

disputes document), the taxpayer can choose not to proceed with the disputes process. However, if the taxpayer chooses to voluntarily continue and issue a disputes document (such as a NOPA, NOR or SOP), the information in that document (or one that is subsequently provided by them) could be used against them in any criminal proceedings. Therefore, it is important that, before voluntarily choosing to continue with the disputes process, the taxpayer considers obtaining legal advice. If the taxpayer decides to continue with the disputes process, they can, at any time, change their mind and choose not to proceed.

28. The Commissioner considers that preserving the taxpayer's rights in current or potential criminal proceedings can be an exceptional circumstance under s 89K (late filing of disputes documents). Further, the Commissioner accepts it is not reasonably practicable for the taxpayer to provide a disputes document until the question of prosecution has been resolved.
29. As a result, the taxpayer can choose to not provide the relevant disputes document until after receiving a letter from the Commissioner advising (as appropriate) that:
 - criminal proceedings have been concluded;
 - criminal proceedings are no longer being contemplated;
 - if the taxpayer intends to rely on the exceptional circumstance and provide a disputes document after the question of prosecution is resolved, they should notify the Commissioner within the applicable response period of their intention;
 - if the taxpayer decides to provide a disputes document despite the exceptional circumstance, they can still use the exceptional circumstance to delay the provision of a subsequent document;
 - if the dispute has reached the conference phase it is possible to agree to pause the dispute, pending resolution of the question of prosecution, but the impact of the time bar provisions in the Act need to be considered.
30. If pausing the disputes process means it is likely the process will be unable to be completed before the expiry of the time bar, the Commissioner will (as applicable):
 - ask the taxpayer to agree to an extension of the time bar;¹³
 - file an application in the High Court for an extension of the time bar;¹⁴ and

¹³ Section 108B.

¹⁴ Section 89N(3) or s 89L(1B).

within those limits, as brief as practicable. For further discussion about the length of NOPAs the Commissioner issues, see [106] under “Length of the Commissioner’s NOPA”.

State how the law applies to the facts

Facts

87. To provide a concise statement of the facts, the NOPA should focus on the material factual matters relevant to the legal issues. This includes, for each proposed adjustment, the facts relevant to proving all arguments made in support of the adjustment. This should also include facts that point to an inconsistency with arguments that have been raised previously by either party.
88. The NOPA should briefly state all the material facts. However, where the parties both know the background to the disputed issues, a summary of the facts in the NOPA will suffice. Where possible, the NOPA should refer to and/or append any documents that have previously set out the facts that are relied on.
89. Fully disclosing the background and facts at the NOPA phase helps to resolve the dispute earlier. However, these should be concisely stated, without irrelevant detail or repetition.
90. Although every attempt should be made to concisely state the facts, the Commissioner accepts that the explanation of the material facts in the NOPA should be relative to the complexity of the issues.

The law

91. The NOPA should state the law by including an outline of the relevant legislative provisions and principles derived from relevant cases that support the proposed adjustment. It is sufficient that the NOPA explains the nature of the legal arguments without providing lengthy quotations from the legislation or case law.
92. It is important the NOPA includes enough analysis of the applicable legal principles or tests to inform the recipient of the rationale underpinning the proposed adjustment. If possible, these should be supported by case authorities with full citations. However, it is not necessary to describe large numbers of precedent cases on the same issue or include extracts from each.
93. The NOPA must apply the legal arguments to the facts that support the proposed adjustment in a way that means the argument is not a statement that appears out of

response in the NOR and later in the SOP, if the disputes process progresses into that phase.

105. As previously discussed, the Commissioner cannot treat a tax return provided by the taxpayer as a NOPA because it will not satisfy these statutory requirements.

Length of the Commissioner's NOPA

106. Although the length of a Commissioner's NOPA will necessarily vary from case to case, it should generally not exceed 30 pages. The 30-page limit excludes any discussion on shortfall penalties (if included in the same Commissioner's NOPA as the substantive issues), the last page of instructions on what to do next, and schedules that show complicated calculations and diagrams. The application of the 30-page limit is subject to two further restrictions:

- For disputes involving less than \$5,000 of tax (excluding evasion and tax avoidance issues), the Commissioner's NOPA should generally not exceed five pages.
- Where the dispute concerns only one issue (for example, the imposition of shortfall penalties), the Commissioner's NOPA should generally not exceed 10 pages.

