

STANDARD PRACTICE STATEMENT

# Disputes process

Issued: 24 February 2023

SPS 23/01

## About this document

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

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

### START DATE:

24 February 2023

### REPLACES

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

## Introduction to this Standard Practice Statement

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

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

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

This statement has also been published as "Disputes process", Tax Information Bulletin Vol 35, No 2 (March 2023).

### How best to use this Standard Practice Statement

**Learn about the obligations of both parties to a dispute.** This statement allows readers to learn not only what their rights and responsibilities are at each step of the disputes process, but also the rights and responsibilities of the other party to the dispute.

**Follow the course of your dispute from its commencement to whatever its conclusion is.** The discussion in the SPS commences at a dispute's starting point, generally the making of an assessment by a taxpayer or the Commissioner (or the making of a disputable decision by the Commissioner) and proceeds through all potential stages of a dispute in the order in which they may occur.

**Learn solely about that stage of the process in which your dispute currently resides.** The discussion on each phase of the disputes process is self-contained. For instance, if your dispute is at the Notice of Response (NOR) phase, it will only be necessary to read the discussion on the NOR phase, rather than having to read all the SPS to ensure that you have all the information that may be of relevance to that phase of the dispute. This is important given that most disputes are concluded without the need to traverse every potential phase of the disputes process. As a result, wherever possible, unnecessary reading has been eliminated.

**Use hyperlinking to navigate the various dispute phases and topics.** By following the instructions (Ctrl + Click), you can navigate directly to the relevant phase of the dispute process from the table of contents. Each content line is hyperlinked directly to the relevant text. In addition, all cross-references within the statement are hyperlinked, so you can jump directly to more in-depth discussion of a topic if you wish to learn more.

## Summary of changes in content from the previous items

This statement replaces:

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

The most obvious change is that what were previously two statements have been merged into a single statement. Additionally, some stylistic and grammatical changes have been made to improve the comprehension of the statement. These have been previously discussed in this introduction under “How best to use this Standard Practice Statement”.

This statement includes additional or amended discussion on the following six topics:

- Certain qualifying taxpayers can have an assessment corrected without a notice of proposed assessment (NOPA) (at [16]-[17]) – this may be important for someone whose income is made up solely of “reportable income”. Reportable income is income Inland Revenue receives regular information about such as income from employment.
- Where Commissioner issues a deemed assessment of reportable income (at [59]-[62], [373]-[374]) – how this income is assessed and how (and when) a taxpayer can dispute an assessment.
- Where prosecution action is being considered during the disputes process (at [21]-[30]) – how the Commissioner seeks to protect a taxpayer’s fair trial rights.
- Deficiencies in the contents of a taxpayer’s dispute documents (at [102]-[105], [139]-[144], [241]-[243]) – what occurs when a taxpayer’s dispute document does not meet the required standard.
- Proposing additional adjustments or an increased liability to tax (at [109]-[112]) – where there is an existing dispute, how an additional adjustment (or an increase in a taxpayer’s tax liability) may be proposed.
- COVID-19-related legislative changes ([290]) – some decisions made under COVID-19 response legislation are excluded from the definition of “disputable decision”.

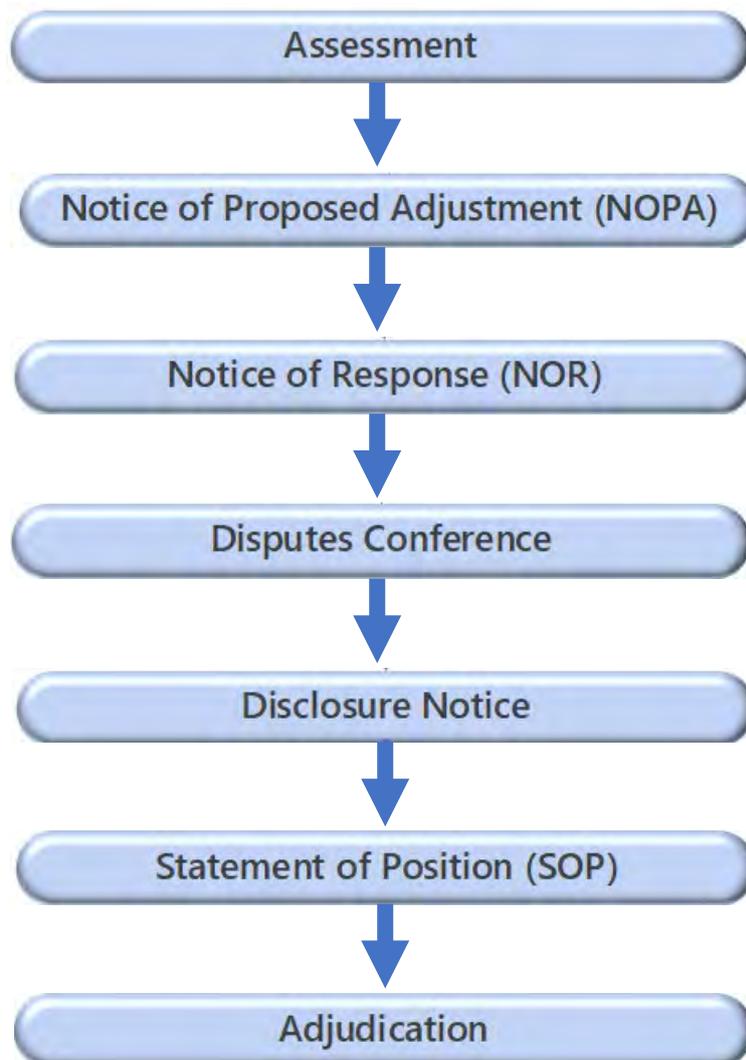
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## Structure of this statement

After a section discussing the background to the disputes process, this statement has the following structure:



A final section addresses other matters that may arise during a dispute ([274] to [377]).

## Background to the disputes process

### Objectives of the disputes process

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

### Legislative and administrative phases of the disputes process

#### Legislative phases

5. The early resolution of a dispute is intended to be achieved through a series of legislative phases (that are specified in the Act) and phases that are purely administrative. The main elements of the legislative phases are the issuing of the following documents:

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

<sup>2</sup> Sections 89C and 89N(1)(c). See further [319].

- A **notice of proposed adjustment (NOPA)** is a notice the Commissioner or taxpayer issues to the other party, advising the other party that an adjustment is sought in relation to the taxpayer's assessment, the Commissioner's assessment or disputable decision. The NOPA is the formal document that begins the disputes process. Its prescribed form is the [Notice of Proposed Adjustment \(IR 770\)](#).
- A **notice of response (NOR)** must be issued if the recipient of the NOPA disagrees with it, wholly or in part. The preferred form for the NOR is the [Notice of Response \(IR 771\)](#). The taxpayer must issue a notice rejecting the Commissioner's NOR if they disagree with the Commissioner's NOR, wholly or in part. The Commissioner is not required to issue a notice rejecting a taxpayer's NOR, but the Commissioner will communicate to the taxpayer whether the NOR is being accepted or rejected in whole or in part.
- A **disclosure notice** is issued by the Commissioner where the taxpayer has initiated the dispute (by issuing a NOPA). This notice triggers the requirement for the taxpayer to provide a statement of position to continue the dispute. Where the Commissioner has initiated the dispute, the Commissioner's statement of position (SOP) will be issued with the disclosure notice.
- Each party's **statement of position (SOP)** must provide an outline of the issues, facts, evidence and propositions of law with sufficient details to support the positions taken. The issues and propositions of law are binding on the parties to the dispute.<sup>3</sup> Each party must issue a SOP. The prescribed form is the [Statement of position \(IR 773\)](#).

## Administrative phases

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

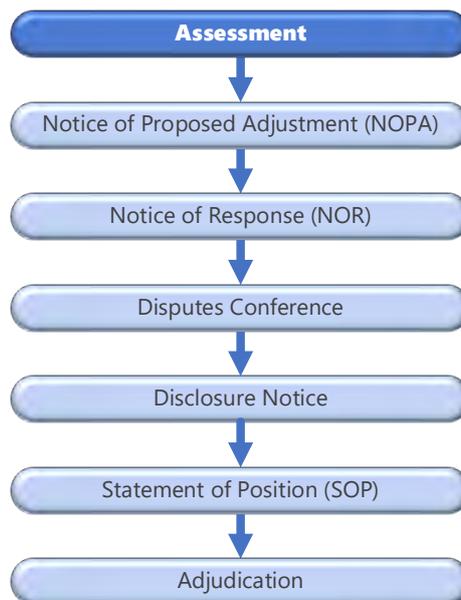
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<sup>3</sup> Section 138G.

8. Adjudication involves a review of the dispute by the TCO. The TCO provides an internal but impartial review of unresolved disputes. Adjudication is the final phase in the disputes process before the taxpayer's assessment is amended (if it is to be amended).
9. Inland Revenue has a quality assurance review process (separate from any TCO review), to ensure the Commissioner's dispute documents are reviewed before they are issued. Given the importance of the disputes process to the Commissioner and taxpayers, Inland Revenue officers must gain approval from a senior officer before issuing any dispute documents.

## Detailed discussion

### Assessment



10. This section about the assessment phase discusses:
  - assessments generally;
  - default assessments;
  - qualifying taxpayers who can have an assessment corrected without a notice of proposed adjustment (NOPA);
  - ability to shorten the disputes process at the NOPA phase; and
  - where prosecution action is being considered during the disputes process.

## Assessments generally

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

## Default assessments

15. A taxpayer cannot assess the amount of tax payable for a return period if the Commissioner has previously made an assessment of the tax that is payable for that period.<sup>7</sup> This Commissioner's assessment is known as a "default assessment" and involves the Commissioner estimating the taxpayer's tax liability (and generally occurs where the taxpayer has failed to file their tax return when they have an obligation to do so). This is further discussed at [53] to [58] under "Where the Commissioner issues a default assessment without a NOPA".

## Qualifying taxpayers who can have an assessment corrected without a NOPA

16. Certain qualifying taxpayers can have their income tax assessments<sup>8</sup> corrected without the need for them or the Commissioner to issue a NOPA. A "qualifying individual" is one whose income is made up solely of "reportable income".

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<sup>4</sup> Section 92(1).

<sup>5</sup> Section 92B(1).

<sup>6</sup> Section 92(2) and for GST s 92B(2).

<sup>7</sup> Section 92(6) and for GST s 92B(3).

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

17. "Reportable income" is defined in the Act.<sup>9</sup> It means income Inland Revenue receives regular information about (typically from third parties such as employers) during the income year or by 31 May following the end of the tax year. Reportable income includes PAYE income payments, along with resident and non-resident passive income (where third parties have the taxpayer's IRD number). Further information on how this income is assessed and how errors in these assessments can be corrected is in [SPS 20/03: Requests to Amend Assessments](#).<sup>10</sup>

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

18. The Commissioner and a taxpayer may be involved in a dispute that relates to an earlier dispute for which the Commissioner has issued a challenge notice, or an amended assessment (as appropriate) and court proceedings have been commenced. In this circumstance, where the taxpayer issues a further NOPA in respect of a period not covered by the earlier dispute, the current disputes process can be shortened in one of two ways. The process can be shortened where the adjustment being considered:<sup>11</sup>
- relates to a matter for which the material facts and relevant law are identical to another assessment for the taxpayer (for another period) that is the subject of court proceedings; or
  - seeks to correct a tax position taken by the taxpayer (or an associated person) as a consequence or result of an incorrect tax position being taken by another taxpayer, which is or was the subject of court proceedings.

This process is different from the opt-out process discussed at [319].

19. If the Commissioner agrees that either of the above conditions is met, then a challenge notice is issued in relation to the current dispute, enabling the taxpayer to file a challenge in a hearing authority. Where a taxpayer considers that using this process may be an option, it is recommended they discuss this with Inland Revenue
20. Where the adjustment being considered relates to a period other than the one already being disputed, taxpayers should contact the Inland Revenue staff who are involved in the existing dispute. Where the parties agree that this process could apply, a NOPA should be able to be issued, cross-referencing the original dispute documents.

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

<sup>10</sup> [SPS 20/03 Request to Amend Assessments](#) (Standard Practice Statement, Wellington, Inland Revenue, June 2020).

<sup>11</sup> As per s 138B(4). A challenge notice is issued (or not issued) under s 89P.

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

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

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

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;<sup>13</sup>
  - file an application in the High Court for an extension of the time bar;<sup>14</sup> and

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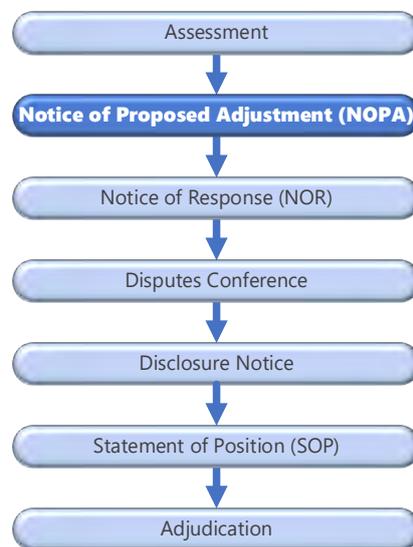
<sup>13</sup> Section 108B.

<sup>14</sup> Section 89N(3) or s 89L(1B).

