

TECHNICAL DECISION SUMMARY > ADJUDICATION

WHAKARĀPOPOTOTANGA WHAKATAU Ā-TURE > WHAKAWĀ

# Disputes resolution process – adjustments in notice of response

Decision date | Te Rā o te Whakatau: 8 October 2021

Issue date | Te Rā Tuku: 14 February 2022

TDS 22/01

## DISCLAIMER | Kupu Whakatūpato

This document is a summary of the original technical decision so it may not contain all the facts or assumptions relevant to that decision.

This document is made available for **information only** and is not advice, guidance or a “Commissioner’s official opinion” (as defined in s 3(1) of the Tax Administration Act 1994).

**You cannot rely on this document as setting out the Commissioner’s position more generally or in relation to your own circumstances or tax affairs.** It is not binding and provides you with no protection (including from underpaid tax, penalty or interest).

For more information refer to the [Technical decision summaries guidelines](#).

## Subjects | Ngā kaupapa

Dispute process: adjustment in notice of response

## Abbreviations | Whakapotonga kupu

The abbreviations used in this document include:

<b>Assessment</b>	Computer generated Notice of Assessment from CCS
<b>CCS</b>	Customer and Compliance Services, Inland Revenue
<b>CNOR</b>	Notice of Response issued by CCS
<b>Commissioner or CIR</b>	Commissioner of Inland Revenue
<b>NOPA</b>	Notice of Proposed Adjustment
<b>NOR</b>	Notice of Response
<b>TAA</b>	Tax Administration Act 1994
<b>TCO</b>	Tax Counsel Office, Inland Revenue
<b>TNOPA</b>	Notice of Proposed Adjustment issued by the Taxpayer
<b>TRA</b>	Taxation Review Authority

## Taxation laws | Ngā ture take

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

## Facts | Ngā meka

1. The Taxpayer is an incorporated company. The company's business activities are land ownership and management.

2. The Taxpayer filed its income tax return for the disputed period, which included a deduction for business expenditure. The return resulted in losses being carried forward.
3. Subsequently, a computer-generated notice of assessment (the Assessment) for the disputed period was issued to the Taxpayer by Customer and Compliance Services of Inland Revenue (CCS). The Assessment recorded an amount of tax to pay, as opposed to a loss.
4. The Taxpayer issued a Notice of Proposed Adjustment (TNOPA) upon receipt of the Assessment. The TNOPA stated that the Assessment was incorrect. It responded to the errors in the Assessment and maintained that it had no profit-making activities and the losses recorded in the self-assessment were correct. The exact reasons for these errors were unclear, but it appears to have been a result of Inland Revenue's system pulling figures from the return that were entered incorrectly by the Taxpayer or by the system.
5. In response, CCS issued a Notice of Response (CNOR). In its CNOR, CCS did not dispute any of the issues raised in the TNOPA. However, CCS asserted that the Taxpayer had not proven it was carrying on a business and was, therefore, not entitled to a deduction for its expenditure.
6. The Taxpayer asserted that the CNOR was unlawful by retrospectively justifying the Assessment on the basis that the Taxpayer was not in business, rather than addressing the errors raised in the TNOPA.

## Issues | Ngā take

7. The issues considered in this dispute were:
  - whether CCS was entitled to propose an adjustment in the CNOR regarding the Taxpayer's entitlement to the expenditure claimed without issuing a further Notice of Proposed Adjustment (NOPA); and
  - if so, whether the Taxpayer has proven it was in business and, therefore, was entitled to the deductions claimed in its return.

## Decisions | Ngā whakatau

8. The Tax Counsel Office (TCO) decided that:

- The CNOR did not meet the requirements of a Notice of Response (NOR) under s 89G and the dispute should be discontinued. A new NOPA is required if the CCS wishes to dispute the Taxpayer's entitlement to the expenditure.
- In light of the conclusion to issue one, it was not appropriate for TCO to consider whether the Taxpayer is in business.