107. A longer Commissioner's NOPA may be appropriate where the dispute concerns multiple issues or the issue is complex and involves a substantial amount of tax.

108. The Commissioner strives to keep NOPAs as short as possible, but this is balanced with the need to achieve the objective of issuing the NOPA (that is, sufficiently communicating to the recipient the proposed adjustments and the reasons for them).

Proposing additional adjustments or an increased liability to tax

109. What is included in a NOPA (or NOR) is not necessarily conclusive as between the parties because they can introduce further grounds or information or adjust the amount of the proposed adjustments later in the disputes process.⁵⁸ Wherever practicable, all adjustments proposed should be included in one NOPA.

110. However, if either party wishes to propose another adjustment after a NOPA has been issued and, in the case of the:

- Commissioner that adjustment increases the taxpayer's tax liability; or
- taxpayer the proposed adjustment decreases their tax liability, then

⁵⁸ *CIR v Zentrum Holdings Ltd* (2006) 22 NZTC 19,912 (CA).

- the disputes process does not have to be completed because the High Court has made an order that the dispute resolution process can be truncated pursuant to an application made by the Commissioner;⁸² or
 - the taxpayer has already been issued with a notice of disputable decision that includes or takes account of the adjustment proposed in the notice of proposed adjustment (NOPA).⁸³
206. A disclosure notice refers the taxpayer to the issues and propositions of law exclusion rule.⁸⁴ The effect of this rule is to limit both parties to only those issues and propositions of law raised in their respective statements of position (SOPs). This rule is further discussed at [233]. The issue of a disclosure notice will trigger the evidence exclusion rule and the start of the response period for the issue of the taxpayer's SOP. The evidence exclusion rule refers to documentary evidence on which a disputant intends to rely.⁸⁵
207. Where the Commissioner initiated the dispute by issuing a NOPA, the Commissioner's SOP will accompany the disclosure notice.
208. If the taxpayer initiated the dispute by issuing a NOPA, the Commissioner will issue a disclosure notice to the taxpayer (where the Commissioner has not agreed to an opt-out). The taxpayer's SOP must be issued to the Commissioner within the allowed two-month response period after the issue of a disclosure notice to the taxpayer.⁸⁶ The Commissioner must then issue a SOP in response within the appropriate response period.
209. As has already been stated in relation to other dispute documents, the date of issue is the date the document (the disclosure notice in this instance) is sent. It is the date the notice is physically sent to the recipient (for delivery to the post office, external mailbox or courier, for instance) or is emailed or otherwise sent to the recipient. Generally, this will be determined by the date on the disclosure notice, which, it is assumed, will be that same date that the notice is actually sent. However, this is a rebuttable presumption. If the taxpayer is able to rebut this presumption, this would be relevant in determining whether an exceptional circumstance exists. Where a due date exists for a response in the disputes process, then the response must be received by the recipient by that due date.

⁸² Section 89N(3).

⁸³ Section 89M(2).

⁸⁴ Set out in s 138G.

⁸⁵ Section 89M(6B).

⁸⁶ Section 89AB(5).

210. The Commissioner will usually advise the taxpayer two weeks before a disclosure notice is issued that it is about to be issued. The Commissioner will also contact the taxpayer shortly after the disclosure notice is issued (together with the Commissioner's SOP where the Commissioner has initiated the disputes process) to ascertain whether the taxpayer has received the notice.

Issue of a disclosure notice

211. This section covers:

- timeframe for issuing a disclosure notice; and
- when the Commissioner issues a SOP with the disclosure notice.

Timeframe for issuing the notice

212. Because there is no statutory timeframe for issuing a disclosure notice, the Commissioner can issue a disclosure notice at any time on or after the date that either party issues their NOPA.
213. The Commissioner's usual practice is to issue a disclosure notice following the conference phase and in accordance with the timeframe agreed with the taxpayer.
214. Where a disclosure notice is issued before the conference phase (for example, when the facts are clear, the taxpayer agrees with the disputed issues and both parties agree a conference meeting is not required), the reasons will be documented and explained to the taxpayer.

