or dispute documents).

For example:

A taxpayer issues a NOPA to the Commissioner two days after the applicable response period has expired. The taxpayer does not provide a legitimate reason for the lateness. The taxpayer also has a history of filing late NOPAs within the minimal allowable lateness period (that is, up to two days outside the applicable response period) and has been previously advised on the calculation of the response period. Although the degree of lateness was minimal each time, the Commissioner would not accept the taxpayer's NOPA in this circumstance.

314. The Commissioner will consider a taxpayer's written request for the Commissioner to consider whether exceptional circumstances exist after receiving their request. The Commissioner's rejection of the taxpayer's application is further discussed at [\[320\]](#) under the heading "Disputant may challenge Commissioner's refusal to accept a late disputes document".

### **Demonstrable intention**

315. The Commissioner can also treat a late NOPA, NOR or SOP, as being received within the response period where the Commissioner considers that the taxpayer had a demonstrable intention to enter or continue the disputes process at the time the taxpayer failed to act within the applicable response period.<sup>123</sup>
316. In considering whether a dispute should be allowed to continue, the courts have held that a factor to be consider was that the taxpayer had:

...consistently asserted that they were entitled to the [tax outcome they were seeking]. This was in marked distinction to a person who, never having contemplated seeking a benefit

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<sup>123</sup> Section 89K of the TAA.

under the taxing legislation, endeavours to take advantage of a matter when they become aware of a decision affecting another taxpayer.<sup>124</sup>

317. The Commissioner, when considering whether a taxpayer has shown a demonstrable intention to enter or continue with the disputes process, will consider whether the taxpayer has:
- responded to Inland Revenue correspondence and consistently asserted their contrary position regarding the substantive issues.
  - complied with other parts of the dispute's process (for example, if the late document in question is the taxpayer's SOP or whether they filed a timely NOR).
  - corresponded with other relevant parties regarding the dispute such as the Ombudsman or Inland Revenue's Complaints Management Service.
318. An application will not be accepted if the degree of lateness is unjustified in the circumstances, or it is considered to be designed to defeat the application of the time period or frustrate the disputes process. An example might be when a taxpayer contacts the Commissioner close to a deadline to confirm they intend to dispute, but then does nothing further for some considerable time, effectively rendering the statutory timeframe meaningless.
319. In a dispute if the taxpayer or their agent has not filed a SOP because they have miscalculated the response period (and the degree of lateness does not amount to exceptional circumstances). In this circumstance it could be said that the taxpayer, having participated in the earlier stages of the disputes process (including complying with timeframes), had a genuine intention to continue with the dispute.

### **Disputant may challenge Commissioner's refusal to accept a late disputes document**

320. The Commissioner can accept a disputant's late NOPA, NOR or SOP by providing written advice to this effect to the taxpayer. Where the Commissioner does not accept that documents were received in time, the Commissioner must notify the taxpayer within one month from when the late document was issued to the Commissioner, of the Commissioner's decision. This is known as a **refusal notice**. The taxpayer may challenge the Commissioner's refusal notice by filing proceedings directly with the Taxation Review Authority. Where the Commissioner omits to issue a refusal notice, the Commissioner is deemed to have rejected the taxpayer's application.<sup>125</sup>

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<sup>124</sup> *Gisborne Mills Ltd v CIR* (1989) 13 TRNZ 405.

<sup>125</sup> Section 89K(5) of the TAA.

321. Where the Commissioner or Taxation Review Authority determines that exceptional circumstances existed, the response period is deemed to commence on the day of the decision finding favour with the taxpayer's request for exceptional circumstances.

### **Exception to the response period for a Commissioner's NOR**

322. As previously stated, the Commissioner can apply to the High Court for an order that a NOR can be issued outside the two-month response period if an exceptional circumstance has occurred or has prevented the Commissioner from issuing a NOR to the taxpayer within the response period.<sup>126</sup> The Commissioner will endeavour to apply this requirement for exceptional circumstances consistently with the similar requirement relating to taxpayers in s 89K(1)(a) (see the discussion from [310]).