- if SOPs have been issued by the taxpayer and the Commissioner, and the TCO has determined it has insufficient time to reach a decision at the Adjudication phase, issue the assessment or challenge notice (as appropriate).<sup>15</sup>

This is discussed in more detail in [Commissioners Statement CS 20/04: The Disputes Resolution Process and Fair Trial Rights](#).

## Notice of proposed adjustment (NOPA)



31. This section about the notice of proposed adjustment (NOPA) phase discusses:

- when the Commissioner must issue a NOPA;
- when a taxpayer can issue a NOPA;
- timeframe available to a taxpayer to issue a NOPA (the response period);
- contents of a NOPA;
- receipt of a taxpayer's NOPA;
- deficiencies in the contents of a taxpayer's NOPA;
- length of the Commissioner's NOPA; and

<sup>15</sup> Section 89P.

- proposing additional adjustments or an increased liability to tax.

## When Commissioner must issue a NOPA

32. The Commissioner must issue a NOPA before making an assessment unless one of 19 statutory exceptions to this rule applies. The exceptions can apply independently or together with others, depending on the circumstances. However, the Commissioner can also choose to issue a NOPA before making an assessment even where one or more exceptions apply.
33. These exceptions are further discussed from [344] under "Circumstances under which the Commissioner may issue an assessment without first issuing a NOPA".

## When the Commissioner can issue a NOPA

34. In most circumstances an investigation into a taxpayer's tax affairs will have been completed before the disputes process starts. However, to ensure all facts have been ascertained and a sustainable position taken in the NOPA and to assist in the timely progression of disputes through the process, the Commissioner may be required to use the Commissioner's information-gathering powers (particularly, s 17B).
35. If the Commissioner decides to issue a NOPA, the responsible Inland Revenue officer will endeavour to advise the taxpayer of this fact at least five working days before the date the NOPA will be issued. This is to give the taxpayer time to consider their position and seek further advice. The NOPA is also quality checked for accuracy and completeness before being issued.
36. A NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties as part of the disputes process. The taxpayer is given the opportunity to agree to the Commissioner making an adjustment before issuing a NOPA. However, the taxpayer is not precluded from subsequently issuing a NOPA in respect of any amended assessment the Commissioner issues to reflect an agreed adjustment.
37. A NOPA forms a basis for ensuring the Commissioner does not issue an assessment without some formal and structured dialogue with the taxpayer in respect of the grounds on which the Commissioner proposes to issue an assessment or amended assessment.<sup>16</sup>

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<sup>16</sup> *McIlraith v CIR* (2007) 23 NZTC 21,456 (HC).

38. The Commissioner can issue one NOPA for multiple issues, tax types and periods.<sup>17</sup> Alternatively, the Commissioner can issue multiple NOPAs for the same issue and period, consistent with the obligation to correctly make an assessment within the four-year statutory period. However, the Commissioner endeavours to keep together issues relating to the same period and tax type in the dispute.
39. If the parties agree on some proposed adjustments and dispute others for the same tax period and type, the Commissioner cannot issue or amend an assessment that reflects only those adjustments that have been agreed to until all remaining disputed issues are resolved between the parties or adjudicated by the TCO. That is, the Commissioner cannot issue a "partial" or "interim" assessment, if the Commissioner is not satisfied the total assessment is correct.
40. However, where the statutory time bar is about to fall due, the Commissioner can issue an assessment to reflect both the agreed and disputed adjustment, provided the requirements of s 89N are met. For further discussion, see [275] under "Statutory time bar and exceptions to the time bar".
41. Where practicable, Inland Revenue officers contact the taxpayer or their tax agent within 10 working days after the NOPA is issued to check the taxpayer has received it.
42. As stated at [32], unless one of the 19 statutory exceptions applies, the Commissioner cannot make an assessment without first issuing a NOPA to a taxpayer.<sup>18</sup> Although the Commissioner will ensure an assessment is made in accordance with this statutory requirement, if, on a rare occasion, an assessment was made that breached this requirement, it will still be considered valid.<sup>19</sup>
43. If the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can issue a NOPA to the Commissioner.<sup>20</sup> However, where the Commissioner issues a NOPA to a taxpayer and the taxpayer accepts the proposed adjustment by written agreement or is deemed to have accepted the proposed adjustment (by virtue of not responding with a notice of response (NOR) within the response period), then the taxpayer cannot further challenge the assessment.<sup>21</sup>

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<sup>17</sup> Section 89B(1).

<sup>18</sup> Section 89C.

<sup>19</sup> Section 114(a).

<sup>20</sup> Section 89D(1).

<sup>21</sup> Sections 89I(1) and 89K.

## Limitations on the Commissioner issuing a NOPA

44. The Commissioner cannot issue a NOPA:<sup>22</sup>
- if the proposed adjustment is the subject of challenge proceedings; or
  - after the statutory time bar has expired.
45. The time bar that arises under ss 108 and 108A prevents the Commissioner from issuing an assessment that increases the amount assessed.<sup>23</sup> The Commissioner can still issue an assessment that decreases the amount of the initial assessment subject to the limitation on refunding overpaid tax under s RM 2(1) of the Income Tax Act 2007 and s 45(1) of the Good and Services Tax Act 1985.
46. However, the Commissioner is not subject to the statutory time bar if the Commissioner considers the taxpayer has:
- provided a fraudulent or wilfully misleading tax return;<sup>24</sup>
  - omitted income for which a tax return must be provided that is of a particular nature or source;<sup>25</sup> or
  - knowingly or fraudulently failed to make a full and true disclosure of the material facts necessary to determine their GST payable.<sup>26</sup>
47. The time bar and the exceptions to it are further discussed at [275] under "Statutory time bar and exceptions to the time bar".

## When a taxpayer can issue a NOPA

48. Where a taxpayer issues a NOPA, the NOPA must be issued within the applicable "response period".<sup>27</sup> Generally, this will be within the four-month period that starts on the date the assessment is issued (or the disputable decision is made). The response period is further discussed at [73] under "Timeframe available to a taxpayer to issue a NOPA (the response period)".

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<sup>22</sup> Section 89B(4).

<sup>23</sup> Provided the return is filed.

<sup>24</sup> Section 108(2)(a).

<sup>25</sup> Section 108(2)(b).

<sup>26</sup> Section 108A(3).

<sup>27</sup> Section 89AB.

49. A taxpayer can issue a NOPA to the Commissioner where the Commissioner:<sup>28</sup>
- issues an assessment without a NOPA;
  - issues a default assessment without a NOPA;
  - issues a deemed assessment of reportable income;
  - makes a disputable decision; or
  - issues an assessment reflecting the taxpayer's tax return.

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

50. Where the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can dispute the assessment by issuing a NOPA in respect of any of the matters relevant to making the assessment.<sup>29</sup> This could include preliminary decisions that are necessary to make the assessment.<sup>30</sup>
51. Where the Commissioner and taxpayer agree on an adjustment **before** the Commissioner issues a NOPA or makes an assessment, the taxpayer may dispute the Commissioner's proposed adjustment in the NOPA, despite this previous agreement. However, if the agreed adjustment occurs **after** the issuing of a NOPA and the agreed adjustment was one proposed in the NOPA, then the taxpayer cannot dispute that agreed adjustment.<sup>31</sup>
52. It is the Commissioner's view that a taxpayer cannot make what they purport to be a voluntary disclosure on a matter that they then dispute. This is because the Commissioner considers that a voluntary disclosure can disclose only a tax position the taxpayer believes to be correct. If a taxpayer wishes to dispute a position they agreed to in a voluntary disclosure, then the Commissioner will treat the matter as though the voluntary disclosure had not been made and consider whether the imposition of shortfall penalties is appropriate. For further information, see "[SPS 19/02: Voluntary disclosures](#)".<sup>32</sup>

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<sup>28</sup> Sections 89D and 89DA.

<sup>29</sup> Section 89D(1).

<sup>30</sup> *MR Forestry (No 1) Trust Ltd v CIR* (2006) 22 NZTC 19,954.

<sup>31</sup> Section 89I.

<sup>32</sup> "[SPS 19/02: Voluntary disclosures](#)", *Tax Information Bulletin* Vol 31, No 4 (May 2019): 157, particularly [44] to [47].

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

53. If a taxpayer has not filed a tax return, the Commissioner can make a default assessment without first issuing a NOPA to the taxpayer.<sup>33</sup> A default assessment involves the Commissioner estimating the taxpayer's tax liability for a particular income year. Similar rules apply in relation to GST.<sup>34</sup>
54. A taxpayer who intends to dispute a default assessment through the disputes process must:<sup>35</sup>
- issue a NOPA to the Commissioner in respect of the default assessment within the applicable response period; generally, this will be within the four-month period that starts on the date the Commissioner issues the default assessment;<sup>36</sup> and
  - provide a tax return for the period to which the default assessment relates, notwithstanding that the tax return cannot include the taxpayer's assessment.<sup>37</sup>
55. The legislative requirement to provide a tax return in respect of a default assessment made by the Commissioner when issuing a NOPA is an additional requirement of this part of the disputes process. This ensures the taxpayer has provided the necessary statutory information before they dispute the default assessment.
56. These legislative requirements also mean a taxpayer cannot commence a dispute or challenge proceedings in a hearing authority by simply filing the tax return to which the default assessment relates. The taxpayer must also issue a NOPA.
57. If the Commissioner agrees with the taxpayer's tax return and NOPA, the Commissioner will amend the default assessment by exercising the discretion provided under s 113 (subject to the statutory time bar and other relevant limitations on the exercise of that discretion).
58. However, if the Commissioner disagrees with the taxpayer's tax return and NOPA, the Commissioner cannot be compelled to amend the default assessment; instead, the Commissioner must issue a NOR to the taxpayer within the relevant response period to continue the disputes process. If the Commissioner does not issue a NOR within the response period, the Commissioner will be deemed to accept the taxpayer's NOPA.<sup>38</sup>

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<sup>33</sup> Section 106(1).

<sup>34</sup> Section 89D(2C).

<sup>35</sup> Section 89D(1) and (2).

<sup>36</sup> Section 89D(1).

<sup>37</sup> Section 89D(2) and (2A). For GST, see s 89D(2C) and (2D).

<sup>38</sup> Section 89H(2).

## Where the Commissioner issues a deemed assessment of reportable income

59. As stated at [16], a qualifying individual (that is, one whose income in an income year is made up solely of reportable income) can have their individual income tax assessment corrected without the need for them or the Commissioner to issue a NOPA.
60. Generally, where the taxpayer considers their pre-populated account is incorrect, they must advise the Commissioner of the reasons and provide the relevant information to correct the pre-populated account.<sup>39</sup> This must be done within the statutory time limit; that is, by their terminal tax due date for the tax year. While the taxpayer can change their automatically issued income tax assessment at any time before this date, the Commissioner does not have to accept the change if the Commissioner has reason to believe the amendment is incorrect.<sup>40</sup>
61. If the taxpayer does not provide the relevant information within the statutory time limit, they are treated as having filed a tax return<sup>41</sup> and made an assessment.<sup>42</sup> This is known as an “automatically issued individual income tax assessment”. Because the taxpayer is treated as having filed a tax return and made an assessment, they can issue a NOPA to the Commissioner if they disagree with the correctness of the automatically issued individual income tax assessment.
62. If a taxpayer wants to dispute this assessment, they must issue a NOPA (with the amended figures) to the Commissioner in respect of the assessment within the applicable response period (that is, four months after the date the assessment is finalised).<sup>43</sup>

## Where the Commissioner makes a disputable decision

63. A taxpayer can issue a NOPA in respect of a disputable decision that is not an assessment.<sup>44</sup>
64. A disputable decision is defined as including “a decision of the Commissioner under a tax law”.<sup>45</sup> A decision of the Commissioner under a tax law generally refers to a tax law that specifically confers a discretion or power on the Commissioner.

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<sup>39</sup> Sections 22G and 22H.

<sup>40</sup> Section 22G(4).

<sup>41</sup> Section 22I(1)(a).

<sup>42</sup> Section 22(1)(b).

<sup>43</sup> Section 89AB(3)(a).

<sup>44</sup> Section 89D(3).

<sup>45</sup> Section 3.

65. However, some decisions the Commissioner makes are specifically excluded from being disputable decisions.<sup>46</sup> Although a taxpayer is unable to dispute these decisions specifically, if the Commissioner subsequently issues an assessment that includes that disputable decision, a taxpayer can challenge the correctness of the assessment in the usual way.<sup>47</sup> Additionally, a decision the Commissioner makes that is not a disputable decision may be amenable to judicial review.
66. If a taxpayer wishes (and is permitted) to challenge a disputable decision, the taxpayer must issue the NOPA to the Commissioner within the applicable response period. Generally, this will be within the four-month period that starts on the date the Commissioner issues the notice of disputable decision or notice revoking or varying a disputable decision that is not an assessment.
67. It is important to note that issuing a NOPA is not the only way a taxpayer can raise concerns about a disputable decision they consider incorrect. They are entitled to engage with Inland Revenue to raise concerns about a disputable decision that has been reached and ask that it be reconsidered or to provide additional information to Inland Revenue.
68. However, it is only by issuing a NOPA that a taxpayer can dispute a disputable decision through the disputes process. Disputable decisions are discussed further at [288].