When the Commissioner issues a SOP with the disclosure notice

215. Where a dispute the Commissioner started remains unresolved after the conference phase, then, although it is not a legislative requirement, it is the Commissioner's administrative practice, to the extent that it is possible, to issue a SOP along with the disclosure notice within three months from the:
- end of the conference phase;⁸⁷ or
 - date when the Commissioner declined the taxpayer's request to opt out.
216. Although rare, even with good planning and the best endeavours of the Inland Revenue officers involved, the disclosure notice and the Commissioner's SOP may not

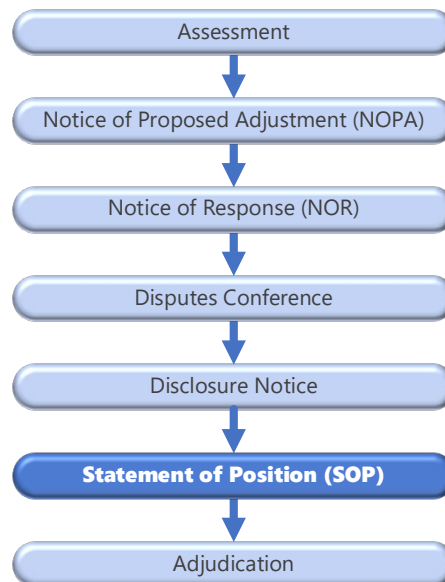
⁸⁷ This three-month timeframe excludes statutory holidays.

always be issued within this three-month timeframe. For instance, this might occur when the:

- facts, issues and law are complex;
- case involves an important issue of precedent and/or Inland Revenue’s legal services or external advisors are involved in advising on the Commissioner’s SOP; or
- Commissioner is waiting for information to be provided under a request using a statutory power. When there is such a request the Commissioner will defer issuing a disclosure notice so any information the taxpayer or a third party provides can be included in the Commissioner’s SOP.

217. If it is considered the three-month timeframe should be extended, then approval will first be obtained from a senior Inland Revenue officer. The taxpayer will then be advised of the estimated date for issue of the Commissioner’s disclosure notice and SOP. Where the estimated date cannot be met, Inland Revenue will use its best endeavours to keep the taxpayer informed of the progress made in the completion of the Commissioner’s SOP.

Statement of position (SOP)



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

- timeframes available to issue a SOP (the response periods);
- contents of a SOP;

This is further discussed at [312] under “Disputant may challenge the Commissioner’s refusal to accept a late disputes document”.

Contents of a SOP

231. A SOP must:

- be issued in the prescribed form ([Statement of position \(IR 773\)](#)); and
- include sufficient detail to fairly advise the recipient of an outline of the facts, evidence and issues and specify the propositions of law on which the party issuing the SOP wishes to rely.⁹⁴

232. As stated at [109], if either party wishes to propose another adjustment or the Commissioner wishes to propose a fresh or increased liability after a NOPA has been issued, this can be done only by including the proposed adjustment in a further NOPA; it cannot be done simply by including it in a subsequent disputes document (a SOP in this instance).

Issues and propositions of law exclusion rule

233. The issues and propositions of law exclusion rule generally confine the taxpayer and Commissioner to arguing in any subsequent challenge proceedings only those issues and propositions of laws that were disclosed in their respective SOPs.⁹⁵

234. The only exception to this rule is where a court order is obtained to the effect that either the applicant could not, with due diligence at the time the SOP was delivered, have discerned those propositions of law or issues, or the hearing authority considers that the raising of those propositions of law or issues is necessary to avoid manifest injustice to either party.⁹⁶

235. A mistaken description of facts, evidence, issues or propositions of law and submissions made in a SOP can later be amended, if the parties agree to include additional information in the SOPs.⁹⁷

⁹⁴ Section 89M(4) and (6).

⁹⁵ Section 138G(1).

⁹⁶ Section 138G(2).

⁹⁷ Section 89M(13).

- time bar prevents the Commissioner from subsequently increasing the assessment (for further discussion see [275] under “Statutory time bar and exceptions to the time bar”);
- any of the legislative exceptions specified in s 89N(1)(c) applies (for further discussion see [319] under “Commissioner’s ability to amend an assessment without completing the disputes process”); or
 - the High Court has made an order that the disputes process can be truncated pursuant to an application by the Commissioner.¹⁰⁴
258. Any decision not to send the dispute to the TCO must be made by a senior Inland Revenue officer. In those rare instances where the dispute does not progress to the TCO for adjudication, the responsible Inland Revenue officer will consider the facts and legal arguments in the taxpayer’s SOP before deciding whether to amend the assessment.
259. Whether the Commissioner has adequately considered a SOP will depend on what constitutes a reasonable length of time and level of analysis for that SOP given the circumstances of the case (for example, the length of the SOP and complexity of the legal issues).
260. Where the TCO has insufficient time before the statutory time bar arises to fully consider a matter submitted to it, the matter will be returned to the responsible officer to decide whether to issue an assessment or amended assessment (as appropriate), issue a challenge notice or accept the taxpayer’s position. Sections 89N and 113 allow the Commissioner to amend an assessment at any time after the Commissioner has considered the taxpayer’s SOP in relation to the particular period.
261. If the dispute is to be referred to the TCO, the Commissioner should not issue an assessment, amended assessment or challenge notice before the adjudication process is completed unless a time bar is imminent.

