



**Inland Revenue**  
Te Tari Taake

## **Standard practice statement**

**SPS 16/06**

### **Disputes resolution process commenced by a taxpayer**

#### **INTRODUCTION**

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 ("SPS") discusses a taxpayer's rights and responsibilities in respect of an assessment or other disputable decision when the taxpayer commences the disputes resolution process. Unless specified otherwise, all legislative references in this SPS refer to the Tax Administration Act 1994 ("TAA").

Where the Commissioner commences the disputes resolution process, the Commissioner's practice is stated in SPS 16/06: *Disputes resolution process commenced by the Commissioner of Inland Revenue*.

The Commissioner regards this SPS as a reference guide for taxpayers and Inland Revenue officers. Where possible, Inland Revenue officers must follow the practices outlined in this SPS.

The disputes resolution process is designed to ensure that there is a full and frank communication between the parties in a structured way within strict time limits for the legislated phases of the process.

The disputes resolution process is designed to encourage an "all cards on the table" approach and the resolution of issues without the need for litigation. It aims to ensure that all the relevant evidence, facts and legal arguments are canvassed before a case goes to a court.

This SPS has been updated to include minor amendments to the "response period" as defined in the TAA, and also the introduction of the new communications framework contained in sections 14 to 14G. Where the legislation requires notification of something in terms of section 14C, this statement is written in terms of that notice being "in writing". The new communications framework requires that the notice be delivered by way of post, by personal delivery, by electronic means or by facsimile. The use of the term "in writing" is not intended to imply that delivery is limited to being by post. For further explanation of the new communications framework, refer to Tax Information Bulletin Vol.28 No. 7 (August 2016).

In accordance with the objectives of the disputes resolution process, the Commissioner (unless a statutory exception applies under section 89C or 89N must go through the disputes resolution process before the Commissioner can issue an assessment.

### **Précis of changes to SPS 11/06**

Apart from what are general style and grammar changes, this SPS incorporates the new definition of "response period" contained in section 89AB of the Tax Administration Act 1994 ("the TAA"). It also includes changes as a result of the introduction of the communications framework contained in sections 14 to 14G of the TAA. Some of the examples given in the SPS have also been updated.

#### **How these changes impact on the Statement:**

There are changes to the definition of "response period" in cases where a disputant's NOPA or SOP is received late but it is determined that exceptional circumstances exist. Where the Commissioner or the Courts accept that exceptional circumstances exist, the response period will commence from the day on which the Commissioner issues a notice in favour of the taxpayer, or the day on which a taxpayer's challenge to the Commissioner's refusal under section 89K(4) is finally judged successful by the Taxation Review Authority (or the day the Commissioner concedes). This aspect was not covered by the previous SPS.

The new sections 14 to 14G of the TAA provide a legislative framework that facilitates information flows between the Commissioner and a person, and between two persons where the tax legislation governs that interaction. At the same time as introducing the new provisions, existing terminology referring to specific modes of communication was also changed to reflect the wording of the new framework. The previous SPS contained a number of references to certain informal or administrative communications that are not specifically provided for in the legislation. Where practical and appropriate, the new SPS is written to reflect wording that is consistent with the law.

For example, in various places the previous SPS used the word "inform" to describe the communication between the Commissioner and a taxpayer. However, often the law does not require such communication. This is an administrative process. The word "inform" is covered by section 14B of the TAA. As such, the new SPS uses the word "advise". This avoids any confusion as to whether this communication is a legislative requirement.

## **APPLICATION**

This SPS applies from 10 October 2016 and incorporates legislative changes to the disputes process enacted in the Taxation (Annual Rates for 2015-16, Research and Development, and Remedial Matters) Act 2016, and also the Taxation (Transformation: First Phase Simplification and Other Measures) Act 2016 which introduced the new communications framework.

It replaces SPS 11/06: *Disputes resolution process commenced by a taxpayer* dated 13 October 2011.

## **STANDARD PRACTICE**

### **Background**

1. The tax dispute resolution procedures were introduced in accordance with the recommendations of the Richardson Committee in the *Report of the Organisational Review of the Inland Revenue Department* (April 1994) and were designed to reduce the number of disputes by:

- (a) promoting full disclosure, and
  - (b) encouraging the prompt and efficient resolution of tax disputes, and
  - (c) promoting the early identification of issues, and
  - (d) improving the accuracy of decisions.
2. The disputes resolution process ensures that there is full and frank communication between the parties in a structured way within strict time limits for the legislated phases of the process.
3. The disputes resolution process is designed to encourage an “all cards on the table” approach and the resolution of issues without the need for litigation. It aims to encourage as far as practicable, the disclosure of all relevant evidence, facts, issues and propositions of law before a case proceeds to a court or hearing authority.
4. The early resolution of a dispute is intended to be achieved through a series of steps specified in the TAA. The main elements of those steps are the issue of:
  - (a) A notice of proposed adjustment (“NOPA”): this is a notice that either the Commissioner or taxpayer issues to the other advising that an adjustment is sought in relation to the taxpayer’s assessment, the Commissioner’s assessment or other disputable decision (the prescribed form is the *IR 770 Notice of proposed adjustment*). A NOPA is the formal document which begins the disputes process.
  - (b) A notice of response (“NOR”): this must be issued by the recipient of a NOPA if they disagree with it (the preferred form is the *IR 771 Notice of response*).
  - (c) A notice rejecting the Commissioner’s NOR: this must be issued by the taxpayer if they disagree with the Commissioner’s NOR (there is no prescribed form for a notice rejecting the Commissioner’s NOR).
  - (d) A disclosure notice and statement of position (“SOP”): the issue of a disclosure notice by the Commissioner triggers the requirement for the taxpayer to provide a SOP to continue the dispute. Each SOP must provide an outline of the facts, evidence, issues and propositions of law with sufficient details to support the positions taken. Each party must issue a SOP (the preferred form is the *IR 773 Statement of position*). The SOPs are important documents because they limit the issues and propositions of law that either party can rely on if the case proceeds to court to what is included in the SOPs (unless a hearing authority makes an order that allows a party to raise new issues and propositions of law under section 138G(2)).
5. There are also two administrative phases in the disputes process: the conference and adjudication phases. If the dispute has not been already resolved after the NOR phase, the Commissioner’s practice will be to hold a conference. A conference can be a formal or informal discussion between the parties to clarify and, if possible, resolve the issues.
6. If the dispute remains unresolved after the conference phase and the exchange of SOPs, the Commissioner will usually refer the dispute to

adjudication, except in limited circumstances. Adjudication involves Inland Revenue independently considering a dispute and is the final phase in the disputes process before the taxpayer’s assessment is amended (if it is to be amended) following the exchange of the SOPs.

7. Timely progression of disputes through the disputes process may require the use of the Commissioner’s information-gathering powers (particularly section 17) before and/or during the disputes process.
8. Inland Revenue has a quality assurance review process known as Core Task Assurance (“CTA”) which is designed to ensure that key pieces of work (including NORs and SOPs) are subject to an independent review by Legal and Technical Services before being issued. Given the importance of the disputes process to the Commissioner and to taxpayers, Inland Revenue officers are required to get CTA approval of disputes documents prior to issue.

**Glossary**

9. The following abbreviations are used throughout this SPS:

- NOPA - Notice of Proposed Adjustment
- NOR - Notice of Response
- SOP – Statement of Position
- Disputes Process – Disputes Resolution Process
- TRA – Taxation Review Authority

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**Summary of key actions and indicative administrative timeframes**

- 10. Set out below is a summary of the key actions and administrative timeframes where a disputes process is commenced by a taxpayer.
- 11. These key actions and timeframes are intended to be administrative guidelines for Inland Revenue officers. Any failure to meet these administrative timeframes will not invalidate subsequent actions of the Commissioner or prevent the case from going through the disputes process.

<b>Paragraph in the SPS</b>	<b>Key actions</b>	<b>Indicative timeframes</b>
	<b>The taxpayer’s NOPA</b>	
29, 38, 50, 61 and 69	A taxpayer’s response period for issuing a NOPA in respect of an assessment or other disputable decision.	Within four months from the date that the assessment or other disputable decision is issued.
95	The Commissioner forwards and assigns the taxpayer’s NOPA to the responsible officer.	Usually within five working days after the taxpayer’s NOPA is received.
97	The Commissioner acknowledges the receipt of the taxpayer’s NOPA (either by telephone or in writing).	Usually within 10 working days after the taxpayer’s NOPA is received.
98	The Commissioner advises that the taxpayer’s NOPA is deficient, but the applicable response period has not expired.	Immediately after the Inland Revenue officer becomes aware of the deficiency.
116	The Commissioner considers the application of section 89K, where a taxpayer’s NOPA has been issued outside the applicable response period.	The Commissioner will advise the taxpayer of the outcome within one month of receipt of the disputant’s “late” notice. If the application is rejected, a refusal notice will be issued.
	<b>The Commissioner’s NOR</b>	
132	The Commissioner advises the taxpayer (either by telephone or in writing) whether the Commissioner intends to issue a NOR.	Usually within 10 working days before the response period for the taxpayer to issue a NOPA expires.
131	The Commissioner has issued and the taxpayer has received a NOR.	Within two months starting on the date that the taxpayer’s NOPA is issued.
	<b>The taxpayer’s written rejection of the Commissioner’s NOR</b>	
152	The Commissioner confirms whether the taxpayer will reject the Commissioner’s NOR.	Usually two weeks before the response period for the Commissioner’s NOR expires.
153	The taxpayer rejects the Commissioner’s NOR in writing.	Within two months after the date that the Commissioner’s NOR is issued.

154	Inland Revenue forwards the taxpayer's rejection of the Commissioner's NOR to the responsible officer.	Usually within five working days after receiving the taxpayer's rejection.
154	The Commissioner acknowledges receipt of the taxpayer's rejection of the Commissioner's NOR.	Usually within 10 working days after receiving the taxpayer's rejection.
151	The taxpayer is deemed to accept the Commissioner's NOR, because they have failed to reject it within the applicable response period and none of the reasons in section 89K apply.	At the end of the two-month period starting on the date of issue of the Commissioner's NOR.
155	The Commissioner will advise the taxpayer in writing that they are deemed to accept the Commissioner's NOR.	Within two weeks after the response period for the Commissioner's NOR has ended.
	<b>Conference phase</b>	
166	The Commissioner will write to the taxpayer to initiate the conference phase and to offer a facilitated conference.	The Commissioner's offer of a facilitated conference will be made in writing within one month after the Commissioner receives the taxpayer's rejection of the Commissioner's NOR. The conference letter marks the start of the conference phase.
168	The taxpayer will advise Inland Revenue whether they will attend the conference meeting, and whether they will accept the conference facilitation offer.	Usually within two weeks of receipt of the conference facilitation letter. If the taxpayer does not respond within this timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer about the letter.
169	When a taxpayer agrees to attend a conference meeting, Inland Revenue will contact the taxpayer to establish a timeframe, and agree on how the meeting will be conducted.	Usually within two weeks following the taxpayer's agreement to a conference.
173	Conference meeting(s) and further information exchange between Inland Revenue and the taxpayer.	The suggested average timeframe of the conference phase is three months, subject to the facts and complexity of the dispute.
	<b>Opt out</b>	
198	The taxpayer may seek to opt out of the disputes resolution process.	Within two weeks from the end of the conference phase.
198	Inland Revenue officer will advise the taxpayer whether the request to opt out has been agreed to.	Usually within two weeks from the date of the taxpayer's request to opt out.



	<b>Disclosure notice</b>	
230	The Commissioner advises the taxpayer that a disclosure notice will be issued.	Usually within two weeks before the date that the disclosure notice is issued.
238	The Commissioner issues a disclosure notice to the taxpayer.	Usually within one month of the end of the conference phase.
	<b>Taxpayer's SOP</b>	
241	The taxpayer must issue a SOP within the response period for the disclosure notice.	Within two months after the date that the disclosure notice is issued, unless section 89K applies.
256	The Commissioner confirms whether the taxpayer will issue a SOP.	Usually 10 working days before the response period for the disclosure notice expires.
256	The Commissioner forwards the taxpayer's SOP to the responsible officer.	Usually within five working days after the taxpayer's SOP is received.
257	The Commissioner acknowledges the receipt of the taxpayer's SOP.	Usually within 10 working days after the taxpayer's SOP is received.
257	The Commissioner advises that the taxpayer's SOP is deficient, but the two-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent as soon as they become aware of the deficiency.
258	The Commissioner considers whether section 89K applies, where the taxpayer has issued a SOP outside the applicable response period.	The Commissioner will advise the taxpayer of the outcome within one month of receipt of the disputant's "late" SOP. If the application is rejected, a refusal notice will be issued.
259	The dispute is treated as if it was never commenced, if the taxpayer fails to issue a SOP within the applicable response period and none of the section 89K grounds apply.	Usually 10 working days after the response period for the disclosure notice expires.
	<b>The Commissioner's SOP</b>	
260	The Commissioner issues a SOP in response to the taxpayer's SOP.	Within two months after the date that the taxpayer's SOP is issued, unless an application has been made to the High Court under section 89M(10).
269	The Commissioner considers whether to additional information in the SOP under section 89M(13).	Usually within one month after the date that the Commissioner's SOP is issued.