### **Where the Commissioner issues an assessment reflecting the taxpayer's tax return**

69. A taxpayer can issue to the Commissioner a NOPA in respect of the taxpayer's own tax assessment.<sup>48</sup>
70. The taxpayer's NOPA must be issued within the applicable response period. Generally, this will be within the four-month period that starts on the date that the Commissioner receives the assessment made by the taxpayer, unless the Commissioner accepts a late NOPA.
71. The date that the Commissioner receives the taxpayer's assessment, or their NOPA is determined by the wording of s 14F. For instance, a communication to the Commissioner by post is treated as having been received at the time the communication would have been delivered in the ordinary course of the post. If the

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<sup>46</sup> These are mostly found in s 138E.

<sup>47</sup> *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

<sup>48</sup> Section 89DA(1).

communication is by electronic means, then it is treated as received at the time it was received electronically by the Commissioner.<sup>49</sup>

72. A taxpayer is limited in their ability to issue a NOPA to the Commissioner where there has been an amended assessment. In this circumstance, the taxpayer is limited to disputing only the amount of the increased liability imposed by the amended assessment.<sup>50</sup>

### **Timeframe available to a taxpayer to issue a NOPA (the response period)**

73. The taxpayer must issue their NOPA within the applicable “response period”.<sup>51</sup> Generally, this will be within the four-month period that starts on the date the assessment is issued, unless the Commissioner accepts a late NOPA.<sup>52</sup> The date of issue is the date the notice of assessment is sent. It is the date that the notice either physically leaves Inland Revenue (for delivery to the post office, external mailbox or courier for instance) or the date the notice of assessment appears in the taxpayer’s myIR account. Generally, this will be determined by the date on the notice, which, it is assumed, will be the same date the notice was actually sent. However, this is a rebuttable presumption. If the taxpayer is able to rebut this presumption, that would be relevant in determining whether an exceptional circumstance exists.
74. It is the Commissioner’s view that where a due date exists for a response in the disputes process, then the response must be received by the recipient by that due date.<sup>53</sup> This is illustrated in Example 1. Taxpayer responses received after the due date are further discussed at [298] under “Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period”.

#### **Example 1: Response must be received by the recipient by the due date**

After filing its 2021 IR3 income tax return, P&B Plate Limited receives the resulting notice of assessment from the Commissioner on Thursday, 24 March 2022. The notice of assessment is dated Monday, 21 March 2022. If P&B Plate Limited wishes to propose an adjustment to this assessment, the calculation of the response period for the issue of its NOPA starts on the date of issue of the assessment – Monday,

<sup>49</sup> Section 214 of the Contract and Commercial Law Act 2017.

<sup>50</sup> Section 89DA(1B)(b).

<sup>51</sup> Section 89AB.

<sup>52</sup> Section 89K(1).

<sup>53</sup> Sections 14 and 14B to 14G.

21 March 2022. Therefore, the NOPA must be received by the Commissioner on or before Wednesday, 20 July 2022; four months after the assessment's date of issue.

75. The Commissioner is able to accept a taxpayer's late dispute documents (NOPA, NOR or SOP) only where an exceptional circumstance exists or the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.<sup>54</sup>

## Contents of a NOPA

76. A NOPA is the document that starts the disputes process, so it is intended to identify the points of contention and explain the legal or technical aspects of the issuer's position in relation to the proposed adjustment in an understandable manner. This ensures all relevant information is made available to the parties in the dispute.
77. With two exceptions, the content requirements for a NOPA are identical for both the Commissioner and taxpayers.<sup>55</sup> All NOPAs must:
- contain sufficient detail of all the following requirements to identify the issues arising between the parties;
  - be in the prescribed form;
  - identify the adjustment or adjustments proposed to be made to the assessment;
  - provide a statement of the facts and the law in sufficient detail to advise the grounds for the proposed adjustment or adjustments, and the Commissioner has the added requirement of concisely stating this information; and
  - state how the law applies to the facts.
78. Taxpayers have an added requirement – to include copies of the documents they are aware of at the time the NOPA is issued that are significantly relevant to the issues arising in the dispute.

### Be in the prescribed form

79. The NOPA should be in the prescribed form, [Notice of proposed adjustment \(IR 770\)](#), which is available from Inland Revenue's website ([www.ird.govt.nz](http://www.ird.govt.nz)). However, a NOPA will not be treated as being invalid just because it contains minor differences from the prescribed form, so long as the form used still has the same effect and is not

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<sup>54</sup> Section 89K(1).

<sup>55</sup> Section 89F(1)–(3).

misleading.<sup>56</sup> This is further discussed at [102] under “Deficiencies in the contents of a taxpayer’s NOPA”.

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

80. The NOPA must include, in respect of each proposed adjustment, the monetary amount or impact of the adjustment, and the tax year or period to which the proposed adjustment relates.
81. In addition, as well as indicating whether use-of-money interest will apply to the proposed adjustment, a NOPA issued by the Commissioner will also consider whether shortfall penalties apply, where appropriate; that is, where sufficient evidence is held to support the imposition of the penalties, and this can be justified (by reference to relevant guidelines). For further discussion on the imposition of shortfall penalties, see [296] under “Shortfall penalties”.

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

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

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<sup>56</sup> Section 52 of the Legislation Act 2019.

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

context. The application of the law to the facts should be stated concisely and logically support the proposed adjustment.

94. The NOPA must outline all relevant materials and arguments (including alternative arguments) being relied on. If more than one argument supports the same or a similar outcome, the NOPA must include all the arguments the disputant is relying on.
95. For each proposition of law, it is recommended that the NOPA makes a clear link to an outline of the supporting facts.

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

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

In this circumstance, the Commissioner expects the taxpayer to send copies of the documents as soon as they are available. Inland Revenue may use the Commissioner's information-gathering powers where this is considered necessary.

## Receipt of a taxpayer's NOPA

99. Inland Revenue will usually assign a taxpayer's NOPA to an officer (the responsible officer) within five working days after it is received.
100. After receiving the NOPA, that responsible officer will determine and record the:
- date on which the NOPA was received by the Commissioner, whether the NOPA has been received within the applicable response period and the date by which the Commissioner's response must be issued; and
  - NOPA's salient features, including any deficiencies in its content.
101. Within 10 working days of receipt, Inland Revenue will advise the taxpayer (or their tax agent), by telephone or in writing, that it has received the NOPA. When the dispute document is received late, the taxpayer will also be advised of the applicable timeframe for the acceptance (or not) of the late document. They will also be informed of the effect of the Commissioner not meeting the one-month timeframe for the issue of the refusal notice. This is further discussed at [312] under "Disputant may challenge the Commissioner's refusal to accept a late disputes document".

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

102. Although, ideally, a NOPA should be in the prescribed form, as long as the document the taxpayer uses is clearly identified as a NOPA, it specifies the adjustments proposed, and it contains the required information in sufficient detail so the objective of the prescribed form is achieved, the Commissioner will accept it.
103. If the Commissioner receives a NOPA that has insufficient detail, the practice is to advise the taxpayer and give them an opportunity to include the required information. If this occurs on the last day of the response period, the Commissioner will consider any resubmitted NOPA received after the response period ends as able to be accepted, because an exceptional circumstance has arisen or the taxpayer can prove a demonstrable intention to enter into or continue the disputes process. For further discussion, see [298] under "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".
104. The Commissioner does not have the power to determine the validity of a taxpayer's NOPA. This can be determined only by the courts in challenge proceedings.<sup>57</sup> The fact the Commissioner believes it to be invalid will form part of the Commissioner's

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<sup>57</sup> *CIR v Alam* [2009] NZCA 273 and *Riccarton Construction Ltd v CIR* (2010) 24 NZTC 24,191.

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.<sup>58</sup> 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

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

this can be done only by including the proposed adjustment in a further NOPA; it cannot be done by one party simply including the additional adjustment in a subsequent disputes document (a NOR or SOP, for instance). Any additional NOPA must be received within the remaining available response period.

111. Where a taxpayer wishes to propose an adjustment that increases their liability, they may do so at any time. However, the Commissioner will treat this as a voluntary disclosure. How to make a voluntary disclosure and how the Commissioner treats them are dealt with in standard practice statement [SPS 19/02: Voluntary disclosures](#).<sup>59</sup>
112. If the Commissioner does not agree with the adjustment the taxpayer proposes in their NOPA, the Commissioner must issue a NOR within the response period. However, if in addition, the Commissioner wishes to propose an additional adjustment that increases the taxpayer's liability, the Commissioner must issue a NOPA in relation to that new proposed adjustment. The Commissioner cannot include the proposed adjustment in relation to the assessable income by simply including that proposal in the Commissioner's NOR. This is illustrated in Example 2:

#### **Example 2: The Commissioner issues a NOR in response to a taxpayer NOPA**

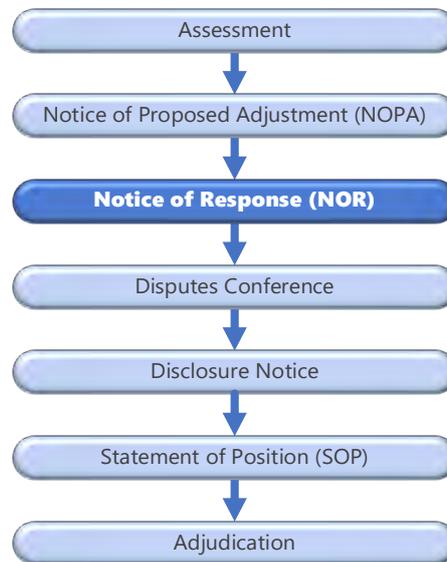
A taxpayer files their 2020 income tax return and subsequently issues a NOPA to the Commissioner proposing an adjustment in relation to additional expenditure the taxpayer believes to be deductible. While considering the taxpayer's proposed adjustment, Inland Revenue staff find income the taxpayer has treated as exempt in that 2020 return that is, in their view, assessable to the taxpayer. In this circumstance, the Commissioner must issue a NOR that responds to the taxpayer's NOPA (if the Commissioner wishes to dispute that proposed adjustment) and, in addition, issue a NOPA in relation to the proposed adjustment that increases the amount of the taxpayer's assessable income.

In this example, two disputes will be being progressed simultaneously in the short term. However, it is expected that, if the parties are still in dispute after the conference phase (discussed from [154]), then the proposed adjustments contained in the multiple NOPAs would be combined into one SOP. Combining multiple issues into one dispute has the benefit of reducing compliance costs and should reduce the time taken in the disputes process.

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<sup>59</sup> [SPS 19/02: Voluntary disclosures](#) "Tax Information Bulletin Vol 31, No 4 (May 2019): 157.

## Notice of response (NOR)



113. This section about the notice of response (NOR) phase discusses:

- NORs generally;
- timeframe available to issue a NOR (the response period);
- contents of a NOR;
- taxpayer's rejection of a NOR; and
- timeframe to complete the disputes process.

### NORs generally

114. If the recipient of a notice of proposed adjustment (NOPA) disagrees with the adjustments proposed by the other party, they must advise the other party which of their proposed adjustments are rejected. The statutory requirement is for the party that is rejecting the proposed adjustment to notify the issuer (of the NOPA) that the adjustment is rejected. This is achieved by issuing a NOR.<sup>60</sup>

115. A NOR must be issued within the applicable response period; that is, within two months starting on the date the NOPA was issued. The date of issue of a NOPA is the date it 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 emailed, posted in myIR or otherwise sent to the recipient. Generally, this will be determined by the date on the

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<sup>60</sup> Section 89G(1).

NOPA, which, it is assumed, will be the same date the notice is actually sent. However, this is rebuttable presumption. If the taxpayer is able to rebut this presumption this would be relevant in determining whether an exceptional circumstance exists.

116. The Commissioner interprets “within the applicable response period” to mean the party receiving the NOR must receive it within this period. For example, if a taxpayer issued a NOPA to the Commissioner on 9 April 2021, the Commissioner must have advised the taxpayer of its rejection by issuing a NOR to the taxpayer and the taxpayer must have received that NOR on or before 8 June 2021.
117. Although a NOR has no prescribed form, it is the Commissioner’s view that, given the wording of the statutory requirement (to issue a response “notice”), a NOR must be provided in writing. Taxpayers may wish to use [Notice of Response \(IR 771\)](#).
118. Where the taxpayer has issued a NOPA, the Commissioner will make reasonable efforts to contact the taxpayer or their tax agent within 10 working days before the response period expires to advise whether the Commissioner intends to issue a NOR to them in response to their NOPA. Such contact may be made by telephone, letter, email or myIR.
119. When Inland Revenue receives a NOR, the date it was received is recorded and attempts to advise the taxpayer or their agent that the NOR has been received. When the dispute document is received late, the taxpayer is also advised of the applicable timeframe for the acceptance (or not) of the late document. They are also informed of the effect of the Commissioner not meeting the one-month timeframe for the issue of the refusal notice. This is further discussed at [312] under “Disputant may challenge the Commissioner’s refusal to accept a late disputes document”.
120. If a taxpayer has not responded to a NOPA issued by the Commissioner, Inland Revenue will make reasonable efforts to contact the taxpayer or their tax agent two weeks before the response period expires to ascertain whether the taxpayer will issue a NOR. Such contact will be by telephone, letter, email or myIR.
121. The Commissioner must issue the NOR to the taxpayer or a representative authorised to act on their behalf in relation to the disputes process.<sup>61</sup> In respect of the latter, it is a question of fact whether the recipient is authorised to receive the NOR on the taxpayer’s behalf. The taxpayer’s NOPA must stipulate the name of the person or agent they have nominated to receive any NOR the Commissioner issues.<sup>62</sup>

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<sup>61</sup> Section 14F(5)(a) and (b).

