

Introduction to the new disputes resolution process

New procedures for resolving tax disputes come into effect from 1 October 1996.

This Tax Information Bulletin sets out how the new procedures will operate. In particular, it sets out the administrative procedures that Inland Revenue will follow when conducting audits and assessing taxpayers.

The appendix to this TIB gives worked examples of the new procedures, and sets out general audit procedures.

These new procedures are established by changes to the Tax Administration Act 1994, other Inland Revenue Acts, and the Commissioner's administrative practices. There are also new High Court Rules and Taxation Review Authority Regulations, and changes to the Taxation Review Authorities Act 1994.

The new procedures apply to disputes relating to taxes, levies, duties, penalties and other amounts payable to the Commissioner under the tax laws. Specifically, they apply to:

- disputed **assessments** issued under tax legislation
- disputed **determinations** issued under tax legislation, such as loss determinations and determinations of employer/employee relationships.

The new procedures do not apply to assessments issued to liable parents under the Child Support Act 1991 or to ACC premium assessments.

The legislative amendments were contained in the Taxpayer Compliance, Penalties, and Disputes Resolution Bill 1995. Their purpose is to ensure that:

- Assessments are as correct as practicable, first time.
- Disputes over tax liability are dealt with fairly, efficiently and quickly.

Current audit procedures remain largely unchanged up to what is currently the final interview stage. The new procedures will be used when proposed adjustments are still in dispute. Similarly, the procedures are unchanged for taxpayer or agent-initiated adjustments until such

time as the taxpayer wishes to dispute the Commissioner's decision not to alter the assessment.

The new procedures aim to ensure a correct assessment by:

- promoting early identification of issues
- improving the accuracy of the Commissioner's decisions in respect of assessments
- reducing the number of disputes by ensuring full disclosure
- encouraging prompt and efficient resolution of disputes.

The new provisions implement recommendations made by the Organisational Review Committee in its report *Organisational Review of the Inland Revenue Department*.

They place increased emphasis on information disclosure and discussions between the Commissioner and the taxpayer or agent. The procedures are designed to ensure that each party to the dispute is fully informed of the facts, evidence, issues, propositions of law and interpretations upon which each party's position is based on.

The combined effect of section 17 information requests and an evidence exclusion rule mean that an "all cards on the table" approach will help to resolve disputes as quickly as possible.

Built into the pre-assessment process for resolving disputes is provision for **conferences** between the Commissioner and the taxpayer or agent. Further, within Inland Revenue there is a new **Adjudication Unit** which provides an impartial and objective review of unresolved disputes between the taxpayer and the Commissioner.

Page 44 of this TIB lists the Amendment Acts that were enacted by the Taxpayer Compliance, Penalties, and Disputes Resolution Bill 1995. The Taxpayer Compliance and Penalties section of the Bill will be covered in a separate TIB.

The new disputes resolution process in context

The new disputes resolution procedures are part of a package of reforms which include:

- legislative enactment of taxpayer obligations
- enhancement of the Commissioner's ability to enforce requests for information under section 17
- more comprehensive compliance and penalties rules which come into effect for the 1997-98 income year for standard balance date taxpayers (i.e., 1 April 1997)
- a customer segment-based organisational structure within Inland Revenue which identifies and targets taxpayer needs and risks.

The package is designed to encourage voluntary compliance by taxpayers. This is achieved by:

- clarifying the behaviour required of taxpayers, and by implication that which is unacceptable
- providing comprehensive penalties for non-compliance, including an increase in penalties for hindrance and a reduction in penalties for co-operation and assistance
- simplifying lines of authority within Inland Revenue
- providing access to efficient and effective means of enforcement such as court orders and prosecution.

continued on page 2

from page 1

The new disputes resolution procedures build on taxpayers' obligations to ensure that their taxation affairs are in order. In addition to requiring full disclosure on a timely basis and penalising tardy or unco-operative behaviour, the Tax Administration Act now contains a new section 15B, which outlines taxpayers' **primary tax obligations**. These obligations are to:

- (a) correctly determine the amount of tax payable by the taxpayer under the tax laws
- (b) deduct or withhold the correct amounts of tax from payments or receipts of the taxpayer when required to do so by the tax laws
- (c) pay tax on time
- (d) keep all necessary information (including books and records) and maintain all necessary accounts or balances required under the tax laws
- (e) disclose to the Commissioner in a timely and useful way all information (including books and records) that the tax laws require the taxpayer to disclose
- (f) co-operate, to the extent required by the Revenue Acts, with the Commissioner in a way that assists the exercise of the Commissioner's powers under the tax laws
- (g) comply with all other obligations imposed on the taxpayer by the tax laws.

In the new disputes resolution process the same stand-

ards of full and timely disclosure apply to both taxpayers and the Commissioner. The nature of the documents required under the new process, combined with an impartial review by a team of technical experts before an assessment is made, encourages both consistency and quality in technical decisions.

The new section 17A of the Tax Administration Act 1994 provides that the Commissioner has access to Court Orders to enforce compliance with requests for information. We expect that this will result in the expeditious gathering of information. All information necessary for an audit should be made available at the earliest possible stage. If information requested has not been produced, or if there have been unnecessary delays in producing it, the Commissioner will seek Court Orders and at the same time will consider prosecution action for failure to furnish information.

The combined effect of section 17A and the evidence exclusion rule means that the "all cards on the table" approach to resolving disputes should be reached at the earliest possible stage. The new procedures are designed to encourage full and open discussion between the Commissioner and taxpayer or agents throughout the audit process.

We will issue a separate TIB shortly to outline in greater detail the new compliance and penalty provisions. In terms of the new disputes resolution process, taxpayers or agents can expect penalties to be considered as part of the audit process.

Application

The new disputes resolution procedures deal with these situations:

1. When the taxpayer disagrees with any of the following actions which the Commissioner intends to undertake:
 - issuing a taxpayer with an assessment or determination that differs from the amount or basis declared in the taxpayer's tax or other return
 - amending an existing assessment or determination based on new information
 - issuing a taxpayer with an assessment and the taxpayer has not filed a tax or other return
 - making a disputable decision.
2. When the Commissioner issues an assessment or a determination instead of a NOPA, and the taxpayer has not previously accepted the assessment or determination in writing, and the Commissioner disagrees with the taxpayer's proposed adjustment.
3. When the Commissioner issues an assessment or a determination instead of a NOPA, and the taxpayer wishes to alter a previously-filed return, but the Commissioner disagrees with the taxpayer's proposed adjustment.

Summary - key changes and concepts

The new disputes resolution procedures introduce a number of new concepts as well as changes to present practices.

This section introduces the key concepts that you need to know about. These concepts are fully described from page 11 onwards. The following is a brief description of the key changes and concepts.

The **Commissioner** will generally issue a **Notice of Proposed Adjustment** (NOPA) in either of these situations:

1. If the Commissioner wishes to issue a taxpayer with an assessment or determination which differs from the amount or basis declared in the taxpayer's return.
2. If the Commissioner wishes to amend an existing assessment based upon new information,

and in either case, the taxpayer does not agree with that assessment or proposed assessment.

The NOPA will set out the details of the assessment or amended assessment which the Commissioner proposes.

A taxpayer or agent is able to issue a **taxpayer NOPA** to the Commissioner if the Commissioner has issued an assessment or determination without first issuing a NOPA to the taxpayer or agent. A taxpayer's NOPA must contain the same information as is required in the Commissioner's NOPA.