	<b>Adjudication</b>	
285	The Commissioner prepares a cover sheet and issues a letter (with a copy of the cover sheet) to the taxpayer to seek concurrence on the materials to be sent to the adjudicator.	Usually within one month after the response period for the taxpayer's SOP expires.
286	The taxpayer responds to the Commissioner's letter.	Within 10 working days after the date that the letter is issued.
287	The Commissioner forwards materials relevant to the dispute to the Disputes Review Unit.	Usually when the Commissioner receives the taxpayer's response or within 10 working days after the date that the Commissioner's letter is issued.
276	Adjudication of the disputes case.	Usually within three months after the date that the Disputes Review Unit receives the disputes files, depending on the number of disputes that are before the Disputes Review Unit, any allocation delays and the technical, legal and factual complexity of those disputes.
294	The taxpayer can file challenge proceedings.	Within two months of the adjudication decision.

**ANALYSIS**

**ASSESSMENT**

**Taxpayer's assessment**

12. Section 92(1) reads:

A taxpayer who is required to furnish a return of income for a tax year must make an assessment of the taxpayer's taxable income and income tax liability and, if applicable for the tax year, the net loss, terminal tax or refund due.

13. Section 92(1) applies to tax on income derived in:

- (a) the 2005–06 and later tax years for a taxpayer whose income year matches the tax year, and
- (b) the corresponding income year for a taxpayer whose income year is different from the 2005–06 and later tax years.

14. If a taxpayer has to file an income tax return they must make an assessment of their taxable income and income tax liability and, if applicable, the net loss, terminal tax or refund due. The definition of disputable decision in section 3(1) includes an assessment made by a taxpayer.

15. Similar requirements apply to a taxpayer who must file a GST return under the Goods and Services Tax Act 1985 ("the GST Act"). For a GST return

period that begins on or after 1 April 2005, the taxpayer must make an assessment of the amount of GST payable. Section 92B(1) reads:

A taxpayer who is required under the Goods and Services Tax Act 1985 to provide a GST tax return for a GST return period must make an assessment of the amount of GST payable by the taxpayer for the return period.

16. Pursuant to sections 92(2) and 92B(2) 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.
17. When the taxpayer's assessment is received, the Commissioner's practice is to stamp, either electronically or manually, the tax return with the date of receipt. This date is then entered into Inland Revenue's computerised database and a return acknowledgment form is sent to the taxpayer or agent. This practice ensures that the taxpayer will have a clear record of when their assessment was made.
18. Under section 92B(3) for a GST assessment and section 92(6) for an income tax assessment, a taxpayer cannot make an assessment of the amount of tax payable for a return period in their tax return if the Commissioner has previously made an assessment of the tax that is payable for that return period. This is commonly known as a "default assessment" and involves the Commissioner making a default determination that estimates the taxpayer's tax liability (for example, if they have missed a return filing deadline).
19. For further discussion regarding how a taxpayer can dispute a default assessment see paragraphs 32 to 44.

### **The Commissioner's assessment**

20. Notwithstanding section 92(1) and subject to the statutory time bar in sections 108 and 108A, the Commissioner can sometimes issue a notice of assessment to a taxpayer.
21. The Commissioner cannot make an assessment without first issuing a NOPA to a taxpayer, unless an exception under section 89C to the requirement for issuing a NOPA applies.
22. The exceptions under section 89C are explained in the Appendix of this SPS. The Commissioner must ensure that any assessment is made in accordance with section 89C. However, if, on a rare occasion, an assessment was made in breach of section 89C, it will still be regarded as being valid under section 114(a).
23. If the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can issue a NOPA to the Commissioner under section 89D(1).

### **NOTICE OF PROPOSED ADJUSTMENT (NOPA)**

#### **A taxpayer can issue a NOPA to the commissioner**

24. A taxpayer can issue a NOPA to the Commissioner in the following situations:

#### **Situation 1: NOPA in respect of the Commissioner's assessment**

25. Section 89D(1) reads:

If the Commissioner–

- (a) issues a notice of assessment to a taxpayer; and
- (b) has not previously issued a notice of proposed adjustment to the taxpayer in respect of the assessment, whether or not in breach of section 89C,–

the taxpayer may, subject to subsection (2), issue a notice of proposed adjustment in respect of the assessment.

26. When the Commissioner issues to a taxpayer a notice of assessment that does not relate to a “default assessment” (as discussed in paragraph 18) without first issuing a NOPA, the taxpayer can issue to the Commissioner a NOPA in respect of the assessment. A taxpayer’s response to a default assessment is discussed in Situation 2.
27. A taxpayer’s NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties. A NOPA forms a basis for ensuring that the Commissioner does not issue an assessment without some formal and structured dialogue with the taxpayer in respect of the grounds upon which the Commissioner is issuing any assessment or amended assessment (*McIlraith v CIR* (2007) 23 NZTC 21,456).
28. If the Commissioner has issued an assessment the taxpayer can issue a NOPA under section 89D(1) in respect of any of the considerations that were relevant to making the assessment. This could include preliminary decisions which are necessary to make the assessment, for example, a decision made by the Commissioner under section 89C (*MR Forestry (No 1) Trust Ltd v CIR* (2006) 22 NZTC 19,954).
29. The taxpayer must issue the NOPA within the applicable “response period” as defined in section 89AB. Generally, this will be within the four-month period that starts on the date that the Commissioner issues the assessment unless the Commissioner accepts a late NOPA under section 89K(1). However, this response period is subject to the exception discussed in Situation 6.
30. For example, if the Commissioner’s notice of assessment is issued on 7 April 2016, under section 89D(1) the taxpayer must issue a NOPA in the prescribed form in respect of the assessment on or before 6 August 2016.
31. The taxpayer’s right to issue a NOPA under section 89D(1) is unaffected, even if, in a very rare circumstance, the Commissioner made the assessment in breach of section 89C. The assessment will be deemed to be valid under section 114(a).

### **Situation 2: NOPA in respect of the Commissioner’s default assessment**

32. If a taxpayer has not filed a tax return, the Commissioner can make a default assessment under section 106(1) without first issuing a NOPA to the taxpayer.
33. Section 89D(2) reads:

A taxpayer who has not furnished a return of income for an assessment period may dispute the assessment made by the Commissioner only by furnishing a return of income for the assessment period.

34. A taxpayer that intends to dispute a default assessment through the disputes process must:
- (a) pursuant to section 89D(2) provide a tax return for the period to which the default assessment relates notwithstanding that the tax return cannot include the taxpayer's assessment (section 89D(2A)), and
  - (b) 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 that the Commissioner issues the default assessment.
35. Similar rules apply to a NOPA that a taxpayer issues in respect of a GST default assessment.
36. Section 89D(2C) reads:  
A taxpayer who has not provided a GST tax return for a GST return period may not dispute the assessment made by the Commissioner other than by providing a GST return for the GST return period.
37. Where a taxpayer has not filed a GST return, the Commissioner can make a GST default assessment without first issuing a NOPA to the taxpayer.
38. If a taxpayer wants to dispute a GST default assessment through the disputes process, they must:
- (a) provide a GST return for the periods to which the GST default assessment relates pursuant to section 89D(2C), notwithstanding that the tax return cannot include the taxpayer's assessment (section 89D(2D)), and
  - (b) issue a NOPA to the Commissioner in respect of the GST default assessment,
- within the applicable response period. That is, within four months from the date that the default assessment is issued.
39. 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 the disputes process. This ensures that the taxpayer has provided the requisite statutory information before they dispute the assessment.
40. If the Commissioner agrees with taxpayer's tax return and NOPA, the Commissioner will amend the default assessment by exercising the discretion under section 113 subject to the statutory time bar in section 108 or 108A and any other relevant limitations on the exercise of that discretion.
41. 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 disputes process.
42. 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 issue a NOPA with their tax return.

43. 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, the Commissioner will amend the assessment under section 113 on the basis of the information provided in the tax return subject to the statutory time bar in section 108 and any other relevant limitations on the exercise of that discretion if this would ensure that the assessment was correct. (See SPS 16/01: *Requests to amend assessments* for further details.) Any amended assessment will be the Commissioner's assessment in this circumstance.
44. The Commissioner can decide not to amend the default assessment by exercising the discretion under section 113 on the basis of the tax return provided.

**Situation 3: NOPA in respect of a deemed assessment made under section 80H**

45. Section 89D(2B) reads:

A taxpayer to whom section 80F applies who has not furnished an amended income statement for an assessment period may dispute a deemed assessment under section 80H only by furnishing an amended income statement for the assessment period.

46. Section 89D(2B) applies to a taxpayer who derives income solely from salary, wages, interest and dividends and who will receive an income statement from the Commissioner under section 80D(1).
47. Generally, where the taxpayer considers that the income statement is incorrect, they must advise the Commissioner of the reasons and provide the relevant information to correct the income statement under section 80F(1). This must be done within the statutory time limit. That is, the later of:
  - (a) the taxpayer's terminal tax date for the tax year to which the income statement relates, and
  - (b) two months after the date that the income statement is issued.
48. If the taxpayer does not provide the relevant information within the statutory time limit, they will be treated as having filed a tax return under section 80G(2) and made an assessment under section 80H in respect of that income statement. In this case, the date of the deemed assessment under section 80H will be the date that the statutory time limit under section 80F expires.
49. Pursuant to section 89D(2B), the taxpayer cannot issue to the Commissioner a NOPA in respect of the deemed assessment made under section 80H without first satisfying their statutory obligation to file an amended income statement for the assessment period.
50. If a taxpayer wants to dispute a deemed assessment under section 80H, they must:
  - (a) provide an amended income statement for the assessment period, and
  - (b) issue a NOPA to the Commissioner in respect of the assessment within the applicable response period (that is, four months after the date that the deemed assessment is issued.)

**Situation 4: NOPA in respect of a disputable decision that is not an assessment**

51. Under section 89D(3) a taxpayer can issue a NOPA in respect of a disputable decision that is not an assessment. Section 89D(3) reads:
- If the Commissioner–
- (a) issues a notice of disputable decision that is not a notice of assessment; and
- (b) the notice of disputable decision affects the taxpayer, –
- the taxpayer, or any other person who has the standing under a tax law to do so on behalf of the taxpayer, may issue a notice of proposed adjustment in respect of the disputable decision.
52. For the purpose of section 89D(3) a person with standing under a tax law to issue a NOPA on behalf of the taxpayer includes a tax advisor and an approved advisor group.
53. Section 3(1) defines a “disputable decision” to include:
- (b) a decision of the Commissioner under a tax law, except for a decision –
- (i) to decline to issue a binding ruling under Part 5A; or
- (ii) that cannot be the subject of an objection under Part 8; or
- (iii) that cannot be challenged under Part 8A; or
- (iv) to issue a Commissioner's notice of proposed adjustment under section 89B, a Commissioner's disclosure notice or statement of position under section 89M, or a challenge notice.
54. 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. Paragraph (b)(iii) excludes from the definition of “disputable decision” any decision that cannot be challenged under Part 8A.
55. For example, if the Commissioner:
- (a) decides not exercise the discretion under section 113 to amend a taxpayer’s income tax assessment, or
- (b) makes a decision under section 108A(3) regarding the application of the time bar, or
- (c) does not agree to a time bar waiver under section 108B,
- section 138E(1)(e)(iv) (within Part 8A) provides that these decisions cannot be challenged. Therefore, these decisions are not disputable decisions for the purposes of section 89D(3). However, under section 89D(1), the taxpayer can issue a NOPA in respect of the initial assessment if the Commissioner has not previously issued a NOPA in respect of that assessment.
56. A decision made by the Commissioner under section 108(2) (to increase an assessment) is not of itself, and in the absence of an assessment, a disputable decision. Any challenge to the correctness of the decision must be brought in the context of a challenge to the assessment itself (*Vinelight Nominees Ltd & Anor v Commissioner of Inland Revenue (No 2)* (2005) 22 NZTC 19,519).

57. Paragraph (b)(iv) of the definition of "disputable decision" in section 3(1) also excludes a decision to issue a Commissioner's notice of proposed adjustment under section 89B, a Commissioner's disclosure notice or statement of position under section 89M, or a challenge notice.
58. However, a taxpayer may challenge the Commissioner's refusal to accept a late NOPA, NOR or SOP in terms of section 89K(6) in the Taxation Review Authority. The Commissioner's refusal notice is treated for the limited purposes in section 89K(6) as a notice of disputable decision and subject to direct challenge to the Taxation Review Authority, without the need to commence the dispute with a NOPA.
59. The exceptions specified in paragraph (b) of the definition of "disputable decision" ensure that only substantive issues are disputed as disputable decisions and the procedural components of the disputes process do not, in themselves, give rise to disputes although they may be amenable to judicial review.
60. The following examples illustrate what is a disputable decision:
- (a) A taxpayer who is a natural person can dispute the Commissioner's decision made under section YD 1 of the Income Tax Act 2007 ("ITA 2007") that they are a New Zealand resident for taxation purposes.
  - (b) Under section RD 3(5) of the ITA 2007, the Commissioner can determine whether, and to what extent, a payment is subject to PAYE. This determination cannot be challenged by the taxpayer and, therefore, is excluded from the definition of "disputable decision" under section 3(1)(b)(iii). However, an employer or employee can dispute an assessment of tax deductions on the basis that a section RD 3(5) determination on which it is founded is wrong in fact or law.
61. 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 under section 89K(1).
62. It is important to note that issuing a NOPA is not the only way that a taxpayer can raise concerns about a disputable decision that they consider is incorrect. They are quite entitled to engage with Inland Revenue to raise concerns about a disputable decision that has been reached or to provide additional information.
63. However, it is only by issuing a NOPA that a taxpayer can dispute a disputable decision through the disputes process.

#### **Situation 5: NOPA in respect of a taxpayer's assessment**

64. Section 89DA(1) reads:

A taxpayer may issue a notice of proposed adjustment in respect of an assessment made by the taxpayer for a tax year or a GST return period if the Commissioner has not previously issued a notice of proposed adjustment to the taxpayer in respect of the assessment.