What happens before the dispute is sent for adjudication

262. Before the dispute is referred to the TCO, the responsible officer prepares a cover sheet that records the documents to be sent to the TCO. These documents will include (as appropriate) copies of all notices of proposed adjustment (NOPAs), notices of response (NORs), notices rejecting the NOR, conference notes (and any recordings of discussions held during the conference), both parties’ SOPs, as well as any other relevant additional

¹⁰⁴ Section 89N(3).

300. The Commissioner cannot accept a dispute document that a taxpayer issues outside the applicable response period, unless that lateness has arisen:¹³³
- because of an exceptional circumstance; or
 - the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.

Exceptional circumstances

301. Although s 89K defines exceptional circumstances very narrowly, case law provides some guidance about when the courts would hold that an exceptional circumstance arises:¹³⁴
- A taxpayer's misunderstanding or erroneous calculation of the applicable response period will usually not be regarded as an event or circumstance beyond the taxpayer's control, so is **not an exceptional circumstance**.
 - An agent's failure to advise their client they have received a notice of assessment or other relevant documents that has caused the taxpayer to respond outside the applicable response period will **not generally be considered an exceptional circumstance**.
 - If the taxpayer has relied on misleading information the Commissioner has given them that causes the taxpayer to respond outside the applicable response period, **an exceptional circumstance can arise**.
 - As discussed at [28], **an exceptional circumstance can arise** when the Commissioner is taking or considering taking prosecution action against a taxpayer and that taxpayer, to protect their fair trial rights, chooses not to proceed with the disputes process until either the Commissioner makes a final decision not to undertake prosecution action or the prosecution action is completed.
302. Further examples of situations considered exceptional circumstances beyond a taxpayer's control are in [Tax Information Bulletin](#) Vol 8, No 3 (August 1996).¹³⁵
303. An exceptional circumstance may also arise where the lateness was minimal or results from one or more statutory holidays falling in the response period. Generally, the

¹³³ Section 89K(1)(a).

¹³⁴ See, for instance, *Treasury Technology Holdings Ltd v CIR* (1998) 18 NZTC 13,752, *Milburn NZ Ltd v CIR* (1998) 18 NZTC 14,005, *Fuji Xerox NZ Ltd v CIR* (2001) NZTC 17,470 (CA), *Hollis v CIR* (2005) 22 NZTC 19,570 and *Balich v CIR* (2007) 23 NZTC 21,230.

¹³⁵ The item in the *Tax Information Bulletin* has no title but is about the new disputes resolution process that came into effect in October 1996.

apply this requirement for exceptional circumstances consistently with the similar requirement relating to taxpayers in s 89K(1)(a) (see the discussion from [301]).

317. What constitutes an **exceptional circumstance** is illustrated in Example 3.

Example 3: An exceptional circumstance

An earthquake damaged an Inland Revenue office during the applicable response period for a taxpayer's NOPA. The taxpayer's NOPA although delivered, could not be subsequently accessed. The Inland Revenue officer could not access the NOPA within the applicable response period. The absence of information has prevented the Commissioner from forming a view on the subject matter in dispute. The Commissioner can apply for a High Court order for further time to issue a NOR.

318. Example 4 illustrates what is **not an exceptional circumstance**.

Example 4: What is not an exceptional circumstance

The Inland Revenue officer to whom a taxpayer's NOPA was assigned is absent on annual leave at the end of the response period. The Inland Revenue officer does not arrange for another officer to prepare and issue a NOR to the taxpayer within the response period. In this circumstance, the Commissioner does not consider that an exceptional circumstance prevented the Inland Revenue officer from rejecting the adjustment within the response period, and the Commissioner will be deemed to have accepted the taxpayer's proposed adjustments.