For example:

- a) A flood damaged an Inland Revenue office during the applicable response period for a taxpayer's NOPA. The taxpayer's NOPA was lost in the flood. The Inland Revenue officer could not obtain another copy of the NOPA within the applicable response period. The absence of information has prevented the Commissioner from forming a view on the subject matter in dispute. The Commissioner can apply for a High Court order for further time to issue an NOR.
- b) The Inland Revenue officer to whom a taxpayer's NOPA was assigned is absent on annual leave at the end of the response period. The Inland Revenue officer does not arrange for another officer to prepare and issue a NOR to the taxpayer within the response period. In this circumstance, the Commissioner does not consider that an exceptional circumstance prevented the Inland Revenue officer from rejecting the adjustment within the response period and the Commissioner will be deemed to have accepted the taxpayer's proposed adjustments.

### **Commissioner's ability to amend an assessment without completing the disputes process**

323. If the disputes process has started and a NOPA issued by the taxpayer or Commissioner and the parties cannot agree on the proposed adjustment, the Commissioner cannot amend an assessment without completing the disputes process, unless one of the statutory exceptions applies.<sup>127</sup> These exceptions are that:

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<sup>126</sup> Section 89L of the TAA.

<sup>127</sup> Contained in s 89N of the TAA.

- in the course of the dispute, the Commissioner considers the taxpayer has committed an offence under an Inland Revenue Act that has had the effect of delaying the completion of the disputes process;<sup>128</sup>
- a taxpayer involved in a dispute, or person associated with them, may take steps to shift, relocate or dispose of the taxpayer's assets to avoid or delay the collection of tax, making the issue of an assessment urgent;<sup>129</sup>
- the taxpayer involved in a dispute, or a person associated with them involved in another dispute involving similar issues has begun judicial review proceedings in relation to the dispute;<sup>130</sup>
- the taxpayer fails to comply with a statutory requirement for information relating to the dispute;<sup>131</sup>
- the parties agree (recording their agreement in a document) the dispute should be resolved by the court or the Taxation Review Authority without completing the disputes process;<sup>132</sup>
- the parties agree (recording their agreement in a document) to suspend the disputes process pending the outcome of a test case;<sup>133</sup>
- the Commissioner applies to the High Court for an order to allow more time to complete or dispense with the disputes process.<sup>134</sup>

324. The Commissioner's view is that the parties should endeavour to resolve the dispute as early as possible, and this should be a focus throughout the stages of the disputes process. If this is not possible and any of the above exceptions applies, the Commissioner can amend an assessment without completing the disputes process. Where this occurs, the disputes process will conclude, and the dispute will not go through the adjudication phase.

325. Where an assessment is amended in this circumstance, the taxpayer can challenge the Commissioner's assessment by filing proceedings in the Taxation Review Authority or High Court within the applicable response period; that is, within two months starting on the date the notice of assessment is issued.

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<sup>128</sup> Section 89N(1)(c)(i) of the TAA.

<sup>129</sup> Section 89N(1)(c)(ii) and (iii) of the TAA.

<sup>130</sup> Section 89N(1)(c)(iv) and (v) of the TAA.

<sup>131</sup> Section 89N(1)(c)(vi) of the TAA.

<sup>132</sup> Section 89N(1)(c)(viii) of the TAA.

<sup>133</sup> Section 89N(1)(c)(ix) of the TAA.

<sup>134</sup> Section 89N(3) of the TAA.

## Taxpayer requirements when wanting to opt out of the disputes process after the conference phase

326. The Commissioner and a taxpayer can enter into an agreement not to complete the disputes process, if they are satisfied that the dispute can be more efficiently resolved by a hearing authority. This is known as “opting out”.<sup>135</sup> The Commissioner will not agree to the taxpayer opting out unless there has been a conference meeting.
327. Where the taxpayer has participated meaningfully during the conference phase and signed a declaration that all material information has been provided, the Commissioner will agree to the taxpayer’s preference to opt out of the disputes process if the:
- total amount of tax in dispute is \$75,000 or less, except where the dispute is part of a wider dispute (discussed from [328]);
  - dispute turns on issues of fact (for example, facts that are to be determined by reference to expert opinions or valuations) only (discussed from [331]);
  - dispute concerns facts and issues that are waiting to be resolved by a court in another case (discussed from [333]); or
  - dispute concerns facts and issues similar to those considered by the Tax Counsel Office (TCO) if similar issues have been considered in a dispute in the past (discussed from [336]).