65. If a taxpayer needs to file an income tax return they must also make an assessment of their taxable income and income tax liability under section 92(1) unless the Commissioner has previously made an assessment for that tax year (section 92(6)).
66. Section 89DA(1) also applies to a taxpayer's GST assessment for a return period. A taxpayer who has to file a GST return must also make an assessment of the amount of GST payable for the return period under section 92B(1).
67. The date on which a taxpayer's assessment of income tax is made is the date on which the taxpayer's return of income is received at an office of Inland Revenue (section 92(2)). A taxpayer's assessment of the amount of GST payable is made on the date on which the taxpayer's GST tax return is received at an office of Inland Revenue (section 92B(2)).
68. Pursuant to section 89DA(1), a taxpayer can issue to the Commissioner a NOPA in respect of their own tax assessment.
69. The taxpayer's NOPA must be issued within the applicable response period as defined in section 89AB. Generally, this will be within the four-month period that starts on the date that the Commissioner receives the taxpayer's assessment unless the Commissioner allows a late NOPA under section 89K(1).
70. The date that the Commissioner receives the taxpayer's assessment will be determined under section 14B. For example, under section 14B(8), the Commissioner will receive a NOPA that the taxpayer sends by post on the date that it would have been delivered in the ordinary course of post.

### **Contents of a taxpayer's NOPA**

71. A NOPA is the document that commences the disputes process. It is intended to identify the true points of contention and explain the legal or technical aspects of the issuer's position in relation to the proposed adjustment in a formal and understandable manner. This will ensure that information relevant to the dispute is quickly made available to the parties. Section 89F(1) and (3) specifies the content requirements for any NOPA that a taxpayer may issue.
72. Section 89F reads:
  - (1) A notice of proposed adjustment must -
    - (a) contain sufficient detail of the matters described in subsections (2) and (3) to identify the issues arising between the Commissioner and the disputant; and
    - (b) be in the prescribed form.
  - ...
  - (3) A notice of proposed adjustment issued by a disputant must -
    - (a) identify the adjustment or adjustments proposed to be made to the assessment; and
    - (b) provide a statement of the facts and the law in sufficient detail to advise the Commissioner of the grounds for the disputant's proposed adjustment or adjustments; and
    - (c) state how the law applies to the facts; and

- (d) include copies of the documents of which the disputant is aware at the time that the notice is issued that are significantly relevant to the issues arising between the Commissioner and the disputant.
73. The prescribed form for a NOPA as required under section 89F(1)(b) is the *IR770 Notice of proposed adjustment* form that can be found on Inland Revenue's website: [www.ird.govt.nz](http://www.ird.govt.nz). A handwritten NOPA in this form is acceptable. Additional information can also be attached to the prescribed form.
74. If the Commissioner receives a NOPA that is not in the prescribed form or has insufficient detail under section 89F(1)(a) the Commissioner's practice will be to advise the taxpayer that the NOPA must be in the prescribed form or include sufficient information. If this occurs on the last day of the response period the Commissioner will consider any resubmitted NOPA under section 89K(1) (see paragraph 106).
75. If the taxpayer's NOPA does not satisfy the content requirements under section 89F(1)(a) and (3) the Commissioner can reject the NOPA and not issue a NOR (see paragraphs 98 to 105).
76. When issuing a NOPA, the taxpayer must state the facts and law in sufficient detail, state how the law applies to the facts, and include copies of the documents that are significantly relevant to the dispute and known to the taxpayer when they issue the NOPA.
77. The Commissioner cannot treat a tax return provided by the taxpayer as a NOPA because it will not satisfy the requirements in section 89F(1) and (3).
78. Section 89F(3)(b) requires that the taxpayer's NOPA states the key facts and law concisely and in sufficient detail. The term "sufficient detail" means that the document must contain adequate analysis of the law and facts that are relevant to the dispute. This means sufficient discussion of the law to enable the Commissioner to clearly understand the proposed adjustment.
79. The Commissioner considers that it is necessary that the taxpayer provides "a statement of the facts and law in sufficient detail" to ensure that they have fully considered issues before they raise them in their NOPA and to reduce further administrative and compliance costs.

#### **Identify the proposed adjustment – section 89F(3)(a)**

80. The taxpayer must identify the proposed adjustment in their NOPA. This includes for each proposed adjustment:
- (a) the amount or impact of the adjustment, and
  - (b) the tax year or period to which the proposed adjustment relates.
81. The proposed adjustment should be set out as specifically as possible. For example:
- "increase the 2016 repairs and maintenance expenditure by \$3,000";
  - "increase the GST input tax deduction by \$4,000 in the April 2016 return period".

**Provide a statement of the facts and law in sufficient detail – section 89F(3)(b)****Facts**

82. To provide a brief and accurate statement of facts, the taxpayer must focus on the material factual matters relevant to the legal issues. The taxpayer must include the facts necessary for proving all the arguments raised in support of each adjustment, including any facts that are inconsistent with any argument that the Commissioner has previously raised.
83. The taxpayer should endeavour to disclose all the relevant material facts clearly and with adequate amounts of detail relative to the complexity of the issues. The taxpayer is best suited to do this because they are usually very familiar with the background and facts that relate to the dispute. Disclosing the background and facts at the NOPA phase helps to resolve the dispute at an earlier stage. However, the taxpayer should not overstate the facts with irrelevant detail or repetition.
84. In complex cases, the Commissioner expects the taxpayer to explain the relevant facts clearly and methodically. The taxpayer should also assist the Commissioner to understand the background and facts of the dispute, so as to facilitate a speedy resolution of the case. The taxpayer should explain the facts and law in sufficient detail to advise the Commissioner of the grounds for the adjustment. It is unhelpful and can cause delays if the Commissioner has to second guess the factual bases of the taxpayer's case.
85. For example, in a dispute that involves a complex financial arrangement, the taxpayer should explain each element of it. This includes explaining the background to the financial arrangement, identifying the parties involved, highlighting the relevant clauses in an agreement, etc.

**Law**

86. Each proposed adjustment should stipulate the relevant section or sections that the taxpayer relies on and including, if a section has multiple independent parts, the applicable subsection(s).
87. It is important that the taxpayer includes an adequate amount of analysis of the applicable legal principles or tests in their NOPA. If possible these should be supported by case authorities with full citations. For example, in a dispute that involves the tax treatment of a trade-tie payment, the taxpayer must apply the legal principles from a leading case such as *Birkdale Service Station v CIR* (2000) 19 NZTC 15,981. However, it is not necessary to laboriously describe large numbers of precedent cases on the same issue or include extracts from each.

**How the law applies to the facts - section 89F(3)(c)**

88. The taxpayer must apply the legal arguments to the facts. This ensures that the proposed adjustment is not a statement that appears out of context in relation to the rest of the document. The Commissioner considers that the application of the law to the facts should logically support the proposed adjustment and be stated clearly and in detail.
89. The taxpayer should present the materials and arguments on which they intend to rely or on which reliance will be placed. That is, if more than one

argument supports the same or a similar outcome, all arguments should be made and supported by evidence. For each proposition of law, it is recommended that the NOPA makes a clear link to an outline of supporting facts.

**Include copies of the relevant documents that support the adjustment – section 89F(3)(d)**

90. The taxpayer must provide full copies of the documents that they know are significantly relevant to the dispute and in existence when they issue the NOPA. This ensures that the Commissioner has all the relevant information necessary to respond to the NOPA.
91. For example:
  - (a) A taxpayer proposes an adjustment to GST input tax credits in their NOPA. The taxpayer must provide copies of the relevant tax invoices as documentary evidence in their NOPA.
  - (b) A taxpayer's dispute involves a sale of land transaction. The taxpayer must provide a copy of the sale and purchase agreement and other relevant correspondence between the vendor and the purchaser as documentary evidence in their NOPA.
92. In some cases, new documentary evidence can emerge, as the dispute progresses. For example, the documentation is quite old and may have been misplaced. The taxpayer may be unaware of these documents when the NOPA was issued. The parties should then exchange this new evidence when it becomes known or available.
93. 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 the following matters in their NOPA:
  - (a) the nature of the document and its relevance to the dispute, and
  - (b) the reasonable steps that the taxpayer has taken to obtain a copy of the document, and
  - (c) the expected date that the document will be made available to the Commissioner.
94. However, this practice should not be treated as dispensing with the requirements under section 89F(3)(d). The Commissioner still expects the taxpayer will send copies of the relevant documents mentioned in their NOPA as soon as they become available.

**Receipt of a taxpayer's NOPA**

95. Inland Revenue will usually assign a taxpayer's NOPA to the responsible officer within five working days after it is received.
96. After receiving the NOPA, the responsible officer will determine and record the following:
  - (a) the date on which the NOPA was issued, whether the NOPA has been issued within the applicable response period and the date by which the Commissioner's response must be issued, and

(b) the NOPA's salient features including any deficiencies in its content.

97. Where practicable, Inland Revenue will advise the taxpayer or their tax agent that it has received the NOPA by telephone or in writing within 10 working days.

#### **Deficiencies in the contents of a NOPA**

98. Where Inland Revenue has received a NOPA that it considers deficient (that is, the requirements under section 89F(1)(a) and (3) may not be met), the responsible Inland Revenue officer will take reasonable steps to have the taxpayer correct the information in the NOPA before the response period expires.
99. The taxpayer will be advised as soon as practicable that the Commissioner considers that the NOPA may not meet the requirements of section 89F(1)(a) and (3) and why. They will also be advised that any additional or corrected information should be provided within the response period.
100. Taxpayers are encouraged to issue their NOPA immediately after they have completed it because they could have insufficient time to rectify any deficiencies if the response period is due to expire.
101. Generally where the deficiencies are not able to be remedied but the NOPA advances sufficient argument to allow the dispute to progress, then the Commissioner will continue with the dispute. The argument that the NOPA is deficient will be incorporated into the Commissioner's SOP and the Commissioner will also fully argue the substantive issue.
102. However, if the NOPA received is highly unsatisfactory the Commissioner is unlikely to continue with the dispute. This will be on the grounds that the NOPA does not satisfy the requirements set out in section 89F(1)(a) and (3).
103. A NOPA is likely to be considered highly unsatisfactory only where the taxpayer's position is materially inconsistent and not capable of coherent explanation, or there is no observable explanation at all of the taxpayer's grounds for dispute. In these situations the dispute will be treated as if it has never commenced (unless the taxpayer resubmits a late NOPA and the Commissioner accepts it under one of the exceptional circumstances under section 89K).
104. In considering the adequacy of the taxpayer's NOPA, the Commissioner's view will not be based on the strength or weakness of the taxpayer's argument. The Commissioner will only be concerned with whether the NOPA meets its statutory requirements.
105. The approach outlined above is consistent with that taken by the Court of Appeal in *CIR v Alam and Begum* (2009) 24 NZTC 23,564.

#### **NOPA that a taxpayer has issued outside the applicable response period**

106. The Commissioner cannot accept a NOPA that a taxpayer issues under section 89D or 89DA outside the applicable response period, unless an exceptional circumstance arises or the disputant can prove a demonstrable intention to enter into or continue the disputes process under section 89K of the TAA.

*Exceptional circumstances under section 89K*

107. The legislation defines exceptional circumstances very narrowly. The cases on "exceptional circumstances", such as *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) 17,470 (CA), *Hollis v CIR* (2005) 22 NZTC 19,570, and *Balich v CIR* (2007) 23 NZTC 21,230 are also relevant. The case law confirms that the Commissioner should apply the definition of "exceptional circumstances" in sections 89K(3) and 138D consistently.
108. The following guidelines have emerged from the case law:
- (a) 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 under section 89K(3)(a);
  - (b) an agent's failure to advise their client that they have received a notice of assessment or other relevant documents that causes the taxpayer to respond outside the applicable response period will not generally be considered to be an exceptional circumstance under section 89K(3)(b) (*Hollis v CIR*); and
  - (c) an exceptional circumstance can arise if the taxpayer has relied on misleading information that the Commissioner has given them that causes them to respond outside the applicable response period (*Hollis v CIR*).
109. See *Tax Information Bulletin* Vol 8, No 3 (August 1996) for some examples of situations that can be considered "exceptional circumstances" beyond a taxpayer's control.
110. Section 89K(3) reads:
- For the purpose of subsection (1),—
- (a) An **exceptional circumstance** arises if—
    - (i) an event or circumstance beyond the control of a disputant provides the disputant with a reasonable justification for not rejecting a proposed adjustment, or for not issuing a notice of proposed adjustment or statement of position, within the response period for the notice:
    - (ii) a disputant is late in issuing a notice of proposed adjustment, notice of response or statement of position but the Commissioner considers that the lateness is minimal, or results from 1 or more statutory holidays falling in the response period:
  - (b) An act or omission of an agent of a disputant is not an exceptional circumstance unless—
    - (i) it was caused by an event or circumstance beyond the control of the agent that could not have been anticipated, and its effect could not have been avoided by compliance with accepted standards of business organisation and professional conduct; or
    - (ii) the agent is late in issuing a notice of proposed adjustment, notice of response or statement of position but the Commissioner considers that the lateness is minimal, or results from 1 or more statutory holidays falling in the response period.