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

319. When the Commissioner and the taxpayer cannot agree on the proposed adjustment, the Commissioner cannot amend an assessment without completing the disputes process, unless one of the statutory exceptions applies.¹⁴⁵ These exceptions are that:
- in the course of the dispute, the Commissioner considers the taxpayer has committed an offence under an Inland Revenue Act that has had the effect of delaying the completion of the disputes process;¹⁴⁶

¹⁴⁵ Contained in s 89N.

¹⁴⁶ Section 89N(1)(c)(i).

The Commissioner may also apply to the High Court for an order to allow more time to complete or dispense with the disputes process.¹⁵⁵ Whether the Commissioner has adequately considered a SOP will depend on what constitutes a reasonable length of time and level of analysis for that SOP given the circumstance of the case (for example, the length of the SOP and the complexity of the legal issues. For further information see [259]).

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

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

323. The Commissioner and a taxpayer can enter into an agreement not to complete the disputes process, if they are satisfied the dispute can be more efficiently resolved by a hearing authority. This is known as opting out.¹⁵⁶ The Commissioner will not agree to the taxpayer opting out unless a conference meeting has occurred.
324. Where the taxpayer has participated meaningfully during the conference phase and signed a declaration that all material information has been provided, the Commissioner will agree to the taxpayer's preference to opt out of the disputes process if the:
- total amount of tax in dispute is \$75,000 or less, except where the dispute is part of a wider dispute (see from [325]);
 - dispute turns on issues of fact only (for example, facts that are to be determined by reference to expert opinions or valuations) (see from [328]);
 - dispute concerns facts and issues waiting to be resolved by a court in another case (see from [330]); or
 - dispute concerns facts and issues similar to those considered by the TCO if similar issues have been considered in a previous dispute (see from [333]).

Threshold of \$75,000 or less

325. 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. In this regard, the "core tax in

¹⁵⁵ Section 89N(3).

¹⁵⁶ Section 89N(1)(c)(viii).

dispute” refers to the tax on all of the proposed tax adjustments for all periods or years in dispute. This \$75,000 or less threshold does not apply if the dispute is part of a wider dispute that involves several taxpayers.¹⁵⁷

326. The \$75,000 or less threshold excludes:

- shortfall penalties proposed in the same NOPA or NOR as the core tax or proposed in a separate NOPA;
- use-of-money interest that results from the position taken in the Commissioner’s NOPA or NOR; and
- late payment penalties imposed on the taxpayer, if applicable.

327. In some disputes, adjustments may be proposed in respect of more than one tax type or more than one return period or income year. The \$75,000 or less threshold applies to the total amount of tax in the **same** dispute. The threshold will consider:

- the proposed adjustments in the parties’ NOPA;
- any variation of the amount of tax in dispute due to the partial acceptance of the parties’ NOPA; and
- any variation of the net total amount of tax in dispute as agreed between the parties during the conference phase.

Dispute turns on issues of fact only

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

329. 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 involves analysing mixed questions of law and fact.

Dispute concerns facts and issues waiting for court resolution of another case

330. The opt-out process is available if the facts and issues relating to the dispute are similar to those waiting for resolution by a court.

¹⁵⁷ An example of this is a tax avoidance arrangement similar to the “Trinity forestry scheme” in *Accent Management Ltd v CIR* [2007] NZCA 230.

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

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

333. The opt-out process is available if the facts and issues relating to the dispute are similar to those the TCO has already considered. A taxpayer may ask to opt out of the disputes process because a previous adjudication decision was in favour of the Commissioner and they consider it unlikely the Commissioner's view will change. In considering the taxpayer's request, Inland Revenue will advise the taxpayer of its views as to any similarity but will consider the confidentiality provisions of the Act.¹⁵⁸
334. In some cases, a taxpayer may not be aware of similar disputes the TCO has considered when the taxpayer issues the NOPA or participates at a conference meeting (perhaps because they are not aware of the appropriate Technical Decision Summary¹⁵⁹ published by the TCO). Inland Revenue officers may be aware of other similar disputes, and may choose to advise the taxpayer that, should the taxpayer ask to opt out, Inland Revenue would be likely to agree. However, Inland Revenue must consider the confidentiality provisions of the Act when considering the extent of any information that can be shared with the taxpayer.