### \$75,000 or less threshold

328. The Commissioner will agree to a taxpayer opting out of the disputes process if the total amount of core tax in dispute is \$75,000 or less. The “\$75,000 or less” threshold does not apply if the dispute is part of a wider dispute that involves several taxpayers.<sup>136</sup>
329. The \$75,000 or less threshold excludes:
- shortfall penalties either proposed in the same NOPA or NOR as the core tax or proposed in a separate NOPA;
  - use-of-money interest that results from the position taken in the Commissioner’s NOPA or NOR; and
  - late payment penalties imposed on the taxpayer, if applicable.

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<sup>135</sup> Section 89N(1)(c)(viii) of the TAA.

<sup>136</sup> An example of this is a tax avoidance arrangement similar to the “Trinity forestry scheme” in *Accent Management Ltd v CIR* [2007] NZCA 230.

330. In some disputes, the Commissioner may propose adjustments in respect of more than one tax type or more than one return period or income year. The \$75,000 or less threshold applies to the total amount of tax in the **same** dispute. The threshold will consider:
- the proposed adjustments in the disputant's NOPA;
  - any variation of the amount of tax in dispute due to the Commissioner's partial acceptance of the taxpayer's NOPA; and
  - any variation of the net total amount of tax in dispute as agreed between the participants during the conference phase.

### **Dispute turns on issues of fact only**

331. The Commissioner will agree to a taxpayer's request to opt out if the dispute turns on issues of fact or evidence only. The "issues of fact" requirement may apply where the disputed facts are to be determined by reference to expert opinions or valuations.
332. Disputes on tax avoidance issues will not meet the issues of fact requirement. In these disputes, case law requires consideration of issues such as whether the arrangement has used a specific provision in a way that cannot have been within Parliament's contemplation when it enacted the provision. This will involve analysing mixed questions of law and fact.

### **Dispute concerns facts and issues that are waiting for court resolution of another case**

333. The opt out process is available if the facts and issues relating to the dispute are similar to those that are waiting to be resolved by a court.
334. A taxpayer may become aware of a current court case that concerns facts and issues they consider to be similar to their dispute. The Commissioner will consider this position when deciding whether to accept the taxpayer's request. In considering the request, while Inland Revenue will advise the taxpayer of its views as to the similarity of the cases, it will not comment on the merit of the current court case or the plaintiff's tax affairs due to the secrecy provisions in s 18 of the TAA.
335. In some cases, a taxpayer may not be aware at the time of issuing the NOPA or during the conference phase of the existence of similar cases that are subject to court proceedings. The taxpayer may still request to opt out of the disputes process without this previous knowledge.

### **Dispute concerns facts and issues similar to those the TCO considered in a separate dispute**

336. The opt out process is available if the facts and issues relating to the dispute are similar to those already considered by the TCO. A taxpayer may request to opt out of the disputes process because a previous adjudication decision was in favour of the Commissioner, and they consider it unlikely the Commissioner's view will change. In considering the taxpayer's request, Inland Revenue will advise the taxpayer of its views as to any similarity but will must bear in mind the confidentiality provisions of the TAA.<sup>137</sup>
337. In some cases, a taxpayer may not be aware of similar disputes the TCO has considered when the taxpayer issues the NOPA or participates at a conference meeting (perhaps because of a Technical Decision Summary<sup>138</sup> published by the TCO). Inland Revenue officers may be aware of such other similar disputes, and may choose to advise the taxpayer that, should the taxpayer ask to opt out, Inland Revenue would be likely to agree. However, Inland Revenue must bear in mind the confidentiality provisions of the TAA when considering the extent of any information that can be shared with the taxpayer.

### **Progressing disputes through the disputes process where the dispute affects multiple taxpayers**

338. Sometimes it is necessary for Inland Revenue to deal with many taxpayers who are all affected by the same disputed matter. Given Inland Revenue's limited resources and bearing in mind taxpayer compliance costs it may not be appropriate for all the cases to proceed through the full dispute process.
339. This can arise, for instance, where:
- the taxpayers are all investors in a particular scheme;
  - the taxpayers have entered into similar arrangements, and they have the same promoter;
  - the taxpayers have entered into similar arrangements, and they have the same tax agent;

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<sup>137</sup> Section 18 of the TAA.

<sup>138</sup> Technical Decision Summaries provide an anonymised summary of a decided adjudication.