111. The statutory holiday exception is self-explanatory. The Commissioner can also accept a late NOPA where the Commissioner considers that the lateness is minimal, that is, the document was only one to two days late.
112. For example, the response period ends on a Saturday and the taxpayer provides a NOPA on the following Tuesday. The Commissioner treats the response period as ending on Monday on the basis of section 35(6) of the Interpretation Act 1999 and accepts that the lateness of the NOPA was minimal. That is, the Commissioner received the NOPA within one to two days of Monday, the last day of the response period. 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.
113. Besides the degree of lateness, the Commissioner will consider the following factors when exercising the exceptional circumstances discretion under section 89K(1):
  - (a) the date on which the NOPA was issued, and
  - (b) the response period within which the NOPA should be issued, and
  - (c) the real event, circumstance or reason why the taxpayer did not issue the NOPA within the applicable response period, and
  - (d) the 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 NOPAs in the past).
114. 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 advised on the calculation of the response period each time.
115. Although the degree of lateness was minimal each time, the Commissioner would not accept the taxpayer's NOPA in this circumstance. This ensures that the section 89K(3)(b)(ii) exception is not treated as an extension of the response period in all circumstances.
116. The Commissioner will consider a taxpayer's application made under section 89K(1)(b) after receiving the relevant NOPA. Where the application is rejected, the Commissioner is required to issue a "refusal notice" within one month of receipt of the application (which must include the late NOPA). The disputant may challenge the Commissioner's refusal notice by taking proceedings directly to the TRA. Where the taxpayer's application is accepted, the Commissioner will advise the taxpayer of the Commissioner's decision in writing within one month after Inland Revenue receives the application.
117. If the Commissioner rejects a taxpayer's application made under section 89K(1), the Commissioner can still consider the validity of the taxpayer's tax position in terms of the practice for applying the discretion under section 113. See *SPS 16/01: Requests to amend assessments* for details of this practice.



*Demonstrable intention*

118. Under section 89K(1)(a)(ii) the Commissioner can also treat a late NOPA, as being on time where the Commissioner considers that the disputant had a demonstrable intention to enter into or continue the disputes process at the time the disputant failed to act within the applicable response period.
119. The concept of "intention to dispute" reflects the court's consideration of when a dispute should be allowed to continue under the old objection regime in Part 8 of the TAA - in particular, the High Court decision in *Gisborne Mills Ltd v CIR* (1989) 13 TRNZ 405. Robertson J, in *Gisborne Mills*, held that a factor to be taken into account in determining whether the disputant was entitled to continue with their dispute was that they 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 under the taxing legislation, endeavours to take advantage of a matter when they become aware of a decision affecting another taxpayer".
120. The officials' issues paper, *Disputes: a review* (July 2010), in relation to an "intention to dispute test", noted:
- The central tenet of any test should be that the taxpayer demonstrates they have, before the deadline, clearly communicated an intention to formally dispute the matter on certain grounds and have not subsequently modified that position.
121. To support this general proposition Inland Revenue will consider the following further factors in reaching a view as to whether a taxpayer had a demonstrable intention to dispute:
- whether the taxpayer has responded to any Inland Revenue correspondence and has consistently asserted their contrary position regarding the substantive issues;
  - whether the taxpayer has complied with other parts of the disputes process and their overall tax obligations (for example, if the late document in question is the taxpayer's SOP, have they filed a timely NOR?);
  - whether the taxpayer has corresponded with other relevant parties regarding the dispute, for example, the Minister of Revenue, the Ombudsman or Inland Revenue's Complaints Management Service.
122. In a dispute where the taxpayer or their agent has not filed an SOP because they have miscalculated the response period (and the degree of lateness does not amount to exceptional circumstances), it could be said that having participated in the earlier stages of the disputes process (including complying with timeframes) that, at the end of the response period, the disputant had a genuine intention to continue with the dispute.
123. 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 to frustrate the disputes process itself. An example might be a taxpayer who 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.

*Disputant may challenge Commissioner's refusal to accept a late NOPA*

124. The Commissioner can accept a disputant's late NOPA (and a late rejection of the Commissioner's NOPA or late SOP) by providing written advice in favour of the disputant stating that the late notice will be treated as being given within the applicable response period. On the other hand, where they are not accepted as being on time, the Commissioner must notify the disputant within one month from when the disputant issues a "late" notice or SOP to the Commissioner, of the Commissioner's decision ("refusal notice"). The disputant may challenge the Commissioner's refusal notice by filing proceedings with the TRA.
125. Where the Commissioner or the TRA determines that exceptional circumstances existed, the response period is deemed to commence on the day of the decision finding favour with the disputants request for exceptional circumstances.

**Timeframes to complete the disputes process**

126. If a taxpayer has issued a NOPA to the Commissioner and the dispute remains unresolved, when practicable, the parties should negotiate a timeframe to ensure that the dispute is progressed in a timely and efficient way.
127. Agreeing to a timeframe is not statutorily required but, rather, is a critical administrative requirement that requires both parties to be ready to progress matters. The parties should endeavour to meet the agreed timeframe. If there are delays in the progress of the dispute the responsible officer must manage the delay including any relationship with internal advisers and liaise with the taxpayer.
128. If the negotiated timeframe cannot be achieved, the Commissioner must enter into continuing discussions with the taxpayer, either to arrange a new timeframe, or otherwise keep them advised of when the disclosure notice will be issued. Therefore, the failure to negotiate or adhere to an agreed timeframe will not prevent the case from progressing through the disputes process in a timely manner.
129. In addition to the above administrative practice, the Commissioner is bound by section 89P. Section 89P provides that where the taxpayer initiated NOPA is issued after 29 August 2011, being the date of enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011, then the Commissioner must issue a challenge notice to a disputant within four years of the issue of the disputant's NOPA. Section 89H(3) provides that where the Commissioner fails to meet the four-year timeframe for issuing a challenge notice, then the Commissioner is deemed to have accepted the adjustments proposed in the disputant's NOPA.
130. Under section 89P(3) the Commissioner cannot issue the challenge notice without completing the disputes process (that is, issue a SOP), unless any of the exceptions in section 89N apply. These exceptions are explained in Appendix 2 of SPS 11/05: *Disputes resolution process commenced by the Commissioner of Inland Revenue* or any replacement SPS.

**NOTICE OF RESPONSE (NOR)****The commissioner's response to a taxpayer's NOPA: NOR**

131. If the Commissioner disagrees with the taxpayer's proposed adjustment, then, under section 89G(1) the Commissioner must advise the taxpayer that any or all of their proposed adjustments are rejected by issuing a NOR within the applicable response period. That is, within two months starting on the date that the taxpayer's NOPA is issued. The Commissioner interprets this to mean that the taxpayer must receive the NOR within this period. For example, if a taxpayer issues a NOPA on 9 April 2010, the Commissioner must advise the taxpayer of its rejection by issuing to them a NOR and they must receive that NOR on or before 8 June 2010.
132. Where practicable, 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 or letter.
133. The Commissioner must issue the NOR to the taxpayer (section 14F(5)(a)) or a representative authorised to act on their behalf (section 14F(5)(b)). 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 must ensure that their NOPA stipulates the name of the person or agent that they have nominated to receive any NOR issued by the Commissioner (*CIR v Thompson* (2007) 23 NZTC 21,375).
134. If a tax agent sends a NOPA to the Commissioner although the tax agent would appear to have authority to receive the Commissioner's NOR, the Commissioner's practice will be to contact the tax agent to confirm whether the agent can accept service of the NOR.
135. Section 89G(2) specifies the content requirements for a NOR. The Commissioner must state concisely in the NOR:
- (a) the facts or legal arguments in the taxpayer's NOPA that the Commissioner considers are wrong; and
  - (b) why the Commissioner considers that those facts and arguments are wrong; and
  - (c) any facts and legal arguments that the Commissioner relies upon; and
  - (d) how the legal arguments apply to the facts; and
  - (e) the quantitative adjustment to any figures proposed in the taxpayer's NOPA that results from the facts and legal arguments that the Commissioner relies upon.
136. Under section 89G(2)(e), the requirement for a quantitative adjustment establishes the extent to which the Commissioner considers that the adjustment in the taxpayer's NOPA is incorrect. This amount need not be exact, although, every attempt should be made to ensure that it is as accurate as possible. The amount in dispute can be varied, as the dispute progresses. For example, if the parties agree on new figures at the conference phase.

137. The Commissioner considers that Inland Revenue has a statutory obligation to advise the taxpayer adequately. Therefore, any NOR that 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.

### **Deemed acceptance**

138. Section 89H(2) reads:

If the Commissioner does not, within the response period for a notice of proposed adjustment issued by a disputant, reject an adjustment contained in the notice, the Commissioner is deemed to accept the proposed adjustment and section 89J applies.

139. If the Commissioner issues a NOR outside the two-month response period, the Commissioner is deemed to have accepted the adjustment proposed in the taxpayer's NOPA under section 89H(2). This will finish the dispute and the Commissioner must issue an assessment or amended assessment to the taxpayer pursuant to section 89J(1) (see the discussion in paragraphs 145 to 150).
140. However, the Commissioner is not precluded from later exercising the discretion under section 113 and issuing to the taxpayer an amended assessment that reflects another adjustment for a different issue to that previously accepted under section 89H(2) for the same tax period.
141. As discussed above, section 89H(3) provides that where the Commissioner fails to meet the 4 year timeframe for issuing a challenge notice, then the Commissioner is deemed to have accepted the adjustments proposed in the disputant's NOPA. The Commissioner must assess the disputant incorporating the adjustments which have been deemed to be accepted: section 89J.

### **Exception to deemed acceptance**

142. Notwithstanding section 89H(2), the Commissioner can apply to the High Court for an order that a NOR can be issued outside the two-month response period under section 89L(1). Section 89L only applies if an exceptional circumstance has occurred or prevented the Commissioner from issuing a NOR to the taxpayer within the response period. The Commissioner will endeavour to apply the requirement for exceptional circumstances in section 89L(1)(a) consistently with the similar requirement in section 89K(1)(a) (see discussion in paragraphs 107 to 117).

143. Under section 89L(3), an "exceptional circumstance":

Is an event or circumstance beyond the control of the Commissioner or an officer of the Department that provides the Commissioner with a reasonable justification for not rejecting an adjustment proposed by a disputant within the response period; and

144. 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 under section 89L for further time to issue a NOR.

(b) The Inland Revenue officer to whom a taxpayer's NOPA was assigned is absent on annual leave for the remainder 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. The Commissioner is deemed to accept the NOPA under section 89H(2). 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 for the purpose of section 89L(1)(a).

145. The exceptions for deemed acceptance have been extended and amended in respect of disputes where the taxpayer initiated NOPA is issued after 29 August 2011, being the date of enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011. The Commissioner can apply to the High Court for an order allowing the Commissioner to issue a challenge notice past the 4 year limitation period, where there has been an exceptional circumstance as defined in section 89L(3). The Court application must be made within the 4 year period.

### **Implication of section 89J**

146. Under section 89J(1), if the Commissioner accepts or is deemed to accept any adjustment that is proposed in a taxpayer's NOPA, the Commissioner must include or take account of the adjustment in:

- (a) a notice of assessment; and
- (b) any further notice of assessment or amended assessment

that is issued to the taxpayer unless the Commissioner has applied to the High Court for an order that a notice can be issued rejecting the proposed adjustment under section 89L(1) and (1B).

147. In this circumstance, the Commissioner's practice will be not to later issue a NOPA that purports to reverse any proposed adjustment previously accepted under section 89H(2) because section 89J(1) prevents the Commissioner from issuing to the taxpayer a further amended assessment that does not include or take into account the previously accepted adjustment.

148. However, pursuant to section 89J(2) the Commissioner does not have to issue a notice of assessment or amended assessment that includes or takes into account an adjustment that the Commissioner has, or is deemed to have accepted, if the Commissioner considers that, in relation to the adjustment, the taxpayer:

- (a) was fraudulent; or
- (b) wilfully misled the Commissioner.

149. If the Commissioner considers that section 89J(2) applies following deemed acceptance under section 89H(2) the Commissioner cannot resume the earlier disputes process but can later issue a NOPA in respect of any of the adjustments proposed in the earlier disputes process.

150. Any opinion that the Commissioner forms under section 89J(2) must be honestly held, based on a correct understanding of the relevant grounds and reasonably justifiable on the basis of the facts and law available. An opinion

formed by the Commissioner under section 89J(2) is a disputable decision for the purposes of section 89D(3).

#### **REJECTION OF THE COMMISSIONER'S NOR**

151. If the Commissioner has issued a NOR under section 89G(1) that rejects the adjustment proposed in the taxpayer's NOPA, the taxpayer must notify the Commissioner that they reject the Commissioner's NOR within the applicable response period. That is, within two months starting on the date that the Commissioner issues the NOR. Otherwise, the taxpayer is deemed to have accepted the Commissioner's NOR under section 89H(3) and the dispute will finish.
152. The Commissioner 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 Commissioner's NOR. Such contact by the Commissioner can be made by telephone or in writing.
153. The taxpayer's notification that they reject the Commissioner's NOR must be in writing. The written rejection must be issued within the response period. A prescribed form is not required to be used. The taxpayer does not have to expressly reject each of the rejections of proposed adjustments that are included in the Commissioner's NOR. The taxpayer's written rejection must simply make it clear that the taxpayer rejects the Commissioner's NOR.
154. Where practicable, the taxpayer's written rejection will be referred to the responsible officer within five working days after Inland Revenue has received it and acknowledged as received within 10 working days.
155. If deemed acceptance occurs (that is, the taxpayer has not rejected the Commissioner's NOR), 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.
156. Under section 138B(3) a taxpayer can file challenge proceedings upon receipt of the Commissioner's NOR. The Commissioner's practice is to treat a notice of proceedings and statement of claim that the taxpayer serves on the Commissioner within the response period commencing challenge proceedings as also being a request for the Commissioner's agreement to opt out of the disputes process under section 89N(1)(c)(viii). The Commissioner will agree to the taxpayer opting out in these circumstances as it is considered that once a challenge is filed the dispute will be resolved more efficiently at a hearing authority.
157. For taxpayer-initiated NOPAs issued after 29 August 2011, being the date of enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011, a new section 138B(3) applies. The new section 138B(3) provides that a disputant may challenge a self-assessment, where the disputant has issued a NOPA which has been rejected by the Commissioner, but only after the Commissioner has issued a challenge notice. As a challenge notice cannot be issued by the Commissioner until the Commissioner issues a SOP (unless one of the exceptions in section 89N(1)(c)(viii) applies), a taxpayer is no longer permitted to unilaterally opt out of the disputes process.
158. Section 89P(4) requires that a challenge notice must state that the Commissioner will not be issuing an amended assessment that includes or

takes into account an adjustment proposed by the disputant, and that a challenge may proceed. The Commissioner must issue a challenge notice within 4 years of the disputant issuing a NOPA to the Commissioner: section 89P(1).