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

335. Sometimes it is necessary for Inland Revenue to deal with many taxpayers who are all affected by the same disputed matter. Given Inland Revenue's limited resources and

¹⁵⁸ Section 18.

¹⁵⁹ Technical Decision Summaries provide an anonymised summary of a decided adjudication.

respect of the same transaction. However, in some rare 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.

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

342. Where the TCO has looked at an issue several times and consistently taken a view supporting the Commissioner, agreement between the parties to opt out is an available option.
343. In these circumstances, the Commissioner will indicate to the taxpayer that the dispute could be suitable for them to opt out of the process. However, taxpayers still have the choice to progress through the full disputes process. The ability to opt out of the disputes process is discussed more generally from [323].

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

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

Exception 1: The assessment corresponds with a tax return provided by a taxpayer¹⁶⁰

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

¹⁶⁰ Section 89C(a).

Exception 2: A simple or obvious mistake or oversight in a taxpayer's return¹⁶¹

348. Examples of a simple mistake or oversight are:¹⁶²

- mathematical errors;
- transposition errors (for example, an error in transposing numbers from one box to another in a tax return);
- double counting (for example, inadvertently including in the taxpayer's income the same item twice); and
- not claiming or incorrectly calculating a credit to which the taxpayer is entitled.

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

Exception 3: An agreement exists to amend a previous tax position taken by a taxpayer¹⁶³

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

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

Exception 4: The assessment reflects an agreement reached between the Commissioner and a taxpayer¹⁶⁴

352. The same procedures apply as for exception 3. However, the agreement the parties reach does not have to relate to a tax position the taxpayer has previously taken.

353. For example, where, under s 6A, the Commissioner settles a tax case or a dispute, the Commissioner will usually enter an individual settlement deed with the taxpayer to

¹⁶¹ Section 89C(b).

¹⁶² *Case V17* (2002) 20 NZTC 10,192, TRA No 002/01.

¹⁶³ Section 89C(c).

¹⁶⁴ Section 89C(d).

confirm the settlement. The Commissioner will then give effect to that settlement deed by issuing an assessment to the taxpayer using this exception.

Exception 5: The assessment is being made on material facts and relevant law that are identical to those for an assessment for the taxpayer for another period that is the subject of court proceedings¹⁶⁵

354. The Commissioner can issue an assessment to the taxpayer in relation to a period in circumstances where the facts and law being relied on are identical to those in another period that is already before the court proceedings. The Commissioner does not have to follow the disputes process for the same issue because the matter is already before the court to resolve; a dual process towards resolution does not need to be adopted.
355. However, a taxpayer who has been issued with an assessment in relation to another period under this exception can dispute that assessment by challenging the assessment by starting proceedings in a hearing authority.¹⁶⁶

Exception 6: The Commissioner has reasonable grounds to believe a notice may cause the taxpayer (or an associated person) to leave New Zealand or take steps to move or hide the taxpayer's assets, making it harder for the Commissioner to collect tax from the taxpayer¹⁶⁷

356. This exception is intended to protect the revenue. It does not require the taxpayer to have physical possession of the assets.
357. Use of this exception needs to be supported by evidence of the "reasonable grounds" relied on. For example, these reasonable grounds could be supported by the taxpayer's correspondence with third parties, an application to emigrate overseas or statements made by the taxpayer (for instance, transcripts of interviews with the taxpayer). These reasonable grounds do not have to be absolute proof but must be reasonable in the circumstances.

¹⁶⁵ Section 89C(db).

¹⁶⁶ Section 138B(3) and (4).

¹⁶⁷ Section 89C(e).

Exception 7: The Commissioner has reasonable grounds to believe the taxpayer has been involved in fraudulent activity¹⁶⁸

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

Exception 8: The assessment corrects a tax position taken by a taxpayer that, in the Commissioner’s opinion, is vexatious or frivolous¹⁶⁹

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

Exception 9: The assessment is being made because of a direction or determination of a court or the Taxation Review Authority¹⁷⁰

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

¹⁶⁸ Section 89C(eb).

¹⁶⁹ Section 89C(f).

¹⁷⁰ Section 89C(g).

Exception 19: The assessment includes a calculation of Working for Families tax credits¹⁸⁴

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

This Standard Practice Statement is signed on 24 February 2023.

Rob Falk

Technical Lead, Technical Standards - Legal Services

¹⁸⁴ Section 89C(m).