<sup>62</sup> *CIR v Thompson* (2007) 23 NZTC 21,375.

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

### **Timeframe available to issue a NOR (the response period)**

123. As stated at [115] the recipient of a NOPA (whether the Commissioner or taxpayer) must issue a NOR within the applicable "response period",<sup>63</sup> if they wish to continue with the disputes process. Generally, this will be within the two-month period that starts on the date the NOPA is issued and ends on the date the recipient receives the NOR. In the case of a taxpayer's NOR, the exception to this period is where the Commissioner accepts a late NOR.<sup>64</sup>
124. The Commissioner may accept a taxpayer's late dispute documents (a NOPA, NOR or statements of position (SOP)) only where:
- an exceptional circumstance exists; or
  - the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.

This is further discussed at [298] under "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".

125. Where either party to the dispute issues a NOR outside the response period (and, in the case of a taxpayer's NOR, the Commissioner is unable to accept it, because it does not meet the requirements set out in [135]), the issuer of the NOR is deemed to have accepted the adjustments set out in the originating NOPA.<sup>65</sup>

### **Deemed acceptance by the Commissioner**

126. If the Commissioner issues a NOR outside the two-month response period (or fails to issue a NOR), the Commissioner is generally deemed to have accepted the adjustment proposed in the taxpayer's NOPA. This finishes the dispute, and the Commissioner must usually issue an assessment or amended assessment to the taxpayer. However, the Commissioner can apply to the High Court for an order that a NOR can be issued outside the two-month response period.<sup>66</sup> This applies if the Commissioner considers

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<sup>63</sup> Section 89AB.

<sup>64</sup> Section 89K(1).

<sup>65</sup> Section 89H.

<sup>66</sup> Section 89L(1).

that an exceptional circumstance applies or has prevented the Commissioner from issuing a NOR to the taxpayer within the response period. This is further discussed at [316] under "Exception to the response period for a Commissioner's NOR".

127. Where the Commissioner accepts or is deemed to have accepted a taxpayer's proposed adjustment, then the relevant assessment or amended assessment is issued to the taxpayer. However, the Commissioner does not have to issue this assessment, if they consider that, in relation to the adjustment, the taxpayer:
- was fraudulent; and/or
  - willfully misled the Commissioner.<sup>67</sup>

If the Commissioner considers that either or both of these circumstances applies, then, the Commissioner cannot resume the earlier disputes process. However, the Commissioner may issue a NOPA in respect of any adjustment they wish to propose.

128. Any opinion the Commissioner forms that an adjustment was fraudulent or wilfully misleading must be honestly held, based on a correct understanding of the relevant grounds and reasonably justifiable based on the law and available facts. Any opinion formed by the Commissioner in this regard is a disputable decision. "Disputable decisions" are further discussed at [288].

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

129. If a taxpayer issues a NOR outside this response period (and s 89K does not apply), they are deemed to have accepted the adjustment the Commissioner proposed. This will often finish the dispute, and the Commissioner will issue the appropriate assessment to the taxpayer.
130. It is the Commissioner's view that where a due date exists for a response in the disputes process, then the recipient must receive the response by that due date. Taxpayer responses received after the due date are further discussed at [298] under "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".
131. The Commissioner can accept a taxpayer's late dispute documents (a NOPA, NOR or SOP) only where an exceptional circumstance exists<sup>68</sup> or the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.

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<sup>67</sup> Section 89J(2).

<sup>68</sup> Section 89K.

## Contents of a NOR

132. A NOR is the document that responds to a NOPA. It identifies those matters the recipient of the NOPA rejects as being incorrect and explains the legal or technical aspects of the recipient's position in relation to those rejected matters.
133. As stated at [109] and [114], 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 after a NOPA has been issued,
- this can be done only by including the proposed adjustment in a further NOPA; it cannot be done simply by including it in a subsequent disputes document such as a NOR or a SOP. Any additional NOPA must be received within the response period.
134. The information a NOR must contain is specified in s 89G(2). **The content requirements for a NOR are identical for the Commissioner and the taxpayer.** In the spirit of openness, any previously undisclosed relevant document should be included.
135. All NORs must state concisely:
- the facts or legal arguments in the NOPA that the issuer of the NOR considers are wrong;
  - why the issuer considers those facts and arguments to be wrong;
  - any facts and legal arguments the issuer is relying on;
  - how the legal arguments apply to the facts; and
  - the quantitative adjustment to any figures proposed in the NOPA that results from the facts and legal arguments the issuer is relying on.

## Facts and legal arguments

136. The issuer of a NOR must specify how they consider the NOPA they have received is incorrect and specify the facts and legal arguments on which they are relying. They can refer to legislative provisions, case law and legal arguments raised in the NOPA they received. To a large extent, these requirements mirror the content requirements for a NOPA (discussed from [76]) and to that extent should be read as being applicable for the contents of a NOR.

137. Any NOR the Commissioner issues to reject the adjustment proposed in the taxpayer's NOPA must be relatively brief but sufficiently detailed to explain all the relevant facts, quantitative adjustments, issues, law and legal arguments.

### **Quantitative adjustments**

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

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

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

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

140. Where a taxpayer's NOR does not strictly meet the statutory requirements, the Commissioner will accept it so long as the taxpayer's document:
- includes a heading that clearly identifies it as a NOR; and
  - contains the required information in sufficient detail so the objective of the legislation is achieved.

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

141. If the Commissioner receives a NOR that has insufficient detail, the Commissioner's practice is to advise the taxpayer of the deficiency in the NOR and give them an opportunity to include the required information within the remaining response period.
142. If the taxpayer does not have enough time within the response period to rectify the deficiency, the Commissioner will allow them a limited period to rectify the deficiency. The Commissioner will expect the taxpayer to respond as soon as reasonably practical in the circumstances and should not use the potential of receiving this limited extension to delay issuing their NOR.

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

143. Despite the comment at [140], the Commissioner does not have the power to determine the validity of a taxpayer's NOR.<sup>69</sup> Only the courts in challenge proceedings can determine validity.
144. Even where the Commissioner believes a taxpayer's NOR is invalid (because, for instance, the taxpayer has not included sufficient detail), the Commissioner will accept the NOR. The fact the Commissioner believes it to be invalid will form part of the Commissioner's SOP.

**Taxpayer's rejection of a NOR**

145. If a taxpayer wishes to reject a Commissioner's NOR and continue with the disputes process, they must notify the Commissioner of this fact within the applicable response period; that is, within two months, starting on the date the NOR was issued. Otherwise, the taxpayer is deemed to have accepted the NOR and the dispute finishes.<sup>70</sup> The response period for a NOR was discussed at [123].
146. The Inland Revenue officer responsible for administering the dispute will make reasonable efforts to contact the taxpayer (or their agent) two weeks before the response period for the Commissioner's NOR expires to determine whether the taxpayer will reject the NOR. Contact will be made by telephone, email or myIR or in writing.
147. There is no prescribed document for rejecting a NOR issued by the Commissioner, and the taxpayer does not have to expressly reject each matter set out in the Commissioner's NOR. Where appropriate, simply rejecting the Commissioner's NOR in total will suffice. Despite there being no prescribed document, it is the Commissioner's practice to ask the taxpayer to notify the Commissioner in writing of their rejection of the Commissioner's NOR. This document is referred to the responsible Inland Revenue officer within five working days after Inland Revenue has received it and acknowledged as received within 10 working days.
148. If the taxpayer has not rejected the Commissioner's NOR within the response period (that is, deemed acceptance has occurred), the Commissioner will make reasonable efforts to advise the taxpayer (and/or their agent) of this within two weeks after the response period to the Commissioner's NOR has expired.

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<sup>69</sup> *CIR v Alam* [2009] NZCA 273, *Riccarton Construction Ltd v CIR* (2010) 24 NZTC 24,191.

<sup>70</sup> Section 89H(3).

## Timeframe to complete the disputes process

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

This is consistent with the purpose of the disputes process: to promote the prompt and efficient resolution of disputes.

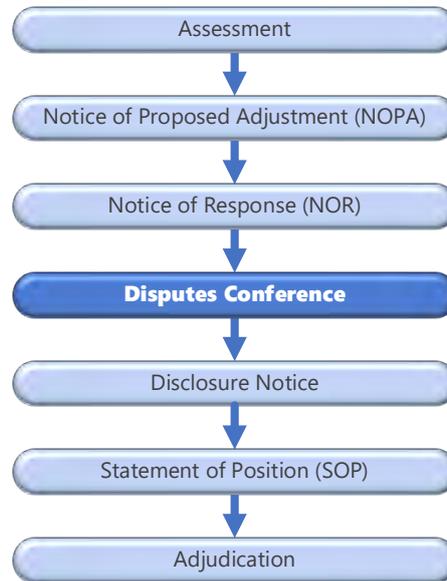
152. In addition to the above administrative practice, the Commissioner is bound by s 89P. Section 89P provides that where the taxpayer initiated the dispute by issuing a NOPA,<sup>71</sup> the Commissioner must issue a challenge notice or amended assessment to the taxpayer within four years of the issue of the taxpayer's NOPA. If the Commissioner fails to meet the four-year timeframe, then the Commissioner is deemed to have accepted the adjustments proposed in the taxpayer's NOPA.<sup>72</sup>
153. The Commissioner is also bound by s 89N(2). Under that provision, if a NOPA has been issued and the parties cannot agree on the proposed adjustment, the Commissioner cannot amend an assessment without completing the disputes process unless one of the exceptions in s 89N applies. These exceptions are further discussed at [319] under "Commissioner's ability to amend an assessment without completing the disputes process".

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<sup>71</sup> Issued after 29 August 2011. This being the date of enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011.

<sup>72</sup> Section 89H(4).

## Disputes Conference



154. The conference phase is an administrative (rather than a legislative) process that aims to clarify and, if possible, resolve the dispute.
155. This section about the conference phase discusses:
- objective of the conference phase;
  - starting and progressing through the conference phase;
  - ending the conference phase;
  - opting out of the rest of the disputes process;
  - progressing disputes through the disputes process where the dispute affects multiple taxpayers.

### Objective of the conference phase

156. The conference phase of the disputes process allows the taxpayer, taxpayer's representatives and Inland Revenue officers directly involved in the dispute to exchange material information, if this has not already been done. Importantly, it is also an opportunity for all parties to attempt to resolve the differences in their understanding of facts, the law and legal arguments.
157. The word "resolve" in this context is not limited to a final resolution of the dispute. Although resolution is a possibility, it is not the only objective of the conference phase. The parties may resolve part of the dispute by agreeing on some facts and clarifying

some legal arguments, while agreeing to disagree on other matters, which become the focus in the later phases of the disputes process. The conference phase may assist to clarify and narrow those matters that remain in dispute.

158. Because the conference phase is an administrative process, it does not have legislative timeframes. Despite this neither party should use this phase to delay completion of the disputes process.
159. The conference phase can involve more than one meeting between the parties. For example, the parties may need further information or to consider further submissions made at an initial meeting.

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

160. The conference phase starts with Inland Revenue issuing a conference facilitation letter, offering to meet with the taxpayer and their agents. The conference facilitation letter is issued within one month from the date of the issue of the taxpayer's rejection of the Commissioner's notice of response (NOR) or the receipt of the taxpayer's NOR by the Commissioner and the Commissioner's rejection of it (as the case may be).
161. The taxpayer is expected to respond within two weeks from the date of the conference facilitation letter (see further from [166]).

### **Facilitation of conference meetings**

162. Meetings are a feature of the conference phase. Inland Revenue will offer the services of a facilitator to promote and encourage structured discussion between its officers and the taxpayer. Although a facilitator is recommended, a taxpayer is under no obligation to agree to this service being provided. Despite being under no obligation, Inland Revenue will always offer facilitation to taxpayers. (For more information about facilitated meetings, see from [175], and about unfacilitated meetings from [185].)
163. The meeting facilitator will be a senior Inland Revenue officer who has not been involved in the dispute and has not given advice on the dispute. The facilitator is independent of the investigation and dispute to date. However, they will have sufficient technical knowledge to understand the issues and legal arguments and lead the meeting.
164. The facilitator is not responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end where the parties to the dispute cannot agree on when to end the conference phase. In particular, it is not the facilitator's role to resolve the dispute. If the possibility of

resolution arises, it is the responsibility of the taxpayer and Inland Revenue officers directly involved in the dispute to conclude matters.

### **Format of conference meetings**

165. Meetings need not be face to face; for instance, the parties may agree to hold a telephone or video conference. For reasons of simplicity, in this Standard Practice Statement, the term “meetings” includes all possible formats.

### **Taxpayer should respond within two weeks**

166. The Commissioner expects the taxpayer to respond within two weeks from the date of the conference facilitation letter. This response should indicate:

- whether the taxpayer will attend the meeting,
- whether the taxpayer accepts the facilitation offer,
- whether the taxpayer has special requirements or needs for the meeting, and
- who else will attend the meeting.