## **CONFERENCE PHASE**

### **What is the conference phase of the disputes process?**

159. The conference phase of the disputes process allows the taxpayer and Inland Revenue officers directly involved in the dispute to exchange material information relating to the dispute (if this has not already been done prior to the conference phase). More importantly it is an opportunity for the parties to the dispute to try to resolve the differences in their understanding of facts, laws and legal arguments.
160. The word "resolve" in this context is not limited to final resolution of the dispute. Settlement is a possibility but this is not the only objective of the conference phase. The parties may "resolve" part of the dispute by agreeing on some of the facts and clarifying some of the legal arguments, while agreeing to disagree on other matters, which will become the focus in the later phases of the disputes process.
161. Generally, if a dispute remains unresolved after the NOR phase, the conference phase will follow.
162. The conference phase is an administrative process that aims to clarify and, if possible, resolve the dispute. However, the conference phase should not be used by either party for the purpose of delaying the completion of the disputes process. The conference phase can involve more than one meeting between the parties and it is not necessarily complete just because the parties have held the final meeting. For example, the parties may need further information or to consider further submissions made at the meeting.

### **Legal and other advisers attending a conference**

163. If a dispute is not settled earlier, the parties can obtain expert legal or other advice during the conference phase in addition to advice previously obtained. These advisers can attend any meetings in relation to the dispute.

### **Conference facilitation**

164. Conference facilitation is a feature in the conference phase. A facilitated conference will involve an independent internal facilitator who will promote and encourage structured discussion between Inland Revenue officers and the taxpayer on an informed basis and with the *bona fide* intention of resolving the dispute. The conference facilitator will be a senior Inland Revenue officer who will not have been involved in the dispute or given advice on the dispute prior to the conference phase. The facilitator will have sufficient technical knowledge to understand and lead the conference meeting.
165. The conference facilitator will not be 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 role of the facilitator to undertake settlement of the dispute. If this possibility arises it is the responsibility of the taxpayer and the Inland Revenue officers involved in the dispute.



166. Having a conference facilitated is optional and a conference can be held without a facilitator but, conference facilitation will be offered to all taxpayers as part of the disputes process. The Commissioner's offer of a facilitated conference will be made in writing ("the conference facilitation letter") within one month from the date of issue of the taxpayer's rejection of the Commissioner's NOR. The conference facilitation letter marks the commencement of the conference phase.
167. The format of the conference meeting need not be limited to a face-to-face meeting. The parties to the dispute may agree to hold a telephone or video conference. (For reasons of simplicity, the SPS refers to "meetings" to include these different conference formats.)
168. 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 conference meeting, whether they will accept the conference facilitation offer, whether there are any special needs or requirements at the meeting and who else will be attending the meeting. If the taxpayer does not respond within this timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer about the conference facilitation letter.

#### **Preparation for the conference meeting**

169. When a taxpayer agrees to attend a conference meeting, Inland Revenue will contact the taxpayer within two weeks from the taxpayer's agreement to establish a timeframe and agree on how the meeting will be conducted.
170. Prior to the conference meeting, the taxpayer should advise Inland Revenue whether their advisors will attend the conference meeting.
171. The parties to the dispute may agree to exchange information relevant to the dispute before the conference meeting. A copy of that information will be provided to the facilitator. The Inland Revenue officers will provide the taxpayer a list of information that has been 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 also crucial for the parties to exchange the information prior to the meeting if the agreed format of the conference is a telephone or video conference.
172. Inland Revenue may decide to concede the dispute after considering the taxpayer's information. The whole disputes process (including the conference phase) would come to an end in these cases.
173. The conference phase will generally be expected to be completed within three months, but this may vary depending on the facts and complexities of the specific case. A longer conference phase may be justified in some disputes if the parties are engaged in meaningful discussions.
174. An agenda will be useful for both parties at the conference meeting. An agreed agenda should divide the conference meeting into two parts. The first part of the meeting should involve an exchange of material information and discussion of contentious facts and issues relating to the dispute. 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 will also be discussed. The second part of the meeting, if applicable, would involve negotiation of possible areas of resolution of the dispute. Any communication made and any materials

prepared for the purpose of negotiating a settlement or resolution during this part of the meeting will be treated as being on a "without prejudice" basis.

175. Where there is no agenda the conference facilitator will guide the taxpayer and the Inland Revenue officers to discuss the contentious facts and issues at the conference meeting.
176. Where the option of conference facilitation has been declined, the parties to the dispute should work out the appropriate structure at the conference meeting, bearing in mind that one of the aims of any conference is to reach agreement on some or all the facts and issues and thus, resolve the dispute.

### **At the conference meeting**

#### *Facilitated conference*

177. The facilitator will:

- (a) explain the objectives of the conference phase on the basis of the agreed agenda;
- (b) remind the parties of any rules relating to the conference (these will generally have been set out in the conference facilitation letter);
- (c) clarify who the parties are at the conference meeting and the capacities they hold (eg, whether they are the authorised tax advisors; whether they have authority to settle the dispute at the meeting);
- (d) ask whether the parties agree to record the meeting discussions using audio or video technology (refer to SPS 12/01: *Recording Inland Revenue Interviews* or any replacement SPS);
- (e) run through the agenda;
- (f) encourage the parties to present evidence in support of their perceived facts (either at the conference meeting or on a later date if the evidence cannot be provided at the time of the meeting). Where possible, encourage the parties to reach agreement on all the facts of the dispute. If no agreement can be made, encourage the parties to establish the common grounds and address the matters that they agree to disagree. These agreements will be recorded in writing. The agreements will be sent to the taxpayer to verify the correctness and sign by a specified date;
- (g) promote constructive discussion of only the contentious tax issues and where possible, encourage both parties to explore the issues, resolve or settle the dispute (subject to our internal revenue delegations and guidelines on settlement). If the contentious tax issues cannot be resolved, ask both parties to do one or more of the following:
  - At the end of the conference meeting, ask the parties to consider whether the conference phase comes to an end. Consider whether there is need for another meeting, noting that another meeting can be justified if both parties need to exchange further information in support of their tax technical arguments but continuous meetings are discouraged if this is seen as a delaying tactic.

- Where the parties agree to end the conference phase and the facilitator considers that the objectives of the conference phase have been achieved, the facilitator can clearly signal the end of the conference phase to the parties.
  - Agree on the timeframe for completing the disputes process and submitting the dispute to the adjudication process. This includes the timeframe for taxpayers to meet outstanding information requests and Inland Revenue officers' undertaking to provide copies of information relevant to the disputes. The agreed timeframe will also factor in time bar waivers if given by the taxpayer and the time required for any court challenge that relates to documents, which are claimed to be protected by professional legal privilege and tax advice documents, which are claimed to be protected by the non-disclosure rights. Ask the taxpayer whether a time bar waiver will be given if the time bar applicable to the assessment in dispute is imminent.
  - Clearly indicate whether the communication 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.
  - Ask the taxpayer to consider whether the opt-out process applies and advise the taxpayer of the right to opt out within the required timeframe, so that it is not necessary to complete the disputes process as required under section 89N and that the dispute will be more efficiently resolved by a hearing authority.
- (h) note that any agreement between the parties will be recorded in writing and signed either at the conference meeting by both parties or on a later date after the taxpayer has verified the correctness of the agreement;
- (i) note that the Inland Revenue officers directly involved in the dispute will remain as the first point of contact.

#### *Unfacilitated conference*

178. In an unfacilitated conference, the parties at the conference should agree on and perform tasks similar to those listed in paragraphs 177(a) to (h) above.
179. At the end of the conference meeting, it is important for the Inland Revenue officers and the taxpayer to discuss whether they consider that the conference phase has come to an end and record any agreement in writing.

#### **After the conference meeting**

180. The following is relevant only if the conference phase does not end at the meeting.

#### *Facilitated conference*

181. The facilitator will:
- (a) follow up on the agreed matters including the agreed timeframe and exchange of information (but does not include enforcing the agreement

between the taxpayer and the Inland Revenue officers directly involved in the dispute);

- (b) assess any need to attend a further meeting;
- (c) suggest to the parties that the conference phase has ended and ask them to reach an agreement on this matter, then clearly notify the parties of the date on which the conference phase has ended.

#### *Unfacilitated conference*

182. In a conference that did not have a facilitator, the Inland Revenue officers will perform these tasks. 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. If the parties cannot agree on when to end the conference phase, the Investigations Manager will be responsible for making the decision on ending the conference phase after considering all the parties' relevant reasons and concerns.

#### **End of the conference phase**

183. It is important for the taxpayer and the Inland Revenue officers to be fully aware of when the conference phase comes to an end. The conference phase is not necessarily complete just because the parties have held the final meeting. For example, the parties may need further information or to consider further submissions made at the meeting. In most cases, it is expected that the parties involved in the dispute will agree on when the conference phase has ended. The disputant will put such agreement in writing.

#### *Facilitated conference*

184. After a facilitated conference the facilitator will be responsible for clarifying the agreed end date of the conference phase with the parties.
185. If the facilitator considers that both the taxpayer and Inland Revenue officers have exchanged all the material information relevant to the dispute, have fully discussed the tax technical issues and have not resolved the dispute, the facilitator may suggest to the parties that the conference phase can come to its end.
186. If there is no agreement and the parties' reasons for continuing the conference phase are considered to be insufficient, the conference facilitator can make a decision to end the conference phase and notify the parties of that decision. The following are examples of strong indicators that the conference phase has come to its end:
- (a) The taxpayer and/or the tax advisors stop contacting the Inland Revenue officers directly involved in the dispute for a few weeks.
  - (b) The parties did not exchange information notwithstanding that this has been agreed on at the conference meeting, thus leading to the exercise of the Commissioner's powers (eg section 17 notices).

- (c) The parties agree to disagree with each other and express interest in progressing to the SOP phase.
- (d) The taxpayer appears to be using delaying tactics at the conference phase when the issue in dispute is subject to an imminent time bar.

187. In rare situations, where conference facilitation is involved and the facilitator is concerned with the parties' decision to end the conference phase before achieving the objectives of the conference meeting, the facilitator may adjourn the meeting and discuss the concerns with the responsible Inland Revenue officers. The facilitator may also contact the taxpayer or the taxpayer's tax advisors to discuss whether the conference phase should come to its end. The facilitator will seek the parties' agreement as to whether or not the conference phase is complete.

#### *Unfacilitated conference*

188. Where no conference facilitation is involved, the taxpayer and the Inland Revenue officers will work out when to end the conference phase. They should consider whether the objectives of the conference phase have been achieved before reaching the agreement. If no agreement can be reached, the Investigations Manager will review the conduct of the parties during the conference phase and make a decision on whether the conference phase has come to an end.
189. When a dispute remains unresolved after the conference phase has been completed, the Commissioner must issue a disclosure notice under section 89M(1).
190. If the taxpayer seeks the Commissioner's agreement to opt out of the disputes process under section 89N(1)(c)(viii), they will be required to sign a declaration that all material information relating to the dispute has been provided to the Commissioner.

#### **OPT OUT OF THE DISPUTES PROCESS**

191. Section 89N(1)(c)(viii) provides that 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 at a hearing authority (referred to as "opt out").
192. A taxpayer may seek to opt out of the remainder of the disputes process. If they do, a decision on whether or not the Commissioner will enter into an opt-out agreement will be made by a senior Inland Revenue officer. In making a decision on opt out, that person will consult with Legal and Technical Services, the Litigation Management Unit, and the Office of the Chief Tax Counsel. The decision-maker will consider the taxpayer's request with reference to all of the specific criteria listed and will also consider if any other factors exist which mean that the dispute can be resolved more efficiently at a hearing authority.
193. Before agreeing to a taxpayer's preference to opt out the Commissioner must be satisfied that the taxpayer has participated meaningfully during the conference phase. In addition, the taxpayer must have signed a declaration that all material information has been provided to the Commissioner.
194. The Commissioner will not agree to opting out unless there has been a conference.