- there exists a widespread but well-defined common problem involving many unrelated taxpayers (for example, several taxpayers claiming non-deductible expenses such as fines for overloading).

340. The Commissioner's approach, to dealing with the different situations which arise where a large number of taxpayers are all affected by the same disputed matter, is outlined in the following paragraphs:

**Where several cases on the same issue are under dispute and at least one has been referred to the TCO, which has still to reach a conclusion on the matter**

341. Where several cases on the same issue are under dispute and at least one has been referred to the TCO, which has still to reach a conclusion on the matter, it may be possible for other affected taxpayers and the Commissioner to merely agree, subject to statutory time bar issues, to place their case "on hold" while the TCO undertakes its analysis on the case(s) already referred to it.
342. However, care will need to be taken to ensure that the time bar will not be breached, and consideration will be given to obtaining a time bar waiver. As the taxpayer needs to agree to providing a time bar waiver, they still have the choice to progress the dispute through the full disputes process.
343. Taxpayers who agree to place their case "on hold" while the TCO considers the issues in question in relation to another taxpayer will not be bound by any decision reached by the TCO and will be free to continue with their dispute should they wish to do so.

**Where the TCO has looked at an issue before and taken a view supporting the taxpayer**

344. It is the Commissioner's policy that a finding for the taxpayer in a previous dispute will generally lead to the other disputes being withdrawn, particularly if the disputes are in respect of the same transaction.
345. However, in some situations further consideration of the issue is required at a national level before the Commissioner will apply the conclusions reached in a particular adjudication report more broadly to other taxpayers. In those cases, Inland Revenue officers may be advised that a specified or contrary approach (to that adopted by the TCO) is to be followed pending further consideration of the issue.

### **Where the TCO has looked at an issue several times and consistently taken a view supporting the Commissioner**

346. Where the TCO has looked at an issue several times and consistently taken a view supporting the Commissioner, agreement between the parties to opt out is an available option.
347. In these circumstances, the Commissioner will indicate to individual taxpayers that the dispute could be suitable for the taxpayer to opt out of the process. However, taxpayers still have the choice to progress through the full disputes process.
348. Before the Commissioner will agree to the taxpayer opting out, the Commissioner will consider whether the taxpayer participated meaningfully during the conference phase. In addition, the taxpayer must sign a declaration that all material information has been provided to the Commissioner.

### **Circumstances under which the Commissioner may issue an assessment without first issuing a NOPA**

349. The general rule is that the Commissioner must issue a NOPA before making an assessment unless one of 19 statutory exceptions to this rule applies. These exceptions can apply independently or together, depending on the circumstances.
350. When using any of these exceptions to make an assessment that has the effect of increasing a taxpayer's liability, the Commissioner will consider whether shortfall penalties will apply. Where the Commissioner intends to apply a shortfall penalty, the Commissioner must issue a NOPA in respect of that penalty.
351. The 19 exceptions are as follows.

#### **Exception 1: Assessment corresponds with a tax return provided by a taxpayer<sup>139</sup>**

352. Generally, a taxpayer makes and files a tax return that includes an assessment. If the taxpayer's assessment is supported by the information in the tax return and the Commissioner agrees with the taxpayer's return and assessment, then the Commissioner does not need to invoke the disputes process.

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<sup>139</sup> Section 89C(a) of the TAA.

**Exception 2: A simple or obvious mistake or oversight in a taxpayer's return<sup>140</sup>**

353. Some examples of a simple mistake or oversight are:<sup>141</sup>

- mathematical errors;
- transposition errors; for instance, an error in transposing numbers from one box to another in a tax return;
- double counting. For instance, inadvertently including in the taxpayer's income the same item twice; and
- not claiming a rebate to which the taxpayer is entitled or that has been calculated incorrectly.

354. Whether an error amounts to a simple or obvious mistake or oversight is determined on a case-by-case basis and has no dollar limit. The Commissioner may consider whether this exception applies irrespective of whether the taxpayer has requested that the Commissioner make the amendment under s 113.

**Exception 3: Agreement exists to amend a previous tax position taken by a taxpayer<sup>142</sup>**

355. At any time, the Commissioner or taxpayer may propose an adjustment with which the other party agrees. While the agreement between the parties can be oral, it is the Commissioner's preference that such agreement is recorded in writing.