167. If the taxpayer does not respond within the two-week timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer to discuss a response to the conference facilitation letter.

168. Parties to the dispute can obtain expert legal or other advice during the conference phase in addition to any advice previously obtained. Legal or other advisers may attend any meetings in relation to the dispute.

### **Preparation for the meeting**

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

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

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

particularly important that the parties exchange this information before the meeting if the agreed format is a telephone or video conference.

### ***Timeframe***

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

### ***Meeting agenda***

172. An agenda is useful for both parties at any meeting. The Commissioner recommends that the agenda divides the meeting into two parts. The first part of the meeting involves an exchange of material information and discussion of contentious facts and issues relating to the dispute. Also discussed will be any procedural matters such as the timeframe for completing the disputes process, the adjudication process, time bar waivers and the possibility of opting out of the disputes process.
173. The second part of the meeting involves discussing the possible resolution of the dispute. Any communication made and any materials provided for the purpose of this discussion are treated as being on a “without prejudice” basis.
174. Where no agenda has been agreed and it is a facilitated meeting, it is up to the facilitator to guide the taxpayer and Inland Revenue officers in discussing the matters noted at [172].

### **Role of the facilitator**

175. During facilitated conference meetings, the facilitator will:
- use the agreed agenda and explain the objectives of the meeting;
  - remind the parties of any rules they have agreed to in relation to the meeting;
  - clarify who the parties are at the meeting and the capacity they are attending in (for instance, whether they are authorised tax advisors or have authority to resolve the dispute at the meeting);

- ask whether the parties agree to record the meeting using audio or video technology;<sup>73</sup>
- promote constructive discussion of contentious tax issues and, where possible, encourage both parties to explore the issues and resolve the dispute;
- encourage the parties to present evidence in support of the facts as they perceive them (this can be done at a later time if the evidence cannot be provided at the time of an initial meeting);
- encourage the parties to reach agreement on all of the facts of the disputed adjustments;
- encourage the parties, if agreement cannot be reached, to establish common ground and attempt to address matters where they agree to disagree; and
- ensure agreements are recorded in writing and later sent to the taxpayer to verify and sign off as being correct by a specified date.

176. If contentious tax issues cannot be resolved, the facilitator will ask the parties to:

- end the phase or hold another meeting;
- agree a timeframe for completing the process;
- indicate whether a without prejudice basis holds for communications and documents prepared for negotiating potential settlement or resolution; and/or
- ask the taxpayer to consider whether the opt-out process applies.

177. At the end of the meeting, the facilitator will ask the parties to consider whether the conference phase should come to an end. This means considering whether another meeting is needed. Another meeting can be justified if both parties need to exchange further information in support of their arguments or believe another meeting and further discussion may result in the dispute's resolution. Continuous meetings are discouraged if they are being used as a delaying tactic.

178. Where the parties agree to end the conference phase and the facilitator considers the objectives of the conference phase have been achieved, the facilitator can clearly signal the end of the conference phase to the parties.

179. The parties may agree on the timeframe for completing the disputes process and submitting the dispute to the next step in the disputes process – the statement of position (SOP) phase. This could, for instance, include the timeframe for taxpayers to

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<sup>73</sup> See [SPS 12/01: Recording Inland Revenue Interviews](#) (Standard Practice Statement, Wellington, Inland Revenue, April 2012) or any replacement Standard Practice Statement.

meet outstanding information requests or Inland Revenue officers undertaking to provide copies of information relevant to the dispute.

180. The agreed timeframe will also factor in time bar waivers (if given by the taxpayer) and the time required for any court challenge relating to documents claimed to be protected by professional legal privilege and tax advice documents claimed to be protected by non-disclosure rights. Further, the facilitator will ask the taxpayer whether a time bar waiver will be given if the time bar applicable to the assessment in dispute is imminent. See further at [283] under "Time bar waivers".
181. The facilitator will indicate clearly whether communications made and/or documents prepared for the purpose of negotiating potential settlement or resolution of the dispute will be treated as being on a without prejudice basis.
182. The facilitator will ask the taxpayer to consider whether the opt-out process applies and advise the taxpayer of their right to seek the Commissioner's agreement to opt out within the required timeframe.<sup>74</sup>
183. Any agreement made at this phase between the parties must be recorded in writing and signed at the meeting by both parties or on a later date if either party requires time to verify the correctness of the agreement.
184. At all times, the Inland Revenue officers directly involved in the dispute, and not the facilitator, remain the taxpayer's first point of contact during the dispute.

### ***Unfacilitated meetings***

185. An unfacilitated meeting, while not involving an appointed facilitator (per [163]), should proceed in a similar way to a facilitated meeting. Inland Revenue officers will perform the tasks the facilitator would otherwise have performed as set out in [175].
186. At the end of the meeting, it is important for the parties to discuss whether they consider the conference phase has come to an end and, if it has, to record any agreement to this effect in writing.

## **Ending the conference phase**

187. The conference phase does not necessarily end because the final meeting has been held. It may be, for instance, that one or both parties require additional time to

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<sup>74</sup> The requirements a taxpayer must meet to opt out of the rest of the disputes process are discussed at [323].

consider matters raised during the meeting. Care should be taken that progress through the conference phase is not delayed unduly.

### **Facilitated meetings**

188. If the facilitated meeting has not ended the conference phase or the disputes process, then after the meeting the facilitator will follow up on any matters agreed during the meeting; for instance, any agreed timeframe for the exchange of information. Although the facilitator will follow up any agreed matters, they cannot enforce any agreement made between the parties directly involved in the dispute. They will also consider whether a further meeting might be beneficial.

189. The facilitator may suggest the conference phase has come to an end where:
- the taxpayer and Inland Revenue officers have exchanged all the material information relevant to the dispute, have fully discussed the issues and have not resolved the dispute;
  - there is no agreement and the parties' reasons for continuing the conference phase are considered to be insufficient.

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

190. Strong indicators that the conference phase has come to its end include:
- the parties agreeing to disagree with each other and expressing interest in progressing to the SOP phase;
  - the taxpayer and/or tax advisor(s) stopping their contact with the Inland Revenue officers directly involved in the dispute;
  - the parties not exchanging information that was agreed during the meeting to be exchanged, thus leading to the exercise of the Commissioner's powers (for example, notices under s 17B); and
  - a party appearing to use delaying tactics in the conference phase.

191. Where the facilitator is concerned about the parties' decision to end the conference phase before achieving the meeting's objectives, the facilitator may discuss their concerns with the parties separately to determine whether the conference phase should come to an end. This is expected to be a rare occurrence. The facilitator will seek the parties' agreement to ending or not the conference phase.

## Unfacilitated meetings

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

## Ending the conference phase

194. The conference phase may have ended with the taxpayer and Commissioner resolving the issues between them. Where a taxpayer has agreed with all the Commissioner's proposed adjustments, then the Commissioner issues the required assessments. Where the Commissioner agrees with all the taxpayer's proposed adjustments, this will bring the dispute to an end and the Commissioner will issue any required assessments. As stated in [39], where some of the proposed adjustments remain in dispute, the Commissioner cannot issue a partial assessment.
195. When a dispute remains unresolved after the conference phase, then the:
- Commissioner and taxpayer may agree to the taxpayer opting out of the rest of the disputes process and the matters being resolved with a hearing authority; or
  - dispute process continues.

## Opting out of the rest of the disputes process

196. The Commissioner and a taxpayer can enter into an agreement to not complete the disputes process if they are satisfied a hearing authority can more efficiently resolve the dispute. This is known as "opting out".<sup>75</sup>
197. The Commissioner will not agree to the taxpayer opting out of the rest of the disputes process unless a conference meeting has taken place. Once the meeting has been held and the parties cannot resolve the dispute after discussing all the facts and issues, the Commissioner will agree to a taxpayer opting out when certain conditions are met.

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<sup>75</sup> Section 89N(1)(c)(viii).

These conditions are discussed at [323], under “Taxpayer requirements when wanting to opt out of the disputes process after the conference phase”.

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

198. Where the Commissioner issued the NOPA and commenced the disputes process and has subsequently agreed to the taxpayer’s request to opt out, the Commissioner will make and issue an amended assessment to the taxpayer that reflects those matters still in dispute.
199. Where the taxpayer issued the NOPA and commenced the disputes process and an opt-out is agreed to, the Commissioner will make and issue an amended assessment that reflects those matters that are no longer in dispute.<sup>76</sup> An amended assessment would not be made for matters still in dispute.
200. Where an opt-out has been agreed to and the Commissioner is not required to make and issue an amended assessment (for instance, in relation to a disputable decision) the Commissioner must issue a challenge notice.<sup>77</sup>
201. In making an amended assessment, the Commissioner is not bound by the facts, evidence, legal arguments and application of law to the facts as stated in the NOPA and NOR.<sup>78</sup> The Commissioner can consider information and arguments raised during the conference phase.<sup>79</sup> The Commissioner’s administrative practice is that grounds of assessment that have not previously been referred to in the Commissioner’s NOPA and taxpayer’s NOR will not be relied on unless the new grounds have been notified to the taxpayer and discussed with them during the conference phase. The Commissioner will also send the taxpayer, at or near the time of the assessment, a brief letter confirming the grounds of assessment.

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

202. Sometimes it is necessary for Inland Revenue to deal with multiple taxpayers who are affected by the same disputed matter. The Commissioner’s approach to the different

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<sup>76</sup> The Commissioner is no longer required to issue a challenge notice in this circumstance. See ss 89P(2) and 138B(2).

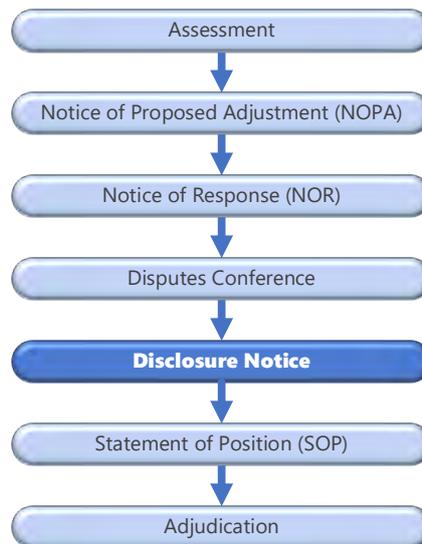
<sup>77</sup> Section 89P(1).

<sup>78</sup> For information about the requirement to issue a NOPA when adding any new adjustments to a dispute, see [109] under “Proposing additional adjustments or an increased liability to tax”.

<sup>79</sup> *CIR v Zentrum Holdings Ltd* (2006) 22 NZTC 19,912 (CA).

situations that arise where multiple taxpayers are all affected by the same disputed matter is outlined at [335] under “Progressing disputes through the disputes process where the dispute affects multiple taxpayers”.

## Disclosure Notice



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

204. This section discusses the:

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

### Purpose of a disclosure notice

205. The Commissioner must issue a disclosure notice unless:<sup>80</sup>

- the disputes process does not have to be completed because any of the exceptions under s 89N(1)(c) applies;<sup>81</sup>

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<sup>80</sup> Section 89M(1).

<sup>81</sup> The application of s 89N(1)(c) of the TAA is further discussed at [319], under “Commissioner’s ability to amend an assessment without completing the disputes process”.

- 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;<sup>82</sup> 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).<sup>83</sup>
206. A disclosure notice refers the taxpayer to the issues and propositions of law exclusion rule.<sup>84</sup> The effect of this rule is to limit both parties to only those issues and propositions of law raised in their respective statements of position (SOPs). This rule is further discussed at [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.<sup>85</sup>
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.<sup>86</sup> 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.

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<sup>82</sup> Section 89N(3).

<sup>83</sup> Section 89M(2).

<sup>84</sup> Set out in s 138G.

<sup>85</sup> Section 89M(6B).

<sup>86</sup> 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;<sup>87</sup> 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

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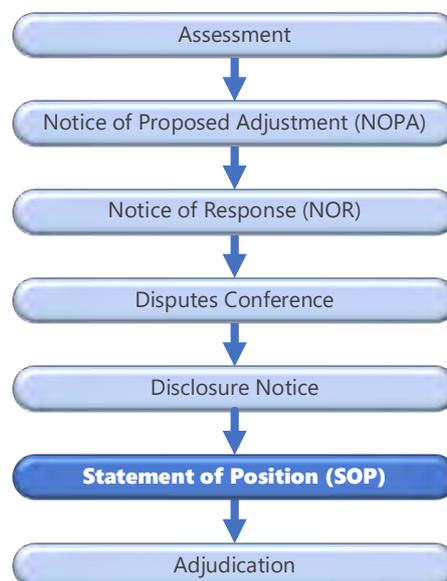
<sup>87</sup> This three-month timeframe excludes statutory holidays.

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;

- deficiencies in the contents of a taxpayer's SOP;
- including additional information (including an addendum to the Commissioner's SOP).