195. In addition to attending the conference, the Commissioner considers that a taxpayer will have participated meaningfully during the conference phase where:
- (a) the taxpayer has provided all relevant information as indicated by Inland Revenue (if it has not already been provided prior to the conference phase); and
  - (b) the taxpayer has discussed the contentious facts and issues of the dispute with Inland Revenue. This discussion will have involved identifying and clarifying what the dispute turns on, seeking potential resolution of the dispute or reaching agreements to enable the dispute to move forward to the next phase if it remains unresolved.
196. If 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 in circumstances where one of the following applies:
- (a) the total amount of tax in dispute is \$75,000 or less except where the dispute is part of a wider dispute;
  - (b) the dispute turns on issues of fact (eg, facts that are to be determined by reference to expert opinions or valuation) only;
  - (c) the dispute concerns facts and issues that are waiting to be resolved by a court; or
  - (d) the dispute concerns facts and issues that are similar to those considered by the Disputes Review Unit of the Office of the Chief Tax Counsel if similar issues have been considered in a dispute in the past.
197. Where the dispute does not fall within the criteria listed at paragraph 196, the Commissioner may still agree to opt out of the disputes process if it is considered that the dispute can be resolved more efficiently at a hearing authority.
198. The taxpayer may request to opt out of the disputes process within two weeks from the end of the conference phase. The Commissioner will advise the taxpayer in writing within two weeks from the date of the request whether the request to opt out has been agreed to.
199. Where the opt-out has been agreed to and the dispute remains unresolved after taking into account the information and discussion during the conference phase, the Commissioner will issue a challenge notice.
200. When it is considered that the taxpayer does not meet the criteria for opting out of the disputes process, the taxpayer will be advised of the decision in writing.

**(a) The \$75,000 or less threshold**

201. 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 a number of taxpayers. An example of this is a tax avoidance arrangement similar to the "Trinity forestry scheme" in *Accent Management Ltd v CIR* (2007) 23 NZTC 21,323; [2007] NZCA 230.
202. The "\$75,000 or less" threshold excludes:
- shortfall penalties, either proposed in the same 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 NOR; and
  - late payment penalties imposed on the taxpayer, if applicable.
203. In some disputes, the Commissioner may propose adjustments in respect of more than one tax type or more than one return period/income year. The "\$75,000 or less" threshold applies to the net total amount of tax in the **same** dispute. The threshold will take into account the following:
- 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.

**(b) The dispute turns on issues of fact only**

204. The Commissioner will agree to a taxpayer's request to opt out if the dispute turns on issues of fact or evidence only.
205. The "issues of fact" requirement may apply where the disputed facts are to be determined by reference to expert opinions or valuation.
206. 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.

**(c) The dispute concerns facts and issues that are waiting to be resolved by a court**

207. 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. The Commissioner will agree to a taxpayer's request to opt out in those cases.
208. A taxpayer may become aware of a current court case that concerns facts and issues that they consider to be similar to their dispute. The Commissioner will consider this position when deciding whether to accept the taxpayer's opt-out request. In considering a taxpayer's request, Inland Revenue will advise the taxpayer of its views as to the similarity, but will not comment on the merit of



the current court case or the plaintiff's tax affairs due to the secrecy provisions in section 81 of the TAA.

209. 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 knowledge. In considering the request, the decision maker will consult with the Litigation Management Unit to determine whether there are any current court cases that concern facts and issues that are considered to be similar to the taxpayer's dispute.

**(d) The dispute concerns facts and issues that are similar to those considered by the Disputes Review Unit**

210. The opt-out process is available if the facts and issues relating to the dispute are similar to those already considered by the Disputes Review Unit. 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 would be unlikely that the Commissioner's view will change. In considering the taxpayer's request, Inland Revenue will advise the taxpayer of its views as to the similarity, but will need to bear in mind the secrecy provisions of the TAA.
211. In some cases, a taxpayer may not be aware of similar disputes that have been considered by the Disputes Review Unit when the taxpayer issues the NOPA or participates at a conference meeting. Inland Revenue officers may be aware of such other similar disputes, and may choose to advise the taxpayer that, should the taxpayer request an opt out, Inland Revenue would be very likely to agree. However, Inland Revenue will need to bear in mind the secrecy provisions of the TAA when considering other disputes.

**CHALLENGE NOTICE WHERE THE COMMISSIONER HAS AGREED TO OPT OUT**

212. In agreeing to the taxpayer's preference for opt out the Commissioner will issue a challenge notice to the taxpayer. In doing so the Commissioner will have taken into account the information and legal arguments raised in the NOPA, the NOR and 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.
213. In issuing the challenge notice, the Commissioner is not bound by the facts, issues, evidence and propositions of law stated in the NOPA and NOR, and the Commissioner is able to take into account information and arguments raised during the conference phase. The Commissioner's administrative practice is that grounds of assessment which have not previously been referred to in the Commissioner's NOR and the taxpayers' NOPA will not be relied on, if they have not been notified or sufficiently discussed during the conference phase.
214. Where the parties have agreed to opt out the Commissioner will send to the taxpayer at or near the time of the challenge notice, a letter confirming briefly the reasons why the Commissioner has not accepted the adjustment proposed by the taxpayer.

**CHALLENGE UNDER SECTION 138B(4)**

215. It is also possible to shorten the disputes process in circumstances where:

- 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
- the adjustment seeks to correct a tax position taken by the taxpayer (or an associated person) as a consequence or result of an incorrect tax position be taken by another taxpayer, which is the subject of or was the subject of court proceedings.

216. If the Commissioner agrees that either of the above conditions are met, then she will issue a challenge notice enabling the disputant to file a challenge in a hearing authority.
217. When a taxpayer wishes to utilise the process provided for in section 138B(4) it is recommended that contact is made with Inland Revenue prior to the issue of the NOPA to discuss the possibility of using the section.
218. Where the adjustment relates to one for another period contact should be made with the Inland Revenue staff who are involved in that dispute. It is envisaged that where the parties agree that the section 138B(4) process could apply, an abridged NOPA would be able to be issued in this circumstance cross-referencing to the dispute for the previous period.

#### **PROGRESSING DISPUTES THROUGH THE DISPUTES PROCESS WHERE THE DISPUTE AFFECTS MULTIPLE TAXPAYERS**

219. Sometimes it is necessary for Inland Revenue to deal with a large number of taxpayers that are all affected by the same disputed matter. This can arise in situations 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;
  - there exists a widespread but well-defined common problem involving many unrelated taxpayers (eg taxpayers moving their private residence into an LAQC, or a number of taxpayers claiming non-deductible expenses such as fines for overloading).
220. 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.
221. The Commissioner's approach, in the context of taxpayer initiated disputes, to 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.

**Situation 1: There are a number of cases on the same issue under dispute. One case has been referred to the Disputes Review Unit, who has still to reach a conclusion on the matter**

222. In this situation 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 Disputes Review Unit undertakes its analysis.
223. However, care will need to be taken to ensure that the time bar will not be breached, and consideration should be given to obtaining a time bar waiver.
224. Again, as this approach requires the taxpayer to agree, the Commissioner can offer it to individual taxpayers but they still have the choice to progress the dispute through the full disputes process.
225. Taxpayers who agree to place their case "on hold" while adjudication considers the issues in question in relation to another taxpayer will not be bound by any decision reached by the Disputes Review Unit and will be free to continue with their dispute should they wish

**Situation 2: The Disputes Review Unit has looked at an issue before and taken a view supporting the taxpayer**

226. It is the Commissioner's policy that a finding for the taxpayer in previous dispute(s) will usually lead to the other disputes being withdrawn, particularly if the disputes are in respect of the same transaction.
227. 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 Disputes Review Unit) is to be followed pending further consideration of the issue at a national level.

**DISCLOSURE NOTICE**

228. The Commissioner must issue a disclosure notice under section 89M(1), unless the Commissioner:
- (a) does not have to complete the disputes process because any of the exceptions under section 89N(1)(c) apply (see the discussion in Appendix to this SPS), or
  - (b) does 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 under section 89N(3), or
  - (c) has already issued to the taxpayer a notice of disputable decision that includes or takes into account the adjustment proposed in the NOPA pursuant to section 89M(2). Section 89M(1) and (2) reads:
    - (1) Unless subsection (2) applies, and subject to section 89N, the Commissioner must issue a disclosure notice in respect of a notice of proposed adjustment to a disputant at the time or after the Commissioner or the taxpayer, as the case may be, issues the notice of proposed adjustment.
    - (2) The Commissioner may not issue a disclosure notice in respect of a notice of proposed adjustment if the Commissioner has already issued a notice of disputable

decision that includes, or takes account of, the adjustment proposed in the notice of proposed adjustment.

229. The meaning of disputable decision is discussed in paragraphs 51 to 61.
230. The Commissioner will usually advise the taxpayer two weeks before a disclosure notice is issued that it will be issued to them.
231. Where practicable, the Commissioner will contact the taxpayer shortly after the disclosure notice and SOP are issued to ascertain whether they have received these documents.
232. If the taxpayer has not received the Commissioner's disclosure notice, for example, due to a postal error or an event or circumstance beyond the taxpayer's control, the Commissioner will issue another disclosure notice to the taxpayer. In this circumstance, the response period within which the taxpayer must respond with their SOP will commence from the date that the Commissioner issued the initial disclosure notice.
233. Where the taxpayer cannot issue a SOP within the applicable response period, they should issue a late SOP with an explanation of why it is late. The Commissioner will consider the late SOP in terms of the discretion under section 89K(1) (see paragraphs 107 to 117 for details).

#### **Evidence exclusion rule and issues and propositions of law exclusion rule**

234. The evidence exclusion rule has been replaced by the issues and propositions of law exclusion rule, in relation to disputes where a disclosure notice is issued on or after 29 August 2011, being the date that the Taxation (Tax Administration and Remedial Matters) Act 2011 received the royal assent. A disclosure notice is the document that triggers the application of either rule under section 138G(1) and its replacement. The evidence exclusion rule restricts the evidence that the parties can raise in court challenges to matters disclosed in their SOP. (Both parties can refer to evidence raised by either party.) The new issues and propositions of law exclusion rule only confines the taxpayer and Commissioner to the issues and propositions of law set out in their respective SOPs, in subsequent challenge proceedings. There is no restriction on introducing new facts or evidence which has not previously been referred to in either party's SOP.
235. Any disclosure notice that the Commissioner issues will explain the effect of the exclusion rules and refer to section 138G.

#### **Issue of a disclosure notice**

236. The Commissioner can issue a disclosure notice at any time on or after the date that the taxpayer issues a NOPA because there is no statutory timeframe specifying when the notice must be issued.
237. The Commissioner does not have to issue a disclosure notice to a taxpayer when they ask for one to be issued. However, the Commissioner will usually discuss such a request with the taxpayer and advise whether a disclosure notice will be issued and, if not, the reasons why and the implications for the dispute.
238. Generally, the Commissioner's practice is to issue a disclosure notice after the exchange of a NOPA, NOR, notice rejecting the NOR, the conclusion of the conference phase and in accordance with any timeframe agreed with the

taxpayer. The Commissioner will usually issue a disclosure notice within one month after the conference phase has been completed.

239. When possible, the responsible officer should use the relevant statutory power under the TAA to obtain any information needed to complete the conference or disclosure phases. This will ensure that the disputes process is conducted in a timely and efficient manner. If the Commissioner is waiting for information to be provided pursuant to a statutory power Commissioner will defer issuing a disclosure notice to ensure that any information provided by the taxpayer can be included in the Commissioner's SOP.
240. If a disclosure notice is issued earlier (for example, the facts are clear, the taxpayer agrees, or a conference is not required) the reasons must be documented and explained to the taxpayer.

### **TAXPAYER'S STATEMENT OF POSITION (SOP)**

241. Pursuant to section 89M(5), once the Commissioner has issued a disclosure notice, the taxpayer must issue to the Commissioner a SOP within the two-month response period that starts on the date that the disclosure notice is issued.
242. The Commissioner cannot consider a document that the taxpayer purports to issue as a SOP before the Commissioner has issued the disclosure notice because it would have been issued outside the applicable response period. The taxpayer must submit another SOP after the disclosure notice is issued to satisfy their obligation under section 89M(5).
243. Unless an "exceptional circumstance" or "demonstrable intention" in section 89K applies, if the taxpayer issues a SOP to the Commissioner outside the response period, the Commissioner will treat the dispute as if it was never commenced. The Commissioner does not have to issue an assessment to include or take account of the taxpayer's proposed adjustment. Section 89M(7)(b) reads:
- (7) A disputant who does not issue a statement of position in the prescribed form within the response period for the statement of position, is treated as follows:
- ...
- (b) if the disputant has proposed the adjustment to the assessment, the disputant is treated as not having issued a notice of proposed adjustment.

### **Contents of a taxpayer's SOP**

244. Different elements of a SOP will be binding on the taxpayer, depending on whether the evidence, or issues and propositions of law exclusion rule apply. Either exclusion rule is subject to section 138G(2), which permits any party to a challenge to apply to the court to include new facts, evidence, issues and propositions of law in the challenge.
245. The taxpayer's SOP must be in the prescribed form (the *Statement of position (IR 773)* form that can be found on Inland Revenue's website: [www.ird.govt.nz](http://www.ird.govt.nz)) and include sufficient detail to fairly advise the Commissioner of the facts, evidence, issues and propositions of law on which the taxpayer wishes to rely. In particular, the taxpayer must clarify what tax laws are being relied on and advise if any of these are different to those relied on in the taxpayer's NOPA.