356. However, if the parties agree on only one adjustment and dispute others in respect of the same assessment, the Commissioner cannot issue an assessment until the disputes process has been completed.

**Exception 4: Assessment reflects an agreement reached between the Commissioner and a taxpayer<sup>143</sup>**

357. The same procedures apply for both exceptions 3 and 4. However, with exception 4, the agreement that the parties reach does not have to relate to a tax position that the taxpayer has previously taken.

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<sup>140</sup> Section 89C(b) of the TAA.

<sup>141</sup> Case law exists on this exception: *Case V17* (2002) 20 NZTC 10,192, TRA No 002/01.

<sup>142</sup> Section 89C(c) of the TAA.

<sup>143</sup> Section 89C(d) of the TAA.

358. For example, if the taxpayer has disputed, but now agrees, that they are a “taxpayer” for the purpose of the definition in s YA 1 of the Income Tax Act 2007 and has not provided a tax return, the Commissioner may issue an assessment to the taxpayer that reflects this agreement.
359. Another example is where, under s 6A, the Commissioner settles a tax case or a dispute. In such cases, the Commissioner will usually enter an individual settlement deed with the taxpayer to confirm the settlement. The Commissioner will then give effect to that settlement deed by issuing an assessment to the taxpayer using this exception.

**Exception 5: Assessment is being made on material facts and relevant law that are identical to those for an assessment for the taxpayer for another period that is the subject of court proceedings<sup>144</sup>**

360. The Commissioner can issue an assessment to the taxpayer in relation to a period in circumstances where the facts and law being relied on are identical to those in another period that is already before the courts or the Taxation Review Authority. The Commissioner does not have to follow the disputes process for the same issue because the matter is already before the court to resolve; a dual process towards resolution does not need to be adopted.
361. However, a taxpayer who has been issued with an assessment in relation to another period under this exception can dispute that assessment by issuing a NOPA to the Commissioner within the applicable response period.

**Exception 6: Commissioner has reasonable grounds to believe a notice may cause the taxpayer (or an associated person) to leave New Zealand or take steps to move or hide the taxpayer’s assets, making it harder for the Commissioner to collect tax from the taxpayer<sup>145</sup>**

362. This exception is intended to protect the revenue. It does not require the taxpayer to have physical possession of the assets.
363. Use of this exception needs to be supported by evidence of the “reasonable grounds” relied on. For example, these reasonable grounds could be supported by the taxpayer’s correspondence with third parties, an application to emigrate overseas or transcripts of interviews with the taxpayer.

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<sup>144</sup> Section 89C(db) of the TAA.

<sup>145</sup> Section 89C(e) of the TAA.

**Exception 7: Commissioner has reasonable grounds to believe that the taxpayer has been involved in fraudulent activity<sup>146</sup>**

364. A taxpayer will have been involved in a fraudulent activity if they have engaged or participated in or related to any fraudulent activity that would have tax consequences for them. If the taxpayer has not been convicted of an offence relating to a fraudulent activity, this exception can still apply provided the Commissioner believes on reasonable grounds that the taxpayer has been involved in a fraudulent activity.
365. As with exception 6, if the Commissioner wishes to use this exception, it needs to be supported by sufficient evidence of the "reasonable grounds" relied on. These reasonable grounds do not have to be absolute proof of fraudulent activity but must be reasonable in the circumstances.

**Exception 8: The assessment corrects a tax position taken by a taxpayer that, in the Commissioner's opinion, is vexatious or frivolous<sup>147</sup>**

366. If the Commissioner wishes to apply this exception, it needs to be supported by evidence showing:
- the action or inaction giving rise to the tax positions previously taken; and
  - why that action is considered to be vexatious or frivolous and any shortfall penalties or prosecution consideration.
367. A tax position taken as result of a vexatious or frivolous act will generally be one that is:
- clearly lacking in substance, for example, where the taxpayer continues to take the same position that has previously been resolved in the Commissioner's favour; or
  - motivated by the sole purpose of delay.

**Exception 9: Assessment is being made because of a direction or determination of a court or the Taxation Review Authority<sup>148</sup>**

368. A direction or determination includes any court or Taxation Review Authority decision that affects the taxpayer in relation to a specific tax period. It also includes a court

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<sup>146</sup> Section 89C(eb) of the TAA.

<sup>147</sup> Section 89C(f) of the TAA.