## Timeframes available to issue a SOP (the response periods)

219. Where the Commissioner has initiated the dispute by issuing a notice of proposed adjustment (a NOPA), the Commissioner's SOP will usually accompany the disclosure notice. If the taxpayer wishes to continue with the disputes process, then the taxpayer must issue their SOP within the two-month response period.
220. If the taxpayer initiated the dispute by issuing a NOPA, then the taxpayer needs to issue a SOP to the Commissioner if they wish to continue the dispute. The taxpayer's SOP needs to be issued within the response period (that is, within two months, starting on the date the Commissioner issues the disclosure notice to them). If the Commissioner wishes to continue the dispute process, then the Commissioner's SOP must be issued to the taxpayer within the same two-month response period. What constitutes the date of issue and receipt of a disputes document is discussed at [73] and [74].
221. The Commissioner cannot consider a document the taxpayer purports to issue as a SOP before the Commissioner has issued the disclosure notice, because the document would have been issued before the response period starts. If this occurs, Inland Revenue will advise the taxpayer of this fact, and they will be asked to resubmit the SOP once the response period has started.<sup>88</sup>
222. If the Commissioner is required to issue a SOP in response to the taxpayer's SOP, then the Commissioner must meet this same two-month response period. Unless the High Court gives an order allowing more time,<sup>89</sup> failure to issue a SOP within the two-month response period will result in the Commissioner being deemed to have accepted the taxpayer's position as put forward in the taxpayer's SOP.
223. A taxpayer can also apply to the High Court for more time to reply to a Commissioner's SOP. To be successful, a taxpayer must apply within their response period and show that they had not previously discussed the issue in dispute with the Commissioner, so it is unreasonable to reply to the Commissioner's SOP within the legislative response period.<sup>90</sup>

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<sup>88</sup> Section 89M(5).

<sup>89</sup> Section 89N(3).

<sup>90</sup> Section 89M(11).

224. The Commissioner will make a reasonable effort to contact the taxpayer or their agent two weeks before the response period expires to determine whether the taxpayer will issue a SOP in response to the disclosure notice. Such contact can be made by telephone, electronically (by email or myIR) or in writing.
225. Where a taxpayer's SOP is issued outside the applicable response period, the taxpayer can apply for the consideration of whether exceptional circumstances exist or that they had a demonstrable intention to continue the dispute. This is discussed at [298] under "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".
226. When the dispute may become subject to the statutory time bar, the parties can agree to a time bar waiver.<sup>91</sup> Time bars are further discussed at [275] under "Statutory time bar and exceptions to the time bar".
227. If the parties cannot agree to a time bar waiver, then the Commissioner can complete the disputes process only if they have considered the taxpayer's SOP<sup>92</sup> or one of the statutory exceptions applies.<sup>93</sup> This is further discussed at [319] under "Commissioner's ability to amend an assessment without completing the disputes process".
228. On receipt by the Commissioner, the taxpayer's SOP will be referred to the responsible officer who will then ascertain and record:
- the date on which the SOP was issued;
  - whether the SOP was issued within the relevant response period; and
  - the SOP's salient features, including any deficiencies in its content when compared with the statutory requirements of s 89M(6).
229. Where practicable, the Commissioner will acknowledge receipt of the taxpayer's SOP within 10 working days after it is received. The responsible officer will also advise the taxpayer or their agent of any deficiencies in the SOP's content as soon as they become aware of the deficiency. The taxpayer will be further advised that those deficiencies must be rectified before the response period expires and whether the Commissioner intends to provide any additional information to the taxpayer.
230. Where the dispute document is received late, the taxpayer will be advised of the one-month timeframe for the acceptance (or not) of the late document. They will also be informed of the effect of the Commissioner not meeting the one-month timeframe.

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<sup>91</sup> Section 108B(1).

<sup>92</sup> Section 89N(2)(b).

<sup>93</sup> Section 89N(1).

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.<sup>94</sup>

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.<sup>95</sup>

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.<sup>96</sup>

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.<sup>97</sup>

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<sup>94</sup> Section 89M(4) and (6).

<sup>95</sup> Section 138G(1).

<sup>96</sup> Section 138G(2).

<sup>97</sup> Section 89M(13).

## Minimum content requirements

236. The minimum content requirement for a SOP is that it contains sufficient detail to fairly advise the recipient by giving an outline of the relevant facts, evidence and issues, as well as specifying the propositions of law on which they intend to rely. It is the Commissioner's view that, in this context, an "outline" that consists of a frank and complete discussion of the relevant facts, evidence, issues and propositions of law is implicit in the spirit and intent of the disputes process. In very complex cases, a full explanation of the relevant evidence and summary of less relevant evidence could be provided.
237. The disputes process does not require that relevant documents are discovered or full briefs of evidence or an exhaustive list of documents are exchanged; rather, providing an outline of relevant evidence in the SOP will ensure both parties appreciate the availability of evidence in respect of the factual issues in dispute. The Commissioner will include an outline of any available expert evidence on which they intend to rely in the SOP.
238. Only documentary evidence needs to be listed in the SOP, not potential witnesses.<sup>98</sup> Identities of witnesses will continue to be protected without undermining the effect of the issues and propositions of law exclusion rule.
239. If a Commissioner's SOP discusses shortfall penalties, it must also discuss any other appropriate penalties of lesser percentages and any shortfall penalty reductions (for example, voluntary disclosure or previous behaviour reductions) as alternative arguments. This ensures appropriate penalties are assessed in all cases. The Commissioner cannot propose shortfall penalties at the SOP phase that have not previously been proposed in the Commissioner's NOPA.
240. Submissions made in the NOPA can be concisely stated but must provide sufficient detail to inform the other party of the disputed issues. However, at the SOP phase, full and detailed submissions should be made. This recognises that the issues are unresolved at this phase and are likely to proceed to the Tax Counsel Office (TCO) for adjudication and, potentially, to a court for resolution. This is especially so given the limitations imposed by the previously discussed issues and propositions of law exclusion rule (at [233]).

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<sup>98</sup> Section 89M(6B).

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

241. Where a taxpayer's SOP does not meet the statutory requirements, it is generally the practice of the Commissioner to accept the SOP so long as the document is clearly identified as a SOP and provides sufficient detail to fairly inform the Commissioner of the issues and propositions of law that are being relied on, so the objective of the legislation is achieved.
242. If the Commissioner receives a SOP that does not use the prescribed form or is otherwise deficient, it is the Commissioner's practice is to advise the taxpayer of these deficiencies and ask them if they wish to amend their SOP.
243. The Commissioner does not have the power to determine the validity of a taxpayer's SOP. Only the courts in challenge proceedings can determine validity. Where the Commissioner believes a taxpayer's SOP is invalid, the Commissioner will accept the SOP as validly constituted. The fact the Commissioner believes the SOP is deficient will form part of the Commissioner's SOP or additional response, as appropriate.

## Including additional information (including an addendum to the Commissioner's SOP)

244. When the taxpayer has provided their SOP, then within the response period a taxpayer has to provide their SOP, the Commissioner can provide the taxpayer with additional information in response to the taxpayer's SOP.<sup>99</sup> This additional information needs to be provided in the same format as the Commissioner's SOP and forms part of that SOP.<sup>100</sup>
245. In addition, both the taxpayer and the Commissioner can agree for the other party to include additional information in their SOP. This may be done at any time, including when the dispute has already progressed to the adjudication phase.<sup>101</sup>
246. Before agreeing to a taxpayer including additional information, the Commissioner will consider the taxpayer's prior conduct and whether they could have provided the information earlier by applying due diligence.
247. The Commissioner will usually also consider the materiality and relevance of the additional information and its ability to help resolve the dispute and may decide to

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<sup>99</sup> Section 89M(8)(a).

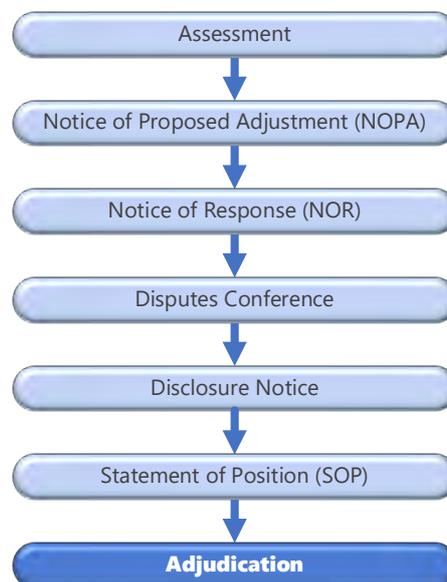
<sup>100</sup> Section 89M(8)(b) and (9).

<sup>101</sup> Section 89M(13) and (14).

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.

- 248. If the Commissioner declines to agree to a taxpayer including additional information in their SOP, the reasons must be documented with detailed reference to the taxpayer's conduct, the level of cooperation before the request was made, and why the information was not provided earlier. Although the responsible officer will advise the taxpayer or their tax agent of the reasons their request was declined, a senior Inland Revenue Officer will make the decision to decline.
- 249. The Commissioner may agree that a taxpayer is able to add further information to their SOP. That agreement will always be made subject to the taxpayer agreeing that the Commissioner can include a response to the taxpayer's additional information, within an agreed timeframe. This is known as an addendum to the Commissioner's SOP.
- 250. Any additional information the parties agree can be provided is deemed to form part of the providing party's SOP.<sup>102</sup> Because this additional information forms part of the provider's SOP, the issues and propositions of law exclusion rule at [233] applies to it.

## Adjudication



- 251. This section about the adjudication phase discusses:
  - role of the Tax Counsel Office (the TCO);

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<sup>102</sup> Section 89M(14).

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

## Role of the Tax Counsel Office

252. The adjudication phase is the final phase of the disputes process. The phase is an administrative (rather than legislative) and involves an independent review of the dispute by the TCO.
253. The TCO's role is to review those disputes that remain unresolved at the end of the conference, disclosure and statement of position (SOP) phases (or when there has been no agreement to truncate the disputes process). The TCO's mandate is to:
- act in an impartial and independent manner;
  - take a fresh look at the application of law to the facts of a dispute; and
  - provide a comprehensive and technically accurate decision.
254. Generally, the TCO will make a decision within 10 weeks of the case being referred to it. The length of time taken to complete the adjudication depends on the number of disputes before the TCO at any one time, any allocation delays, and the technical, legal and factual complexity of those disputes.
255. Judicial comments have been made indicating that, as a matter of law, it is not strictly necessary for Inland Revenue officers to send all disputes to the TCO for review and Inland Revenue officers are not necessarily bound by TCO decisions.<sup>103</sup> Notwithstanding these comments, it is the Commissioner's policy and practice to follow the decision of the TCO, even where that decision finds against the Commissioner.
256. Further, if the parties have not agreed on all the issues at the end of the conference, disclosure and SOP phases or have not agreed to truncate the disputes process, it is the Commissioner's policy and practice that all disputes are sent to the TCO for review. This is so irrespective of the complexity or type of issues or amount of tax involved.
257. The only times disputes are not sent to the TCO are when:
- the Commissioner has considered the taxpayer's SOP and referred the dispute to the TCO for its preliminary consideration and the TCO has determined it has insufficient time to reach a decision in respect of the dispute before a statutory

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<sup>103</sup> See for instance, *CIR v Zentrum Holdings Ltd, Ch'elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,618 and *ANZ National Bank Ltd v CIR (No 2)* (2006) 22 NZTC 19,835.

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.<sup>104</sup>

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

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<sup>104</sup> Section 89N(3).

information (such as time bar waivers) and evidence (including expert opinions), and a schedule of all evidence held.

263. The responsible Inland Revenue officer will issue a letter together with a copy of the cover sheet to the taxpayer before sending the submissions, notes and evidence to the TCO. It is expected that this will happen usually within one month after the SOP in reply (whether it be from the Commissioner or taxpayer) is received or the appropriate response period expires (whichever is the latter).
264. The purpose of this letter is to seek the taxpayer's agreement on the material to be sent to the TCO; that is, agreement on what documentary evidence has been disclosed at the SOP phase. This letter will allow no more than 10 working days for a response from the taxpayer.
265. Once the taxpayer has agreed (or the taxpayer has failed to respond within the timeframe) the material is sent to the TCO. The TCO may then contact the parties if further information is required.
266. Where the dispute has covered several issues, the cover sheet will outline any issues the parties are agreed on as well as the issues still in dispute. The TCO will consider only the disputed issues and not those issues that have been agreed on.
267. Although the TCO is not strictly limited to considering the issues and propositions of law set out in the parties' SOPs, it would be inappropriate to direct an assessment on grounds other than those set out in the SOPs.
268. Generally, the TCO will consider only the material the parties have submitted. It does not usually seek out or consider further information unless it considers it relevant. When additional information is supplied, the TCO may consider it despite the parties not agreeing that the provider of that information could include it in their SOP.

## **Adjudication decision**

269. Once a conclusion is reached, the TCO will prepare an adjudication report and advise the taxpayer and responsible Inland Revenue officer of the decision. The responsible officer will implement the TCO's recommendations, including issuing any notices of assessment to the taxpayer where this is required. The adjudication report is admissible in a court as evidence in support of the act of assessment.
270. If the TCO decides against the Commissioner, then the:
  - Commissioner's practice is not to challenge that decision;
  - dispute comes to an end; and

- Commissioner issues any necessary assessment to the taxpayer to reflect the decision.
271. If the TCO decides against the taxpayer, the taxpayer may file challenge proceedings in the Taxation Review Authority or High Court as long as they do so within the applicable two-month response period, and they meet any of the following conditions:
- The Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed and the Commissioner rejected within the applicable response period and the Commissioner has later issued an amended assessment to the taxpayer.<sup>105</sup>
  - 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 an NOR; and the Commissioner then issued a challenge notice to the taxpayer.<sup>106</sup>
  - The Commissioner or taxpayer has issued an assessment that is the subject of an adjustment notified to the Commissioner where the Commissioner has issued a challenge notice<sup>107</sup> and the adjustment:
    - relates to a matter for which the material facts and relevant law are identical to another assessment for the taxpayer (for another period) which is the subject of court proceedings; or
    - seeks to correct a tax position taken by the taxpayer (or an associated person) as a consequence or result of an incorrect tax position taken by another taxpayer, which is or was the subject of court proceedings.
  - The Commissioner has issued a disputable decision (that is not an assessment) that was the subject of an adjustment the taxpayer proposed and the Commissioner rejected within the applicable response period.<sup>108</sup>
272. To challenge an assessment, a taxpayer must file proceedings with the Taxation Review Authority or High Court within the two-month response period that starts on the date the Commissioner issues:
- an amended assessment;<sup>109</sup>

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<sup>105</sup> Section 138B(2).