246. However, if the Commissioner receives a SOP that is not in the prescribed form (as described in paragraph 245) the Commissioner's practice will be to advise the taxpayer that the SOP must be in the prescribed form. If this occurs on the last day of the response period the Commissioner will consider the resubmitted SOP under section 89K.
247. Section 89M(6) reads:
- A disputant's statement of position in the prescribed form must, with sufficient detail to fairly advise the Commissioner,–
- (a) give an outline of the facts on which the disputant intends to rely; and
  - (b) give an outline of the evidence on which the disputant intends to rely; and
  - (c) give an outline of the issues that the disputant considers will arise; and
  - (d) specify the propositions of law on which the disputant intends to rely.
248. The minimum content requirement for a SOP is an outline of the relevant facts, evidence, issues and propositions of law. To allow the Disputes Review Unit to successfully reach a decision, the outline in the SOP must contain full, complete and detailed submissions.
249. An outline that consists of a frank and complete discussion of the issues, law, arguments and evidence supporting the arguments is implicit in the spirit and intent of the disputes process. (In very complex cases the taxpayer should provide a full explanation of the relevant evidence.)
250. The disputes process does not require that relevant documents are discovered or full briefs of evidence or exhaustive lists of documents exchanged. Rather, providing an outline of relevant evidence in the SOP will ensure that both parties appreciate the availability of evidence in respect of the factual issues in dispute. The taxpayer should include an outline of any expert evidence on which they intend to rely in the SOP.
251. If the Commissioner considers that the SOP has insufficient detail to allow a correct assessment to be made the SOP can be treated as not complying with the requirements of section 89M(6).
252. Subject to any order made by the court under section 138G(2), the evidence exclusion rule found in section 138G(1) and the issues and propositions of law exclusion rule found in the replacement section 138G(1) (applying to disclosure notices issued after 29 August 2011) prevents a hearing authority from considering facts, evidence, issues and propositions of law (where the evidence exclusion rule applies) or issues and propositions of law (where the issues and propositions of law exclusion rule applies) that are not included in:
- (a) the SOP, or
  - (b) any additional information that:
    - (i) the Commissioner provides under section 89M(8), that is deemed to be part of the Commissioner's SOP under subsection (9), or
    - (ii) the parties provide pursuant to an agreement under section 89M(13), that is deemed to be part of the provider's SOP under subsection (14).

253. Section 89M(6B) reads:

In subsection 4(b) and 6(b), **evidence** refers to the available documentary evidence on which the person intends to rely, but does not include a list of potential witnesses, whether or not identified by name.

254. Pursuant to section 89M(6B), the SOP must list any documentary evidence but not potential witnesses. Any witnesses' identities will continue to be protected without undermining the effect of the evidence exclusion rule, in disputes where that rule applies.

#### **Receipt of a taxpayer's SOP**

255. If a taxpayer has issued a SOP the Commissioner can accept the SOP or issue a SOP in response to the taxpayer's SOP. Furthermore, section 89P allows the Commissioner to issue a challenge notice after the Commissioner has issued the SOP. (However, the Commissioner's practice is to send the dispute through the adjudication process. See paragraphs 275 to 290 for details.)

256. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent 10 working days before the response period expires to determine whether the taxpayer will issue a SOP in response to the disclosure notice. Such contact will be made by telephone or in writing. The taxpayer's SOP will be referred to the responsible officer within five working days after Inland Revenue receives it. Upon receipt of the SOP, the responsible officer will ascertain and record the following:

- (a) the date on which the SOP was issued, and
- (b) whether the SOP has been issued within the relevant response period, and
- (c) the salient features of the SOP including any deficiencies in its content.

257. Where practicable, the Commissioner will acknowledge that the taxpayer's SOP is received within 10 working days after it is received. However, the Commissioner will advise the taxpayer or their agent of any deficiencies in the SOP's content as soon as they become aware of the deficiency. They will be further advised when the response period expires that those deficiencies must be rectified and whether the Commissioner intends to provide any additional information to the taxpayer.

258. Where a SOP is issued outside the applicable response period, the taxpayer can apply for consideration of exceptional circumstances or that the disputant had a demonstrable intention to continue the dispute under section 89K. The responsible officer will 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.

259. If the taxpayer issues a SOP outside the applicable response period and none of the exceptional circumstances under section 89K apply, the dispute will be treated as if it was never commenced (see paragraph 243). Where practicable, the Commissioner must advise the taxpayer of this within 10 working days after the response period for the disclosure notice has expired.



**COMMISSIONER'S SOP IN RESPONSE**

260. When the taxpayer has issued a NOPA, section 89M(3) allows the Commissioner to issue a disclosure notice without a SOP. If the dispute remains unresolved the Commissioner's practice is to issue a SOP that addresses and responds to the substantive items in the taxpayer's SOP within the applicable response period (that is, within two months starting on the date that the taxpayer issued their SOP).
261. However, in very rare circumstances the Commissioner may not issue a SOP in response to the taxpayer's SOP. For example, an exception arises under section 89N(1)(c) or the High Court has made an order that the disputes process can be truncated pursuant to an application made under section 89N(3).
262. 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 under section 89M(10) if the application is made before the response period expires and the Commissioner considers that it is unreasonable to reply within the response period because of the number, complexity or novelty of matters raised in the taxpayer's SOP.
263. Such applications are expected to be rare but can arise if the taxpayer is less than cooperative with supplying information and/or has failed to maintain proper and adequate records.
264. The Commissioner's SOP must be in the form that the Commissioner has prescribed under section 35(1) and include sufficient details to fairly advise the taxpayer of the facts, evidence, issues and propositions of law on which the Commissioner wishes to rely.
265. Section 89M(4) reads:
- The Commissioner's statement of position in the prescribed form must, with sufficient detail to fairly advise the disputant,–
- (a) give an outline of the facts on which the Commissioner intends to rely; and
  - (b) give an outline of the evidence on which the Commissioner intends to rely; and
  - (c) give an outline of the issues that the Commissioner considers will arise; and
  - (d) specify the propositions of law on which the Commissioner intends to rely.
266. If the Commissioner has issued a SOP, the Commissioner can also provide to a taxpayer additional information in response to matters raised in their SOP under section 89M(8) within two months starting on the date that the taxpayer's SOP is issued.
267. However, the Commissioner's practice is to issue a SOP to the taxpayer towards the end of the response period to allow sufficient time for gathering any further information in response and considering the SOP's content. This minimises the occasions when additional information needs to be provided under section 89M(8) as the information in question will be in the SOP. In any event, as any additional information must be provided within the same response period as the Commissioner's SOP in most cases it will be unlikely that the Commissioner will be able to issue additional information within the response period.

268. The taxpayer cannot reply to the Commissioner's SOP (or any additional information provided) unless the Commissioner agrees to accept additional information under section 89M(13).

#### **AGREEMENT TO INCLUDE ADDITIONAL INFORMATION**

269. The parties can agree to include additional information in their SOP under section 89M(13) at any time during the disputes process including after the dispute has been referred to the Disputes Review Unit. Although there is no statutory time limit, the Commissioner's practice is to allow one month (from the later of the date that the Commissioner issues a SOP or provides any additional information under section 89M(8)) for such an agreement to be reached and information provided.
270. However, before agreeing to include additional information under section 89M(13) the Commissioner will consider the taxpayer's prior conduct and whether they could have provided the information earlier through the application of due diligence.
271. The Commissioner will usually also consider the materiality and relevance of the additional information and its capacity 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. The Commissioner may wish to apply resources to verification and comment and this will be considered by the adjudicator.
272. If the Commissioner does not agree to add additional information to the taxpayer's SOP, the reasons for not agreeing 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 also advise the taxpayer or their tax agent of the reasons why their request was not agreed to.
273. Any agreements to add further information to the SOP will be made subject to the taxpayer agreeing that the Commissioner can also include responses to the additional information to the SOP under section 89M(13), if required.
274. Any additional information that the parties provide under section 89M(13) will be deemed to form part of the provider's SOP under section 89M(14). The evidence exclusion rule under section 138G(1) and the issues and propositions of law exclusion rule under the new section 138G(1) apply to the additional information.

#### **PREPARATION FOR ADJUDICATION**

275. The Disputes Review Unit is part of the Office of the Chief Tax Counsel and represents the final step in the disputes process. The adjudicator's role is to review unresolved disputes by taking a fresh look at the tax dispute and the application of law to the facts in an impartial and independent manner and provide a comprehensive and technically accurate decision that will ensure the correctness of the assessment.
276. Generally, the adjudicator will make such a decision within three months after the case is referred to the Disputes Review Unit (although sometimes a decision can be made in a few weeks). The length of time taken to make a decision will depend on the number of disputes that are before the Disputes

Review Unit, any allocation delays and the technical, legal and factual complexity of those disputes.<sup>1</sup>

277. Judicial comments have been made in *C of IR v Zentrum Holdings Limited and Another, Ch'elle Properties (NZ) Limited v CIR* (2004) 21 NZTC 18,618 and *ANZ National Bank Ltd and others v C of IR (No. 2)* (2006) 22 NZTC 19,835 indicating that, as a matter of law, it is not strictly necessary for Inland Revenue officers to send all disputes to the Disputes Review Unit for review, and Inland Revenue officers are not necessarily bound by the Disputes Review Unit's decisions.
278. Notwithstanding the above judicial comments, if the parties have not agreed on all the issues at the end of the conference and disclosure phases or to truncate the disputes process under section 89N(1)(c)(viii), it is the Commissioner's policy and practice that all disputes are to be sent to the Disputes Review Unit for review, irrespective of the complexity or type of issues or amount of tax involved unless any of the following exceptions arise:
- (a) the Commissioner has considered the taxpayer's SOP for the purposes of section 89N(2)(b) and referred the dispute to the Disputes Review Unit for their preliminary consideration and the Disputes Review Unit has determined that it has insufficient time to reach a decision in respect of the dispute before a statutory time bar would prevent the Commissioner from subsequently increasing the assessment (see paragraph 282 for further discussion), or
  - (b) any of the legislative exceptions specified in section 89N(1)(c) apply (see Appendix to this SPS) so that the Commissioner can amend an assessment without first completing the disputes process, or
  - (c) the High Court has made an order that the disputes process can be truncated pursuant to an application made by the Commissioner under section 89N(3).
279. Inland Revenue officers will adequately consider the facts and legal arguments in the taxpayer's SOP before deciding whether to amend the assessment. It is expected that this will occur only in very rare circumstances.
280. Whether the Commissioner has adequately considered a SOP will depend 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).
281. Thus a simple dispute could take only a couple of days to consider adequately while a complex dispute could take a few weeks.
282. The decision not to refer the case to adjudication must be made by a senior person in Service Delivery (for example, at the time of writing the delegation was with Area Manager level or above). In respect of the first exception mentioned in paragraph 278(a) it is necessary that the parties have

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<sup>1</sup> For further information on the timeframe for adjudication of disputes see the article titled "Adjudication Unit – Its role in the dispute resolution process" that was published in the *Tax Information Bulletin* Vol. 19, No. 10 (November 2007).

exchanged a SOP and it is a matter solely for the Disputes Review Unit to determine whether it has insufficient time to fully consider the dispute.

283. If the dispute is to be referred to the Disputes Review Unit, the Commissioner should not issue a challenge notice before the adjudication process is completed unless a time bar is imminent. The responsible officer will prepare a cover sheet that records all the documents that must be sent to the Disputes Review Unit.
284. The cover sheet together with copies of the documents (NOPA, NOR, notice rejecting the NOR, conference notes, both parties' SOP, additional information, material evidence including expert opinions and a schedule of all evidence held) and any recordings of discussions held during the conference must be sent to the Disputes Review Unit.
285. When the dispute is to be referred for adjudication, the responsible officer will issue a letter and copy of the cover sheet to the taxpayer before sending the submissions, notes and evidence to the Disputes Review Unit. The cover sheet and letter is usually completed within one month after the date that the Commissioner issues the SOP or provides additional information under section 89M(8).
286. The purpose of this letter is to seek the taxpayer's concurrence on the materials to be sent to the adjudicator - primarily in regard to the documentary evidence that has been disclosed at the SOP phase. This letter will allow the taxpayer no more than 10 working days from when it is received to provide a response.
287. Once the taxpayer has concurred on the materials to be sent to the Disputes Review Unit, those materials will usually be so forwarded. However, if the taxpayer does not provide a response the materials will be forwarded within 10 working days after the date that the letter is issued to the taxpayer advising that the materials will be sent to the Disputes Review Unit. The adjudicator can also contact the parties after the initial materials have been received to obtain further information.
288. Where an investigation has covered multiple issues, the cover sheet will outline any issues that the parties have agreed upon and any issues that are still disputed. The adjudicator can then consider the disputed issues and not reconsider those issues that have been agreed upon.
289. Generally, the adjudicator only considers the materials that the parties have submitted. They do not usually seek out or consider further information, unless it is relevant. The adjudicator may consider such additional information notwithstanding that the parties have not agreed that the provider can include this information in their SOP under section 89M(13).
290. However, any additional material which amounts to a legal or factual issue, or a proposition of law, that the parties have not included in their SOP (or is not deemed to be included in their SOP under section 89M(14)) cannot later be raised by the parties as evidence in the TRA or a hearing authority because of the issues and propositions of law exclusion rule in section 138G(1).

#### **ADJUDICATION DECISION**

291. Once a conclusion is reached, the Disputes Review Unit will advise the taxpayer and responsible officer of the decision. The responsible officer will

implement the Disputes Review Unit's recommendations and follow up procedures where required, including issuing a notice of assessment to the taxpayer where applicable.

292. If the Disputes Review Unit makes a decision that is not in the Commissioner's favour, the Commissioner is bound by and cannot challenge that decision. The dispute will come to end. The Commissioner will issue an assessment or challenge notice to the taxpayer to reflect the decision.
293. If a taxpayer commences the disputes process, they can file challenge proceedings in the TRA or the High Court within the applicable response period if any of the following conditions are met:
- (a) The Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed and Commissioner rejected within the applicable response period and the Commissioner has later issued an amended assessment to the taxpayer (section 138B(2)).
  - (b) For taxpayer-initiated disputes where the taxpayer NOPA is issued after 29 August 2011, a new section 138B(3) applies. A taxpayer may issue challenge proceedings where: 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 has issued a challenge notice to the disputant. The latter requirement has the effect of deferring the commencement of challenge proceedings, as the Commissioner's challenge notice can only generally be issued after the Commissioner has issued a SOP.
  - (c) The Commissioner or taxpayer has issued an assessment that is the subject of an adjustment notified to the Commissioner, where:
    - 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
    - the adjustment 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 the subject of or was the subject of court proceedings; and
    - the Commissioner has issued a challenge notice.
  - (d) 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 (section 138C).
294. A taxpayer must file proceedings with the TRA or High Court within the two-month response period that starts on the date that the Commissioner issues:
- (a) the amended assessment if the challenge proceedings are filed under section 138B(2), or
  - (b) the challenge notice if the challenge proceedings are filed under section 138B(3) or (4), or

- (c) the written disputable decision rejecting the taxpayer's proposed adjustment if the challenge proceedings are filed under section 138C.