## Reasons for decisions | Ngā take mō ngā whakatau

### Issue 1 | Take tuatahi: Adjustments in notice of response

9. The main issue is whether CCS is entitled to propose an adjustment in the CNOR regarding the deductibility of expenses claimed by the Taxpayer without first issuing a NOPA.
10. The Taxpayer argued that CCS acted inconsistently with the requirements for a NOR in s 89G because the CNOR did not address the issues raised in the TNOPA but instead took a statement regarding profitability in the TNOPA and used this as an admission that the Taxpayer is not carrying on a business. Alternatively, it can be inferred that the Taxpayer was arguing that CCS was acting inconsistently with s 89C by proposing these adjustments without issuing a NOPA.

### NOR requirements

11. Section 89G sets out the requirements of a NOR. A NOR must notify the issuer of the NOPA that the adjustment proposed is rejected and must state concisely the facts or legal arguments in the NOPA that is considered wrong and state why they are wrong.
12. Additionally, s 89G(2)(e) provides a NOR must state the quantitative adjustment to any figure in the NOPA that results from the arguments relied on by the issuer of the NOR, i.e., state concisely by how much they consider an adjustment in the NOPA is incorrect.
13. The purpose of a quantitative adjustment in a NOR in a taxpayer-initiated dispute is to establish the extent to which the Commissioner agrees or does not agree with the proposed adjustments in a TNOPA. While the arguments in a dispute may be refined or changed over the course of the dispute, there is nothing to suggest a NOR can

operate as a vehicle to propose a separate adjustment involving new grounds outside the scope of the NOPA.<sup>1</sup>

14. This is consistent with the purpose of the dispute procedures more generally, as set out in s 89A. This is to reduce the likelihood of disputes by encouraging open and full communication and early identification of the basis for a dispute concerning a disputable decision.<sup>2</sup>
15. There is no case law directly relating to the Commissioner's ability to raise new issues during the NOR stage of a dispute but the case *CIR v Delphi Fishing Ltd* considered the Commissioner's ability to provide additional information under s 89M(8) in response to a taxpayer's Statement of Position (SOP).<sup>3</sup> Section 89M(8), which has parallels with s 89G, has a constraining feature in that the additional information must be in response to the other party's material.<sup>4</sup>
16. The *Delphi Fishing* case found that there must be limits on the Commissioner's ability to raise new matters as otherwise it would be unfair to a taxpayer. Further, this would limit the time the taxpayer has, and the avenues through which they are able, to respond to the arguments raised by the Commissioner. Having restrictions on the Commissioner's ability to raise new matters in the course of a dispute is consistent with the purpose of the disputes process in s 89A.
17. The CNOR in this dispute did not meet the requirements of s 89(2). It did not state any of the facts or legal arguments in the TNOPA that CCS thought were wrong; CCS agreed with the Taxpayer that there were errors in the Assessment. Instead, the CNOR raised the argument that the Taxpayer has failed to provide evidence it was entitled to the deduction for the expenditure incurred.
18. TCO considered a possible argument that CCS had disallowed the expenditure in the Assessment by virtue of recording a profit figure rather than a loss, and it would follow that the adjustments sought in the TNOPA was about expenditure and the CNOR was responding to those adjustments.

---

<sup>1</sup> See the Official's Report to the Finance and Expenditure Committee on Submissions on the Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions) Bill 2004 (August 2004) and the Commissioner's standard practice statement *SPS 16/06: Disputes resolution process commenced by a taxpayer* at para 136.

<sup>2</sup> See also *Allen v CIR* (2005) 22 NZTC 19,473 (CA) at [15] and *Vinelight Nominees Ltd v CIR* (2012) 25 NZTC 20,155 (HC) at [29]. "Disputable decision" is defined in s 3 as an assessment or a decision of the Commissioner under a tax law, with a number of specified exceptions.

<sup>3</sup> *CIR v Delphi Fishing Ltd* (2004) 21 NZTC 18,525 (HC).