<sup>106</sup> Section 138B(3). Applies only to taxpayers who issued a NOPA to the Commissioner after 29 August 2011.

<sup>107</sup> Section 138B(4).

<sup>108</sup> Section 138C.

<sup>109</sup> Section 138B(2).

- a challenge notice;<sup>110</sup> or
- the written disputable decision rejecting the taxpayer's proposed adjustment.<sup>111</sup>

273. At the end of the court process, the responsible Inland Revenue officer will implement any decision made by the hearing authority, including issuing a notice of assessment or amended assessment to the taxpayer, or taking such other steps as required to give effect to the decision of the hearing authority as applicable.

## Other matters that may arise during a dispute

274. This section discusses matters that may arise during a dispute:

- statutory time bar and exceptions to the time bar (from [275]);
- time bar waivers (from [283]);
- exceptions under s 89N (from [286]);
- disputable decisions (from [288]);
- shortfall penalties (from [296]);
- dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period (from [298]);
- Commissioner's ability to amend an assessment without completing the disputes process (from [319]);
- taxpayer requirements when wanting to opt out of the disputes process after the conference phase (from [323]);
- progressing disputes through the disputes process where the dispute affects multiple taxpayers (from [335]); and
- circumstances under which the Commissioner may issue an assessment without first issuing a NOPA (from [344]).

## Statutory time bar and exceptions to the time bar

275. Sections 108 and 108A generally limit to four years the Commissioner's ability to issue an assessment that increases a taxpayer's tax.

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<sup>110</sup> Section 138B(3) or (4).

<sup>111</sup> Section 138C.

276. In respect of a dispute, the assessment will be amended (if necessary) after the disputes process is completed. The Commissioner will endeavour to complete the disputes process within four years.
277. This four-year statutory time bar does not apply to the same extent to limit the Commissioner's ability to issue an assessment that decreases the amount of the initial assessment and issue a refund of a taxpayer's overpaid tax<sup>112</sup> or when dealing with certain tax credits.<sup>113</sup>
278. When increasing a taxpayer's liability, the Commissioner is not subject to the statutory time bar if the Commissioner considers the taxpayer has:<sup>114</sup>
- provided a fraudulent or wilfully misleading tax return;
  - omitted income for which a tax return must be provided that is of a particular nature or source; or
  - knowingly or fraudulently failed to make a full and true disclosure of the material facts necessary to determine their GST liability.
279. When considering whether these exceptions apply, the Commissioner disregards omissions of relatively small amounts of income.<sup>115</sup>
280. The time bar ensures finality in relation to assessments and is a key protection for most taxpayers. Therefore, any exclusions from the time bar's protection must occur only where an adequate basis exists in fact and law to support this action. The Commissioner must decide whether any of the above exceptions to the time bar apply before determining whether a NOPA can be issued.
281. Any opinion that the Commissioner forms about the application of the exceptions to the time bar must be honestly held and reasonably justifiable on the basis of the evidence available and the relevant law. The decision must be clearly documented and include reference to the grounds and reasoning on which it is based.
282. Any NOPA where the Commissioner is proposing an adjustment on the basis that the exception to the time bar in either s 108(2)(a)–(b) or s 108A(3) applies, will set out the reasons the Commissioner does not consider the time bar applies.

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<sup>112</sup> Subject to the limitation on refunding overpaid tax under s RM 2(1) of the Income Tax Act 2007 and s 45(1) of the Good and Services Tax Act 1985.

<sup>113</sup> Section LA 6 of the Income Tax Act 2007.

<sup>114</sup> Sections 108(2) and 108A(3).

<sup>115</sup> *Babington v CIR* [1957] NZLR 861.

## Time bar waivers

283. If it is contemplated that the disputes process cannot be completed before the statutory time bar period for amending an assessment starts, the parties can agree in writing<sup>116</sup> to waive the time bar for an initial 12 months to enable the full disputes process to be applied. A statutory time bar waiver must be agreed in writing on the prescribed form ([Notice of Waiver of Time Bar \(IR 775\)](#)) and delivered to the Commissioner before the relevant four-year period expires.
284. The taxpayer can then agree to waive the time bar for a further six months after the end of that 12-month period.<sup>117</sup> This notice must be given, in writing, to the Commissioner within the initial 12-month period.
285. The statutory time bar waiver applies only to those years and issues the parties have identified and understood before the initial statutory time bar occurring. Issues not identified at that time remain subject to the original statutory time bar unless any of the statutory exclusions from the time bar apply to them. (The exclusions are discussed from [278])

## Exceptions under s 89N

286. As stated at [153], when a NOPA has been issued, the Commissioner follows the disputes process unless an exception under s 89N applies. The application of s 89N is discussed at [319] under "Commissioner's ability to amend an assessment without completing the disputes process".
287. The responsible staff member must obtain and document all administrative approvals for departing from the full disputes process.

## Disputable decisions

288. As discussed at [63], a taxpayer can issue a NOPA in respect of a "disputable decision" that is not an assessment.
289. The term disputable decision is widely defined and includes not only an assessment but also a decision of the Commissioner under a tax law.<sup>118</sup> For the purposes of the definition of disputable decision, the word "decision" is also defined to include "the

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<sup>116</sup> Section 108B(1)(a).

<sup>117</sup> Section 108B(1)(b).

<sup>118</sup> Section 3(1).

making, giving, or exercising of a discretion, judgment, direction, opinion, approval, consent, or determination by the Commissioner”.<sup>119</sup>

290. The definition of “disputable decision” excludes decisions the Commissioner makes:

- to decline to issue a binding ruling under the binding rulings regime;<sup>120</sup>
- that cannot be the subject of an objection under Part 8;
- that cannot be challenged under Part 8A;<sup>121</sup>
- to issue a Commissioner’s NOPA, a disclosure notice or a Commissioner’s SOP, or a challenge notice;
- to issue or decline to issue a Commissioner’s COVID-19 response variation;<sup>122</sup>
- to grant or not grant a loan under the small business cashflow scheme;<sup>123</sup> and
- to make or decline to make a grant under the COVID-19 resurgence support payments scheme or another COVID-19 support payment scheme.<sup>124</sup>

291. For example, if the Commissioner decides not to exercise the discretion under s 113 to amend a taxpayer’s tax assessment, then because s 113 falls within the exclusion to the definition of disputable decision in Part 8A, the taxpayer cannot challenge the decision.<sup>125</sup>

292. Although a taxpayer cannot dispute these decisions specifically, if the Commissioner subsequently issues an assessment that includes these decisions, a taxpayer can dispute the correctness of the assessment in the usual way.<sup>126</sup> Additionally, any decision the Commissioner makes that is not a disputable decision is amenable to judicial review.

293. Similarly, a decision the Commissioner makes to increase an assessment is not of itself, and in the absence of an assessment, a disputable decision. Any challenge to the

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<sup>119</sup> Section 3(1).

<sup>120</sup> Part 5A.

<sup>121</sup> Section 138E.

<sup>122</sup> Section 6I.

<sup>123</sup> Section 7AA.

<sup>124</sup> Section 7AAB.

<sup>125</sup> Section 138E(1)(e)(iv).

<sup>126</sup> *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

correctness of the decision must also be brought in the context of a challenge to the assessment itself.<sup>127</sup>

294. As stated at [290], the definition of disputable decision excludes a decision to issue a Commissioner's NOPA, a disclosure notice or a Commissioner's SOP or a challenge notice. However, a taxpayer may challenge the Commissioner's refusal to accept a late NOPA, NOR or SOP in the Taxation Review Authority within two months from the date of the refusal notice.<sup>128</sup> In this circumstance, the Commissioner's refusal notice is treated as a notice of disputable decision and subject to direct challenge to the Taxation Review Authority, without the taxpayer needing to start an additional dispute with a NOPA.
295. The following example illustrates what is and is not a disputable decision:
- On request, a view is provided to a taxpayer stating that, as a natural person, the Commissioner believes they are a New Zealand resident for taxation purposes (per s YD 1 of the Income Tax Act 2007). This is **not** a disputable decision, because the Commissioner is simply providing a view of the law based on facts the taxpayer supplied. Nothing in s YD 1 allows the Commissioner to determine a taxpayer's residency status. Therefore, it is a decision "about" a tax law rather than being one made "under" a tax law.
  - Were the Commissioner to subsequently make a further decision "under" a tax law that incorporated this previously expressed view, this would be a disputable decision and the taxpayer could dispute the Commissioner's decision (including the fact the Commissioner believes they are resident).

## Shortfall penalties

296. Shortfall penalties are treated separately to the underlying adjustments on which they have been imposed. In a NOPA, the Commissioner must explain and support their imposition in the same manner as the underlying tax shortfall, and they must be assessed in the same way as the underlying tax.<sup>129</sup> Even though assessments of shortfall penalties relate to the underlying tax, they are not subject to the time bars. (Time bars are discussed from [275].)
297. Where sufficient evidence exists to suggest shortfall penalties should be imposed, it is the Commissioner's practice to propose the shortfall penalties in the same NOPA as

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<sup>127</sup> *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

<sup>128</sup> Section 89K(6).

<sup>129</sup> Section 94A(2).

the substantive issues (together with any other available alternative penalties that could be imposed). However, shortfall penalties are not proposed in the same NOPA as the substantive issues in four circumstances:

- The evidence supporting the imposition of shortfall penalties does not become available until after the Commissioner has issued the NOPA on the substantive issues. In such circumstances, a separate NOPA may be issued in respect of the shortfall penalties later.
- Before entering the disputes process, a taxpayer has accepted the proposed adjustment in relation to the substantive issues, but not accepted the imposition of the shortfall penalties. In this circumstance, the Commissioner may still issue a NOPA to the taxpayer for the proposed penalties.
- The taxpayer makes a voluntary disclosure of the substantive issues to the Commissioner and the only disputed issue relates to the imposition of the shortfall penalties.
- If prosecution action against the taxpayer is being considered and shortfall penalties also apply, then, in most instances<sup>130</sup> the Commissioner must complete the prosecution action before the shortfall penalties can be imposed.<sup>131</sup>

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

298. The response period starts on the date the originating document is sent to the recipient. Generally, this will be determined by the date on the document, which, it is assumed, will be that same date the document 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 (“exceptional circumstances” are discussed at [301]). Where a due date exists for a response in the disputes process, then it is the Commissioner’s view that the responding document must be received by the recipient by that due date.

299. The Commissioner’s view is that where a response has a due date in the disputes process, then the recipient must receive the response by that due date.<sup>132</sup>

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<sup>130</sup> Unless the shortfall penalties are imposed under s 141ED (penalty for unpaid amounts of employer’s withholding payments).

<sup>131</sup> Section 149(5).

<sup>132</sup> Sections 14 and 14B to 14G.

300. The Commissioner cannot accept a dispute document that a taxpayer issues outside the applicable response period, unless that lateness has arisen:<sup>133</sup>
- 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:<sup>134</sup>
- 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).<sup>135</sup>
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

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<sup>133</sup> Section 89K(1)(a).

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

<sup>135</sup> 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.

Commissioner will accept that a dispute document received within two days of the end of the response period as being received in time where the lateness is minimal. For example, the response period ends on a Saturday and the taxpayer provides a NOR on the following Tuesday. In this circumstance, the Commissioner would treat the response period as ending on the Monday<sup>136</sup> and then accept that the lateness of the NOR (one day) was minimal. If the response period ended on Friday and the taxpayer provided the NOR on the following Monday, the Commissioner would also accept that the lateness is minimal.

304. This general acceptance of two days should not be viewed as an extension of the response period in all circumstances. Besides the degree of lateness, the Commissioner, when exercising this discretion, will objectively consider the:
- real event, circumstance or reason for the taxpayer not issuing a dispute document within the applicable response period; and
  - taxpayer's compliance history in relation to the tax types under consideration (for example, the taxpayer may have a history of paying tax late or filing late tax returns or dispute documents).
305. 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 dispute documents within the minimal allowable lateness period (that is, up to two days outside the applicable response period) and has been previously advised on the calculation of the response period. Although the degree of lateness was minimal each time, the Commissioner would not exercise the discretion in this circumstance.
306. The Commissioner will consider whether exceptional circumstances exist after receiving a taxpayer's written request to do so. The responsible officer will advise the taxpayer of the receipt of their request and of the Commissioner's responsibility to deal with the request within one month. This and other matters are further discussed at [312], under "Disputant may challenge Commissioner's refusal to accept a late disputes document".