295. If applicable, the responsible officer will implement any decision made by the hearing authority and follow up procedures where required including issuing a notice of assessment or amended assessment to the taxpayer.

This Standard Practice Statement is signed on 10<sup>th</sup> October 2016.

**Rob Wells**

**LTS Manager – Technical Standards**

## APPENDIX

### SECTION 89N – EXCEPTIONS – WHEN AN ASSESSMENT CAN BE ISSUED WITHOUT COMPLETING THE DISPUTES PROCESS

1. If a NOPA has been issued and the dispute is unresolved, the Commissioner can issue an assessment without completing the disputes process under the following circumstances:

**Exception 1: In the course of the dispute, the Commissioner considers that the taxpayer has committed an offence under an Inland Revenue Act that has had the effect of delaying the completion of the disputes process (section 89N(1)(c)(i)).**

2. Section 89N(1)(c)(i) reads:
  - (i) the Commissioner notifies the disputant that, in the Commissioner's opinion, the disputant in the course of the dispute has committed an offence under an Inland Revenue Act that has had an effect of delaying the completion of the disputes process:
3. This exception applies where the Commissioner may need to act quickly to issue an assessment because it is considered that the taxpayer has committed an offence under an Inland Revenue Act that has caused undue delay to the progress of the dispute.
4. For example, in the course of a dispute a taxpayer obstructed Inland Revenue officers in obtaining information from the taxpayer's business premise under section 16. The Commissioner will advise the taxpayer in writing that it is considered that an offence has been committed under section 143H. The offence has the effect of delaying the completion of the disputes process meaning that the Commissioner does not have to complete that process and can amend the taxpayer's assessment under section 113.
5. Another example of when the exception may apply is where, in the course of a dispute, a taxpayer wilfully refuses to attend an enquiry made under section 19 on the date specified in the Commissioner's notice. In these circumstances, the Commissioner will advise the taxpayer in writing that that it is considered that an offence has been committed under section 143F that has had the effect of delaying the completion of the disputes process. The Commissioner can then exercise the discretion to amend the taxpayer's assessment under section 113 without completing the disputes process.
6. In order to apply this exception, Inland Revenue officers must form an opinion that is honestly and reasonably justifiable on the basis of the evidence available, that the disputant has committed an offence under an Inland Revenue Act. The Inland Revenue officer's decision must be clearly documented and stipulate the grounds and reasoning on which it is based.

**Exception 2: A taxpayer involved in a dispute, or person associated to 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 (section 89N(1)(c)(ii) and (iii)).**

7. If the Commissioner has reasonable grounds to believe that the taxpayer or a person associated with them ("associated person") intends to dispose of assets in order to avoid or defer the payment of an outstanding or pending



tax liability, the Commissioner can urgently issue an assessment to the taxpayer. Section 89N(1)(c)(ii) and (iii) reads:

- (ii) the Commissioner has reasonable grounds to believe that the disputant may take steps in relation to the existence or location of the disputant's assets to avoid or delay the collection of tax from the disputant:
- (iii) the Commissioner has reasonable grounds to believe that a person who is an associated person of the disputant may take steps in relation to the existence or location of the disputant's assets to avoid or delay the collection of tax from the disputant:

8. In order to issue an assessment on the basis of either of the above exceptions, Inland Revenue officers must record any relevant correspondence and evidence (for example, the directors' written instructions to shift the company's assets overseas, evidence of electronic wiring of funds to overseas countries, transcripts of interviews with the taxpayer, etc) or other grounds for the reasonable belief.

**Exception 3: 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 (section 89N(1)(c)(iv) and (v)).**

9. Section 89N(1)(c)(iv) and (v) reads:

- (iv) the disputant has begun judicial review proceedings in relation to the dispute:
- (v) a person who is an associated person of the disputant and is involved in another dispute with the Commissioner involving similar issues has begun judicial review proceedings in relation to the other dispute:

10. These exceptions apply to any judicial review proceedings that are brought against the Commissioner. In judicial review proceedings, the parties' resources are likely to be directed away from advancing the dispute through the disputes process.
11. For the purpose of section 89N(1)(c)(v), an associated person of a taxpayer may be involved in a similar issue to the taxpayer even if the issue relates to a different revenue type. For example, if the dispute between the Commissioner and taxpayer relates to PAYE issues, but the dispute between the Commissioner and person associated with the taxpayer relates to income tax the taxpayer may still be involved in similar issues to the person associated with them.
12. Even if the two disputes relate to the same revenue type, section 89N(1)(c)(v) will not apply in some circumstances. For example, the dispute with the taxpayer relates to the tax treatment of entertainment expenditure, whereas the dispute with the person associated with the taxpayer relates to the capital and revenue distinction of merger expenditure. The Commissioner would not regard these two disputes as involving similar issues.

**Exception 4: The taxpayer fails to comply with a statutory requirement for information relating to the dispute (section 89N(1)(c)(vi)).**

13. Section 89N(1)(c)(vi) reads:

- (vi) during the disputes process, the disputant receives from the Commissioner a requirement under a statute for information relating to the dispute and fails to comply with the requirement within a period that is specified in the requirement:

14. Generally, a taxpayer provides information to Inland Revenue voluntarily. However, when this does not occur the Commissioner can seek information from the taxpayer under a statutory provision, for example sections 17 or 19. (The Commissioner's practice regarding section 17 is currently set out in OS 13/02: *Section 17 Notices*.) The requirement for statutory information will specify the period within which the information must be provided. This period will allow the taxpayer reasonable and sufficient time to comply.
15. Where the taxpayer does not comply with a formal requirement for information that relates to a dispute (for example, as a tactic to delay the progress of the disputes process), the Commissioner can issue an assessment to the taxpayer without first completing the disputes process.

**Exception 5: The parties agree in writing that the dispute should be resolved by the court or TRA without completing the disputes process (section 89N(1)(c)(viii)).**

16. Section 89N(1)(c)(viii) reads:

(viii) the disputant and the Commissioner agree, recording their agreement in a document, that they have reached a position in which the dispute would be resolved more efficiently by being submitted to the court or Taxation Review Authority without completion of the disputes process:

17. Under this exception, where the Commissioner or taxpayer commences the disputes process, the parties can make such an agreement before either party issues their SOP. This would occur, for example, if the parties could incur excessive compliance and administrative costs in completing the full disputes process relative to the amount in dispute.
18. This exception allows the taxpayer to bring challenge proceedings against the Commissioner. The parties must have exchanged a NOPA and NOR before the taxpayer can bring challenge proceedings under section 138B(1).
19. The circumstances under which the Commissioner will enter into such an agreement are discussed in detail from paragraph 191 to 214. This SPS refers to this exception as opting out of the disputes process or "opt out".

**Exception 6: The parties agree in writing to suspend the disputes process pending the outcome of a test case (section 89N(1)(c)(ix)).**

20. Section 89N(1)(c)(ix) reads:

(ix) the disputant and the Commissioner agree, recording their agreement in a document, to suspend proceedings in the dispute pending a decision in a test case referred to in section 89O.

21. Section 89O(2) allows a dispute to be suspended pending the result of a test case. Pursuant to section 89O(3), the parties can agree, recording their agreement in a document, to suspend the dispute from the date of the agreement until the earliest date that:
  - (a) the court's decision is made, or
  - (b) the test case is otherwise resolved, or
  - (c) the dispute is otherwise resolved.

22. If the parties agree to suspend the disputes process, any statutory time bar affecting the dispute is stayed. The Commissioner can then make an assessment that is consistent with the test case decision. (However, the taxpayer is not precluded from challenging the Commissioner's assessment under section 89D(1), even if it is consistent with the test case decision.)
23. The Commissioner must issue an amended assessment or perform an action within the time limit specified in section 89O(5).
24. Section 89O(5) reads:
- The Commissioner must make an amended assessment, or perform an action, that is the subject of a suspended dispute by the later of the following:
- (a) the day that is 60 days after the last day of the suspension:
  - (b) the last day of the period that –
    - (i) begins on the day following the day by which the Commissioner, in the absence of the suspension, would be required under the Inland Revenue Acts to make the amended assessment, or perform the action; and
    - (ii) contains the same number of days as does the period of the suspension.
25. If the statutory time bar arising under section 108 or 108A is imminent, section 89O(5) allows the Commissioner more time to complete the disputes process.
26. For example, the Commissioner commences a dispute and on 1 March 2010 agrees with the taxpayer in writing to suspend the disputes proceedings pending the decision in a designated test case. The disputed issue is subject to a statutory time bar that commences after 31 March 2010 and the taxpayer does not agree to delay its application under section 108B(1)(a). A decision is reached in the test case on 31 July 2010.
27. The Commissioner must make an amended assessment or perform an action that is the subject of the suspended dispute by 29 September 2010. This date is calculated as follows:
- (a) The suspension period commences on the date of the agreement (1 March 2010) and ends on the date of the court's decision in the test case (31 July 2010). This is a period of 153 days.
  - (b) The last date that the Commissioner can make an amended assessment falls on the later of the following two dates:
    - (i) 29 September 2010, that is 60 days after the date that the suspension period ends on 31 July 2010 pursuant to section 89O(5)(a), and
    - (ii) 31 August 2010, that is 153 days after the period commences on 1 April 2010 pursuant to section 89O(5)(b).

**Exception 7: The Commissioner applies to the High Court for an order to allow more time to complete or dispense with the disputes process.**

28. Section 89N(3) reads:

... [T]he Commissioner may apply to the High Court for an order that allows more time for the completion of the disputes process, or for an order that completion of the disputes process is not required.

29. The Commissioner envisages that this exception will be used if section 89N(1)(c) does not apply and there are exceptional circumstances.
30. Any application made by the Commissioner under section 89N(3) must be based on reasonable grounds. Whether there are reasonable grounds will depend on considerations such as the complexity of the issues in the dispute, whether the taxpayer has caused delays; whether the dispute involves large amounts of revenue or whether there were significant matters in the dispute that were unforeseen by either party and provided a justification for the delay.
31. For example, due to unusual circumstances the Commissioner does not learn about a proposed adjustment until late. Further delays by the taxpayer and the need for the Commissioner to obtain significant legal advice means that the Disputes Review Unit cannot consider the dispute before the time bar applies. In these circumstances, the Commissioner may apply to the High Court for an order that allows more time for the disputes process to be completed under section 89N(3). (Note: This is only an example of a possible unforeseen situation and it is anticipated that there will be a wide variety of circumstances under which an application under section 89N(3) will be appropriate.)
32. The Commissioner's application to the High Court under section 89N(3) must be made before the four-year statutory time bar falls due.
33. The Commissioner must also issue an amended assessment within the time limit specified in section 89N(5). Section 89N(5) reads:
 

If the Commissioner makes an application under subsection (3), the Commissioner must make an amended assessment by the last day of the period that -

  - (a) begins on the day following the day by which the Commissioner, in the absence of the suspension, would be required under the Inland Revenue Acts to make the amended assessment; and
  - (b) contains the total of -
    - (i) the number of days between the date on which the Commissioner files the application in the High Court and the earliest date on which the application is decided by the High Court or the application or dispute is resolved:
    - (ii) the number of days allowed by an order of a court as a result of the application.
34. Section 89N(5) allows the Commissioner more time to complete the disputes process where the statutory time bar under section 108 or 108A is imminent.
35. For example, the Commissioner commences the disputes process. On 1 March 2010 the Commissioner applies to the High Court under section 89N(3) for an order allowing more time to complete the process. The disputed issue is subject to a statutory time bar that commences after 31 March 2010 and the taxpayer does not agree to delay its application under section 108B(1)(a). On 30 June 2010, the High Court makes an order that allows the Commissioner's application and gives the Commissioner 30 further days to complete the disputes process.

36. Pursuant to section 89N(5), the Commissioner must make an amended assessment by 30 August 2010. This date is calculated as follows:
  - (a) The Commissioner would have one month to make the amended assessment before the statutory time bar commences. That is, 1 March 2010 to 31 March 2010. The period during which an amended assessment must be made under section 89N(5)(a) commences on 1 April 2010.
  - (b) The period during which the assessment must be made includes 122 days, that is the period between 1 March 2010 and 30 June 2010 (the date of the decision) under section 89N(5)(b)(i) and the 30-day period allowed by the High Court order under section 89N(5)(b)(ii). This is a total of 152 days.
  - (c) The Commissioner must issue an amended assessment to the taxpayer on the date that is 152 days from 1 April 2010. That is, by 30 August 2010.
37. During the period from 1 March to 30 August 2010, the parties may continue to attempt to resolve the dispute. This may include exchanging SOPs and going through the adjudication process.
38. The above example indicates that the Commissioner has more time to complete the disputes process. The time bar will not commence until 30 August 2010.
39. Where the Commissioner applies to the High Court under section 89N(3) for an order to truncate the disputes process, an assessment must be issued within the period as calculated under section 89N(5). Applying the same facts as in the above example, the Commissioner must issue an assessment to the taxpayer by 30 August 2010.