<sup>4</sup> *CIR v Delphi Fishing Ltd* at [58]

19. However, this argument did not accord with the facts. The Assessment does not show a breakdown of expenditure or income and there is nothing to suggest that the Assessment reflected Inland Revenue's belief that the Taxpayer was not in business.
20. It was considered that the adjustments proposed in the TNOA did not concern expenditure, and the adjustments proposed in the CNOR are separate adjustments from those proposed in the TNOA.
21. Further, the adjustments proposed in the CNOR cannot be categorised as a quantitative adjustment under s 89G(2)(e). It does not state the extent to which CCS disagrees with the TNOA. It raised a different issue.
22. The inclusion of the proposed adjustments in the CNOR limited the Taxpayer's ability to address the arguments. It is unlikely that Parliament intended the Commissioner to be able to use a NOR to raise a separate issue regarding deductibility of expenditure when the dispute concerned errors in an assessment which both parties agreed were errors.

### **Dispute should be discontinued**

23. If a taxpayer disputes the validity of a dispute document issued by the Commissioner, the Commissioner may form the view that the dispute document is valid and continue with the dispute and the taxpayer can contest the validity of the document before the TRA or a court if the matter proceeds to challenge stage. However, if the Commissioner forms the view that one of the Commissioner's dispute documents is invalid it would be open to the Commissioner to discontinue the dispute.<sup>5</sup>
24. On the basis that TCO considers the CNOR to be invalid, the dispute should be discontinued.

### **NOPA required**

25. For completeness, TCO considered the requirement to issue a NOPA by the Commissioner.
26. Inland Revenue's published position is that a new NOPA may be needed if a new adjustment is proposed or the basis for the original adjustment has fundamentally

---

<sup>5</sup> This approach is consistent with case law that considered the approach to be taken when the validity of a taxpayer's dispute document is in question. See *CIR v Alam and Begum* [2009] NZCA 273, (2009) 24 NZTC 23,564 (CA) and *Riccarton Construction Limited v CIR* (2010) 24 NZTC 24,191 (HC).

changed.<sup>6</sup> Further, if the Commissioner decides to increase the quantum of any proposed adjustments after the NOPA is issued the Commissioner must issue a new NOPA.<sup>7</sup>

27. This requirement is supported by s 89B(1), which allows the Commissioner to issue one or more NOPAs in respect of a tax return or an assessment; and by s 89C, which requires a NOPA to be issued before the Commissioner can make an assessment, unless an exception applies.
28. In this dispute, none of the exceptions apply in s 89C to enable CCS to issue an assessment as proposed in the CNOR without acting in breach of s 89C. It is further noted that s 114 would not operate to enable the Commissioner to knowingly issue an assessment in breach of s 89C or any other provision of the TAA.<sup>8</sup>
29. Therefore, if CCS wishes to pursue a dispute regarding the expenditure incurred by the Taxpayer, it will need to issue a new NOPA.

## Issue 2 | Take tuarua: Whether taxpayer in business

30. In light of the conclusion to issue one, it was not appropriate for TCO to consider whether the Taxpayer is in business. If CCS wishes to pursue a dispute regarding expenditure, it will need to issue a new NOPA proposing new adjustments for this issue.

---

<sup>6</sup> This was explained in the Tax Information Bulletin item "Introduction to the new disputes resolution process", Tax Information Bulletin Vol 8, No 3 (August 1996) at page 12.

<sup>7</sup> The Commissioner's Standard Practice Statement: SPS 16/05 *Disputes resolution process commenced by the Commissioner of Inland Revenue*, para 60 and 62. This SPS concerns Commissioner-initiated disputes and these paragraphs concern the ability to propose adjustments at the SOP phase. However, it is considered the same principles apply to the Commissioner's ability to propose another adjustment outside the scope of the issues in a TNOA.

<sup>8</sup> Under s 114, an assessment made by the Commissioner is not invalidated through a failure to comply with a provision of the TAA or another Inland Revenue Act. However, this provision is designed to prevent administrative error invalidating an assessments and case law indicates that it may not protect the Commissioner in cases of "conscious maladministration" or "abuse of power". See *Westpac Banking Corp v CIR* (2009) 24 NZTC 23,340 and *Accent Management Ltd v CIR* (2010) 24 NZTC 24,126.