### **Demonstrable intention**

307. The Commissioner can also treat a late NOPA, NOR or SOP as being received within the response period where the Commissioner considers the taxpayer had a

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<sup>136</sup> On the basis of s 55 of the Legislation Act 2019.

demonstrable intention to enter or continue the disputes process at the time the taxpayer failed to act within the applicable response period.<sup>137</sup>

308. In considering whether a dispute should be allowed to continue, the courts have held that a factor to be considered was whether the taxpayer had:<sup>138</sup>

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.

309. The Commissioner, when considering whether a taxpayer has shown a demonstrable intention to enter or continue with the disputes process, will consider whether the taxpayer has:

- responded to Inland Revenue's correspondence and consistently asserted their contrary position regarding the substantive issues;
- complied with other parts of the disputes process (for example, if the late document in question is the taxpayer's SOP or whether they filed a timely NOPA or NOR (as appropriate)); or
- corresponded with other relevant parties about the dispute such as the Ombudsman or Inland Revenue's Complaints Management Service.

310. An application will not be accepted if the degree of lateness is unjustified in the circumstances or it is considered to be designed to defeat the application of the time period or frustrate the disputes process. An example might be when a taxpayer contacts the Commissioner close to a deadline to confirm they intend to dispute, but then does nothing further for some considerable time, effectively rendering the statutory timeframe meaningless.

311. However, where a taxpayer has participated in the earlier stages of the disputes process (including complying with timeframes), then were they to file their SOP late because they miscalculated the SOP response period (and the degree of lateness does not, in itself, amount to exceptional circumstances) it could be said the taxpayer had a genuine intention to continue with the dispute.

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<sup>137</sup> Section 89K.

<sup>138</sup> *Gisborne Mills Ltd v CIR* (1989) 13 TRNZ 405.

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

312. The Commissioner can accept a disputant's late NOPA, NOR or SOP by providing written advice to this effect to the taxpayer. It is incumbent on the taxpayer to issue their late dispute document to the Commissioner as soon as reasonably practicable after becoming aware of their failure to meet the applicable response period.<sup>139</sup> Where the Commissioner does not accept that documents were received in time, the Commissioner must notify the taxpayer of the Commissioner's decision within one month from when the late document was issued to the Commissioner. This is known as a **refusal notice**.<sup>140</sup>
313. Where the Commissioner omits to issue a refusal notice or issues a refusal notice outside the one-month timeframe, the Commissioner is deemed to have issued a refusal notice on a date one month from the date that the taxpayer issued the late document.<sup>141</sup>
314. The taxpayer may challenge the Commissioner's refusal notice by filing proceedings directly with the Taxation Review Authority within two months from the date of the refusal notice (irrespective of whether the refusal notice was actually issued by the Commissioner or deemed to have been issued). This is on the basis that the refusal notice is treated as a notice of disputable decision.<sup>142</sup>
315. Where the Commissioner or Taxation Review Authority determines that exceptional circumstances existed, the response period is deemed to commence on the day of the decision finding favour with the taxpayer's request for exceptional circumstances.<sup>143</sup>

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

316. As previously stated, the Commissioner can apply to the High Court for an order that a Commissioner's NOR can be issued outside the two-month response period if an exceptional circumstance has occurred or has prevented the Commissioner from issuing a NOR to the taxpayer within the response period.<sup>144</sup> The Commissioner will

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<sup>139</sup> Section 89K(1)(b).

<sup>140</sup> Section 89K(4).

<sup>141</sup> Section 89K(5).

<sup>142</sup> Section 89K(6).

<sup>143</sup> Section 89AC.

<sup>144</sup> Section 89L(1).

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.<sup>145</sup> 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;<sup>146</sup>

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<sup>145</sup> Contained in s 89N.

<sup>146</sup> Section 89N(1)(c)(i).

- a taxpayer involved in a dispute, or person associated with them, may take steps to shift, relocate or dispose of the taxpayer's assets to avoid or delay the collection of tax, making the issue of an assessment urgent;<sup>147</sup>
  - the taxpayer involved in a dispute, or a person associated with them involved in another dispute involving similar issues, has begun judicial review proceedings in relation to the dispute;<sup>148</sup>
  - the taxpayer fails to comply with a statutory requirement for information relating to the dispute;<sup>149</sup>
  - the parties agree (recording their agreement in a document) the dispute would be resolved more efficiently by the court or Taxation Review Authority without completing the disputes process;<sup>150</sup>
  - the parties agree (recording their agreement in a document) to suspend the disputes process pending the outcome of a test case;<sup>151</sup> and
  - the Commissioner or taxpayer accepts the proposed adjustment.<sup>152</sup>
320. The Commissioner's view is that the parties should try to resolve the dispute as early as possible and this should be a focus throughout all stages of the disputes process. If this is not possible and any of the above exceptions applies, the Commissioner can amend an assessment or issue a challenge notice without completing the disputes process.<sup>153</sup> Where this occurs, the disputes process will conclude, and the dispute will not go through the adjudication phase.
321. Where the above exceptions do not apply, the Commissioner may issue an amended assessment or challenge notice where the Commissioner:
- or taxpayer accepts the NOPA, NOR, or SOP issued by the other party; or
  - has considered a SOP the taxpayer issued.<sup>154</sup>

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<sup>147</sup> Section 89N(1)(c)(ii) and (iii).

<sup>148</sup> Section 89N(1)(c)(iv).

<sup>149</sup> Section 89N(1)(c)(vi).

<sup>150</sup> Section 89N(1)(c)(viii).

<sup>151</sup> Section 89N(1)(c)(ix).

<sup>152</sup> Section 89N(2)(b).

<sup>153</sup> Section 89P.

<sup>154</sup> Section 89N(2)(a) and (b).

The Commissioner may also apply to the High Court for an order to allow more time to complete or dispense with the disputes process.<sup>155</sup> 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.<sup>156</sup> 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

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<sup>155</sup> Section 89N(3).

<sup>156</sup> 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.<sup>157</sup>

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.

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

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.<sup>158</sup>
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 Summary<sup>159</sup> 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

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<sup>158</sup> Section 18.

<sup>159</sup> Technical Decision Summaries provide an anonymised summary of a decided adjudication.

bearing in mind taxpayer compliance costs it may not be appropriate for all the cases to proceed through the full dispute process.

336. This can arise, for instance, where:

- the taxpayers are all investors in a particular scheme;
- the taxpayers have entered into similar arrangements and have the same promoter;
- the taxpayers have entered into similar arrangements and have the same tax agent;
- there exists a widespread but well-defined common problem involving many unrelated taxpayers (for example, several taxpayers claiming non-deductible expenses such as fines for overloading).

337. The Commissioner's approach to dealing with the different situations that arise where a large number of taxpayers are all affected by the same disputed matter, is outlined next.

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

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

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

341. It is the Commissioner's policy that a finding for the taxpayer in a previous dispute will generally lead to the other disputes being withdrawn, particularly if the disputes are in

respect of the same transaction. 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 taxpayer<sup>160</sup>**

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.

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<sup>160</sup> Section 89C(a).

**Exception 2: A simple or obvious mistake or oversight in a taxpayer's return<sup>161</sup>**

348. Examples of a simple mistake or oversight are:<sup>162</sup>

- 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 taxpayer<sup>163</sup>**

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 taxpayer<sup>164</sup>**

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

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<sup>161</sup> Section 89C(b).

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

<sup>163</sup> Section 89C(c).

<sup>164</sup> 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 proceedings<sup>165</sup>**

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.<sup>166</sup>

**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 taxpayer<sup>167</sup>**

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.

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<sup>165</sup> Section 89C(db).

<sup>166</sup> Section 138B(3) and (4).

<sup>167</sup> Section 89C(e).

**Exception 7: The Commissioner has reasonable grounds to believe the taxpayer has been involved in fraudulent activity<sup>168</sup>**

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 frivolous<sup>169</sup>**

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 Authority<sup>170</sup>**

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

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<sup>168</sup> Section 89C(eb).

<sup>169</sup> Section 89C(f).

<sup>170</sup> Section 89C(g).

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

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

**Exception 10: The taxpayer has not provided a tax return and a “default assessment” is made<sup>171</sup>**

364. Where a taxpayer fails to provide a tax return, the Commissioner can make an assessment or amended assessment under s 106. This is commonly known as a “default assessment”.
365. Where a taxpayer wishes to dispute a default assessment, the taxpayer must, within the applicable response period:<sup>172</sup>
- provide a tax return for the period to which the default assessment relates (notwithstanding that the tax return will not include the taxpayer’s assessment); and
  - issue a NOPA to the Commissioner in respect of the default assessment.
366. The requirement to provide a tax return in respect of a default assessment before issuing a NOPA is an additional requirement of the disputes process. This ensures the taxpayer has provided the information required by the tax law (that is, the tax return) before they are entitled to dispute the assessment. This was discussed at [56] to [62].

**Exception 11: The taxpayer has failed to make or account for tax deductions<sup>173</sup>**

367. This exception is intended to address a taxpayer’s failure to withhold, deduct or account to the Commissioner for an amount of tax, including PAYE, schedular payments to non-resident contractors, and resident withholding tax.
368. The Commissioner may not apply this exception if a dispute involves statutory interpretation (for example, whether a particular item attracts liability for resident

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<sup>171</sup> Section 89C(h).

<sup>172</sup> Four months from the date the default assessment is issued.

<sup>173</sup> Section 89C(i).

withholding tax, meaning the taxpayer was required to withhold or deduct resident withholding tax) and/or shortfall penalties are to be imposed.

**Exception 12: The taxpayer has already provided a NOPA<sup>174</sup>**

369. If a taxpayer proposes an adjustment in a NOPA<sup>175</sup> with which the Commissioner agrees, then an assessment can be issued.

**Exception 13: The assessment corrects a tax position taken by the taxpayer or an associated person as a consequence of an incorrect tax position taken by another taxpayer<sup>176</sup>**

370. If transactions affect multiple taxpayers, whether in the same way or in related but different ways, the Commissioner can reassess any consequentially affected taxpayers. This is notwithstanding that the consequentially affected taxpayers have not agreed to the amended assessments. However, those taxpayers subject to the amended assessments may still issue a NOPA to dispute the consequential adjustment within the applicable response period.

371. Before using this exception, the Commissioner must be satisfied a direct consequential link exists between the affected taxpayers. For example, in the case of group loss offsets, if a loss company has claimed losses to which it is not entitled and the Commissioner has amended the loss company's loss assessment to disallow those losses, under s 89C(k), the Commissioner can also make a separate assessment for the profit company that had offset the loss company's losses against its profits.

**Exception 14: The assessment corrects a tax position taken by taxpayer in relation to a tax position taken by a look-through company, where the disputes process between that company and the Commissioner has been completed<sup>177</sup>**

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

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<sup>174</sup> Section 89C(j).

<sup>175</sup> There are limitations on a taxpayer's ability to issue a NOPA in this circumstance. See s 89DA(1).

<sup>176</sup> Section 89C(k).

<sup>177</sup> Section 89C(ka).

**Exception 15: The assessment is as a result of amending a qualifying individual account for incorrect or missing information<sup>178</sup>**

373. A NOPA is not required if the assessment results from the Commissioner making an amendment to correct the effect of using incorrect or missing information. This forms part of the assessment process further explained at [16] under “Certain qualifying taxpayers”.

**Exception 16: The Commissioner is making an amendment before finalising the account of a qualifying individual<sup>179</sup>**

374. A NOPA is not required if the assessment results from the Commissioner making an amendment to correct before finalising the account of a qualifying individual. This forms part of the assessment process further explained at [16], under “Qualifying taxpayers who can have an assessment corrected without a NOPA”.

**Exception 17: The assessment of certain penalties<sup>180</sup>**

375. A NOPA is not required where the Commissioner is imposing a penalty in relation to the failure:

- of financial institutions to meet their requirements under Part 11B and the Common Reporting Standard applied standard;<sup>181</sup> and
- of a person or entity to meet requirements under Part 11B to provide information, including self-certifications (this part relates to foreign account information-sharing agreements).<sup>182</sup>

**Exception 18: The assessment will extinguish all or part of a tax loss<sup>183</sup>**

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

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<sup>178</sup> Section 89C(l).

<sup>179</sup>Section 89C(lbaa).

<sup>180</sup> Section 89C(lba).

<sup>181</sup> See s 3(1) (“CRS applied standard”) and s 142H

<sup>182</sup> Section 142l.

<sup>183</sup> Sections 89C(lb) and 177C(5).

**Exception 19: The assessment includes a calculation of Working for Families tax credits<sup>184</sup>**

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

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<sup>184</sup> Section 89C(m).

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*Statement of Position* (IR 773, Inland Revenue, September 2022). [www.ird.govt.nz/managing-my-tax/disputes/fill-out-a-statement-of-position](https://www.ird.govt.nz/managing-my-tax/disputes/fill-out-a-statement-of-position)

*Tax Information Bulletin Vol 8, No 3* (August 1996): 1.

[www.taxtechnical.ird.govt.nz/tib/volume-08---1996/tib-vol8-no3](https://www.taxtechnical.ird.govt.nz/tib/volume-08---1996/tib-vol8-no3) (this item has no title but is about the new disputes resolution process that came into effect in October 1996).