<sup>148</sup> Section 89C(g) of the TAA.

decision on a “test case” that applies to the taxpayer irrespective of whether they were a party to the test case.

369. The Commissioner must retain a copy of the direction or determination to support the application of this exception. In these circumstances, the Commissioner will endeavour to make an assessment including imposing shortfall penalties, within two weeks after receiving the written direction or determination. However, if the direction or determination relates to a test case the Commissioner must issue an assessment within the periods specified under s 89O(5).

**Exception 10: Taxpayer has not provided a tax return and a “default assessment” is made<sup>149</sup>**

370. Where a taxpayer fails to provide a tax return the Commissioner can make an assessment or amended assessment under s 106(1). This is commonly known as a “default assessment”.
371. Where a taxpayer wishes to dispute a default assessment the taxpayer must, within the applicable response period:<sup>150</sup>
- provide a tax return for the period to which the default assessment relates (notwithstanding that the tax return will not include the taxpayer’s assessment); and
  - issue a NOPA to the Commissioner in respect of the default assessment.
372. The requirement to provide a tax return in respect of a default assessment before issuing a NOPA is an additional requirement of the disputes process. This ensures the taxpayer has provided the information required by the tax law (that is, the tax return) before they are entitled to dispute the assessment.
373. If the Commissioner agrees with the taxpayer’s NOPA and tax return, the Commissioner will generally amend the default assessment by exercising the discretion under s 113 (subject to the statutory time bar and other relevant limitations). However, if the Commissioner does not agree with the taxpayer’s tax return and NOPA, the Commissioner can decide to not amend the default assessment and issue a NOR instead.
374. If a taxpayer cannot provide a NOPA because they are outside the applicable response period to dispute a default assessment or do not want to enter into the disputes process, they must still provide a tax return. In this circumstance, although the

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<sup>149</sup> Section 89C(h) of the TAA.

<sup>150</sup> Four months from the date that the default assessment is issued.

Commissioner does not have to amend the initial assessment on receipt of the tax return from a defaulting taxpayer, the Commissioner can exercise the discretion to amend the default assessment using s 113 (subject to the time bar and other relevant limitations on the exercise of that discretion).

375. If the Commissioner decides not to exercise the discretion under s 113, a NOPA can be issued in respect of the default assessment where, for example, new information received from the taxpayer suggests that the default assessment is incorrect.
376. The Commissioner is not precluded from further investigating an amended assessment issued based on the taxpayer's tax return and, if necessary, issuing a NOPA to the taxpayer.

#### **Exception 11: Taxpayer has failed to make or account for tax deductions<sup>151</sup>**

377. This exception is intended to address a taxpayer's failure to withhold, deduct or account to the Commissioner for an amount of tax including PAYE, schedular payments to non-resident contractors and resident withholding tax).
378. The Commissioner may not apply this exception if a dispute involves statutory interpretation (for example, whether a particular item attracts liability for resident withholding tax meaning that the taxpayer was required to withhold or deduct resident withholding tax) and/or shortfall penalties are to be imposed.

#### **Exception 12: Taxpayer has already provided a NOPA<sup>152</sup>**

379. If a taxpayer proposes an adjustment in a NOPA<sup>153</sup> with which the Commissioner agrees, then an assessment can be issued.

#### **Exception 13: Assessment corrects a tax position taken by the taxpayer or an associated person as a consequence of an incorrect tax position taken by another taxpayer<sup>154</sup>**

380. If transactions affect multiple taxpayers, whether in the same way or in related but different ways, the Commissioner can reassess any consequentially affected taxpayers. This is notwithstanding that the consequentially affected taxpayers have not agreed to

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<sup>151</sup> Section 89C(i) of the TAA.

<sup>152</sup> Section 89C(j) of the TAA.

<sup>153</sup> There are limitations on a taxpayer's ability to issue a NOPA in this circumstance. See s 89DA(1) of the TAA.

<sup>154</sup> Section 89C(k) of the TAA.

the amended assessments. However, those taxpayers subject to the amended assessments may still issue a NOPA to dispute the consequential adjustment within the applicable response period.

381. Before using this exception, the Commissioner must be satisfied a direct consequential link exists between the affected taxpayers.