A NOPA is a written document containing all of the following:

- the items the Commissioner or taxpayer proposes should be adjusted (*an itemised description by nature and amount, with supporting calculations, for each proposed adjustment. Penalties, including penal tax (if any) will be included in a Commissioner's NOPA.*)
- the tax laws upon which the proposed adjustments are based (*the section or sections of the Revenue Acts relied upon for each separate adjustment*)
- the facts giving rise to the proposed adjustments (*including reference to source documents, contracts, memoranda and other evidence bearing on the facts. Full details are essential to enable consideration of all the facts and issues.*)
- the legal issues in respect of the proposed adjustments (*the legal questions raised by each proposed adjustment, including tax laws relied upon*)
- the propositions of law relied on or distinguished in respect of the proposed adjustments (*the reason for taking a particular position stated in terms of established law. Leading case authorities may be cited here.*)

A NOPA may contain more than one issue, relate to more than one period and relate to more than one tax type.

If a taxpayer or the Commissioner disagrees with one or more of the proposed adjustments in a NOPA, he or she must notify the other party by means of a **Notice of Response** within two months from the date of issue of the NOPA.

A Notice of Response is a written document which:

- specifies which items are not agreed with or considered erroneous
- specifies the tax laws relied upon
- outlines facts contained in the NOPA which are in error
- outlines any additional facts
- outlines any additional legal issues arising from the NOPA
- states the propositions of law relied on in relation to the notice.

The definition of **taxpayer** has been amended. A taxpayer is defined as a person who:

- is liable to perform, or comply with, a tax obligation; or
- may take a tax position

whether as principal, or as an agent or employee or officer of another person.

There is a provision relating to **adjustments accepted in writing**. Once adjustments proposed by the Commissioner have been accepted in writing, no further challenge can be made to those adjustments.

The legislation also defines **response period**. This is generally two months from the date of issue of the originating document (NOPA, assessment, disclosure notice or disputable decision). The two month response period is not varied in cases when the period embraces all or part of the Christmas holiday break.

Deemed acceptance occurs if there has been no response to an originating document within the response period. Deemed acceptance results in the loss of rights to challenge the adjustments further.

A taxpayer's late response will be deemed to be received within the response period if **exceptional circumstances** apply. Exceptional circumstances are circumstances which:

continued on page 4

from page 3

- are beyond the taxpayer's control; and
- provide reasonable justification for a late response.

An **act or omission of a taxpayer's agent** is not an exceptional circumstance, unless the act or omission was caused by an event or circumstance beyond the control of the agent and meets both of the following conditions:

- It could not have been anticipated.
- It could not have been avoided by compliance with accepted standards of business organisation and professional conduct.

The **Commissioner's late response** will be deemed to have been received within the response period if **exceptional circumstances** apply. Such circumstances must meet both of the following conditions:

- They must be beyond the control of the Commissioner.
- They must provide reasonable justification for a late response.

Before issuing a late notice rejecting a taxpayer's NOPA, the Commissioner must obtain from the High Court an order allowing the late issue. Reasonable justification includes a change to a tax law, or a new tax law, or a Court decision on a tax law, that is enacted or made within the response period.

The **statute (time) bar** provision has been amended to:

- expire four years from the end of the year/period in which a tax return is filed
- allow a taxpayer to waive the statute (time) bar for a period of up to six months.

A **conference** process is incorporated into the new procedures to ensure that the parties have every chance to resolve issues during the dispute. A conference may occur at any stage considered beneficial and there may be several throughout the process. The conference is an administrative procedure and is not a legislative requirement.

The **disclosure notice** procedure is started by the Commissioner. It requires both the Commissioner and the taxpayer to "lay their cards on the table" by detailing, in writing, their respective Statements of Position.

Each party's **Statement of Position** must contain all of the following for each adjustment still in dispute:

- the facts and evidence
- the issues considered to arise
- the propositions of law to be relied on.

Once the parties have completed their Statements of Position, the **evidence exclusion rule** applies.

Under the evidence exclusion rule, both the taxpayer and the Commissioner are limited in any challenge to the facts, evidence, issues and propositions of law disclosed in their respective statements of position.