For example:

In the case of group loss offsets, if a loss company has claimed losses to which it is not entitled and the Commissioner has amended the loss company's loss assessment to disallow those losses, under s 89C(k), the Commissioner can also make a separate assessment for the profit company that had offset the loss company's losses against its profits.

**Exception 14: Assessment corrects a tax position taken by taxpayer in relation to a tax position taken by a look-through company, where the disputes process between that company and the Commissioner has been completed<sup>155</sup>**

382. If an assessment will correct a tax position taken by the taxpayer in relation to a disputed tax position taken by a look-through company and the Commissioner and the company have completed the disputes process, the assessment can be issued.

**Exception 15: Assessment is as a result of amending a qualifying individual account for incorrect or missing information<sup>156</sup>**

383. A NOPA is not required if the assessment results from the Commissioner making an amendment to correct the effect of using incorrect or missing information. This forms part of the assessment process further explained at [17] under the heading "Certain qualifying taxpayers".

**Exception 16: Commissioner is making an amendment before finalising the account of a qualifying individual<sup>157</sup>**

384. A NOPA is not required if the assessment results from the Commissioner making an amendment to correct before finalising the account of a qualifying individual. This

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<sup>155</sup> Section 89C(ka) of the TAA.

<sup>156</sup> Section 89C(l) of the TAA.

<sup>157</sup> Section 89C(lbaa) of the TAA.

forms part of the assessment process further explained at [17] under the heading “Certain qualifying taxpayers”.

**Exception 17: Assessment of certain penalties<sup>158</sup>**

385. A NOPA is not required where the Commissioner is imposing a penalty in relation to the failure:
- of financial institutions to meet their requirements under Part 11B and the Common Reporting Standard applied standard;<sup>159</sup> and
  - to meet requirements under Part 11B to provide information, including self-certifications (this part relates to foreign account information-sharing agreements).

**Exception 18: Assessment extinguishing all or part of a tax loss<sup>160</sup>**

386. If the Commissioner writes off outstanding tax for a taxpayer who has a tax loss, the Commissioner must extinguish all or part of the taxpayer’s tax loss. Where the taxpayer is not a company, the amount written off is divided by 0.33 and the tax loss is reduced by that amount. Where the taxpayer is a company, the divisor is 0.28.

**Exception 19: Assessment includes a calculation of Working for Families tax credits<sup>161</sup>**

387. Where the Commissioner is giving effect to a Working for Families tax credit (WfFTC) entitlement, the Commissioner is not required to issue a NOPA.

This Standard Practice Statement is signed on XX XXXX 20XX.

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<sup>158</sup> Section 89C(lba) of the TAA.

<sup>159</sup> See s 3(1) *CRS applied standard*.

<sup>160</sup> Section 89C(lb) of the TAA and s 177C(5) of the TAA.

<sup>161</sup> Section 89C(m) of the TAA.

## References

### Legislation cited

Contract and Commercial Law Act 2017, s 214

Goods and Services Tax Act 1985, s 45, s 92B

Income Tax Act 2007, s LA 6, s RD 3, s RM 2, s YA 1 and YD 1

Legislation Act 2019, s 55

New Zealand Bill of Rights Act 1990, s 25

Tax Administration Act 1994, s 3, s 6I, s 7AA, s 7AAB, s 14, s 14C, s 14F, s 14G, s 17B, s 18, s 22, s 22D, s 22G, s 22H, s 22I, s 89AB, s 89B, s 89C, s 89D, s 89DA, s 89H, s 89I, s 89J, s 89K, s 89L, s 89M, s 89N, s 89O, Part 5A, s 92, s 94A, s 106, s 113, s 114, Part 8, Part 8A, s 138B, s 138C, s 138E, s 138G, s 141E, s 149, s 177C and Part 11B

Taxation (Tax Administration and Remedial Matters) Act 2011

### Cases cited

*Accent Management Ltd v CIR* [2007] NZCA 230

*ANZ National Bank Ltd v CIR (No 2)* (2006) 22 NZTC 19,835

*Babington v CIR* [1957] NZLR 861

*Balich v CIR* (2007) 23 NZTC 21,230

*Case V17* (2002) 20 NZTC 10,192, TRA No 002/01

*CIR v Alam* [2009] NZCA 273

*CIR v Thompson* (2007) 23 NZTC 21,375

*CIR v Zentrum Holdings Ltd* (2006) 22 NZTC 19,912 (CA)

*CIR v Zentrum Holdings Ltd, Ch'elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,618

*Fuji Xerox NZ Ltd v CIR* (2001) NZTC 17,470 (CA)

*Gisborne Mills Ltd v CIR* (1989) 13 TRNZ 405

*Hollis v CIR* (2005) 22 NZTC 19,570

*McIlraith v CIR* (2007) 23 NZTC 21,456 (HC)

*Milburn NZ Ltd v CIR* (1998) 18 NZTC 14,005

*MR Forestry (No 1) Trust Ltd v CIR* (2006) 22 NZTC 19,954

*Riccarton Construction Ltd v CIR* (2010) 24 NZTC 24,191

*Treasury Technology Holdings Ltd v CIR* (1998) 18 NZTC 13,752

*Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC)

## Other references

Notice of Proposed Adjustment (IR 770). [ird.govt.nz/managing-my-tax/disputes/fill-out-a-notice-of-proposed-adjustment](http://ird.govt.nz/managing-my-tax/disputes/fill-out-a-notice-of-proposed-adjustment)

Notice of Response (IR 771). [ird.govt.nz/managing-my-tax/disputes/fill-out-a-notice-of-response](http://ird.govt.nz/managing-my-tax/disputes/fill-out-a-notice-of-response)

Notice of Waiver of Time Bar (IR 775). [ird.govt.nz/-/media/project/ird/home/documents/forms-and-guides/ir700--ir799/ir775/ir775-2019.pdf?modified=20200507034021&modified=20200507034021](http://ird.govt.nz/-/media/project/ird/home/documents/forms-and-guides/ir700--ir799/ir775/ir775-2019.pdf?modified=20200507034021&modified=20200507034021)

*Organisational Review of the Inland Revenue Department* (Report to the Minister of Revenue (and on tax policy, also to the Minister of Finance) from the Organisational Review Committee (Wellington, New Zealand Government, April 1994)). [taxpolicy.ird.govt.nz/publications/1994/1994-other-organisational-review](http://taxpolicy.ird.govt.nz/publications/1994/1994-other-organisational-review)

“SPS 12/01: Recording Inland Revenue Interviews” (Standard Practice Statement, Inland Revenue, April 2012). [taxtechnical.ird.govt.nz/en/standard-practice-statements/investigations/sps-1201-recording-inland-revenue-interviews](http://taxtechnical.ird.govt.nz/en/standard-practice-statements/investigations/sps-1201-recording-inland-revenue-interviews)

“SPS 16/05: Disputes resolution process commenced by the Commissioner of Inland Revenue” (Standard Practice Statement, Inland Revenue, October 2016). [taxtechnical.ird.govt.nz/standard-practice-statements/disputes/sps-1605-disputes-resolution-process-commenced-by-the-commissioner-of-inland-revenue](http://taxtechnical.ird.govt.nz/standard-practice-statements/disputes/sps-1605-disputes-resolution-process-commenced-by-the-commissioner-of-inland-revenue)

“SPS 16/06: Disputes resolution process commenced by a taxpayer” (Standard Practice Statement, Inland Revenue, October 2016). [taxtechnical.ird.govt.nz/standard-practice-statements/disputes/sps-1606-disputes-resolution-process-commenced-by-a-taxpayer](http://taxtechnical.ird.govt.nz/standard-practice-statements/disputes/sps-1606-disputes-resolution-process-commenced-by-a-taxpayer)

“SPS19/02: Voluntary Disclosures” (Standard Practice Statement, Inland Revenue, March 2019). [taxtechnical.ird.govt.nz/en/standard-practice-statements/shortfall-penalties/sps-1902-voluntary-disclosures](http://taxtechnical.ird.govt.nz/en/standard-practice-statements/shortfall-penalties/sps-1902-voluntary-disclosures)

“SPS 20/03: Requests to Amend Assessments” (Standard Practice Statement, Inland Revenue, June 2020). [taxtechnical.ird.govt.nz/en/standard-practice-statements/investigations/sps-20-03](http://taxtechnical.ird.govt.nz/en/standard-practice-statements/investigations/sps-20-03)

Statement of Position (IR 773). [ird.govt.nz/managing-my-tax/disputes/fill-out-a-statement-of-position](http://ird.govt.nz/managing-my-tax/disputes/fill-out-a-statement-of-position)

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