The evidence exclusion rule is subject to a **judicial discretion** to admit previously undisclosed matters. The applicant must show that he or she could not, with due diligence, have found or discovered this material at the time of delivery of his or her Statement of Position, and admission of those items is necessary to avoid manifest injustice.

Disputes that aren't resolved at the disclosure stage or earlier will generally be referred to Inland Revenue's **Adjudication Unit**. The Adjudicator is delegated the Commissioner's power to assess. The Adjudicator exercises this power in a manner that is quite separate from other areas of Inland Revenue, in particular from Operations, as a crucial part of ensuring impartiality.

The Adjudicator's focus is to consider the correct application of the law and determine whether the facts of the case meet the requirements of the legislation. Adjudication also brings an impartial fresh perspective to the dispute. The Adjudicator will not revisit issues which have been resolved during the course of the audit process.

Adjudication is an administrative procedure; not a legislative requirement.

A **disputable decision** is an assessment or a decision of the Commissioner under a tax law that may be subject to an objection or a challenge.

If the taxpayer is dissatisfied with a disputable decision, he or she may **challenge** it by filing Court proceedings. There are three different Court forums; the Taxation Review Authority's **Small Claims Jurisdiction**, the TRA's **General Jurisdiction**, and **High Court**. These are all explained below.

The Commissioner's policy on the use of **information Requests** under section 17 of the Tax Administration Act 1994 has been revised to suit the objectives of the new disputes resolution process:

- The Commissioner will issue Section 17 requests as required when there is a dispute between the Commissioner and a taxpayer over a proposed adjustment. Such requests will be directed at specific issues, and will seek confirmation in writing that the request has been complied with.
- New **section 17A** permits the Commissioner to seek a **Court Order** for the production of information. This

is an alternative to prosecution action for failure to furnish information.

These are the key features of the TRA's new **Small Claims Jurisdiction**:

- The taxpayer can elect for the case to go to the Small Claims Jurisdiction.
- There is a \$50 filing fee, payable by the taxpayer.
- Its jurisdiction is limited to cases in which the disputed tax amount is \$15,000 or less.
- It can only hear simple cases in which the facts are clear and not in dispute.
- The taxpayer can represent himself/herself, or use an agent.
- Its decisions are non-precedential.
- There is no right of appeal.
- Decisions are not published.

There are no significant changes to cases heard in the TRA's **General Jurisdiction**.

The only significant change to cases heard in the **High Court** is that the High Court rules have been amended.

To take a case to the TRA (either jurisdiction) or the High Court, the taxpayer must **issue proceedings** in the relevant authority within two months of whichever of the following applies:

- the date the amended assessment was issued, if the Commissioner issued the NOPA and the adjustment imposes a fresh liability or increases an existing liability
- the date the amended assessment was issued, if the taxpayer issued the NOPA and the Commissioner has rejected some part of it
- the date the Commissioner issued a written notice that the adjustment will not be made, if the taxpayer issued the NOPA and the Commissioner's rejection does not result in an amended assessment.

This two month time limit can be extended by **judicial discretion** if there are exceptional circumstances.

For this purpose **exceptional circumstances** is defined as an event or circumstance beyond the taxpayer's control, which gives the taxpayer a reasonable justification for not challenging an assessment or determination within the prescribed two-month period. An act or omission of a taxpayer's agent, employee or tax adviser is generally not an exceptional circumstance.

If the Commissioner intends to **prosecute**, this action must be completed before any penal tax or shortfall penalty is imposed.

To impose penal tax or a shortfall penalty, the Commissioner must issue the taxpayer with an assessment notice showing the amount of the penalty.

The new procedures do not affect taxpayers' rights to judicial review.

Summary charts - steps in disputes resolution process

Diagram 1: Pre-assessment phase - Commissioner issues a Notice of Proposed Adjustment

This diagram shows the procedures usually followed when the Commissioner proposes an adjustment to a return. (There may be variations according to the circumstances.)

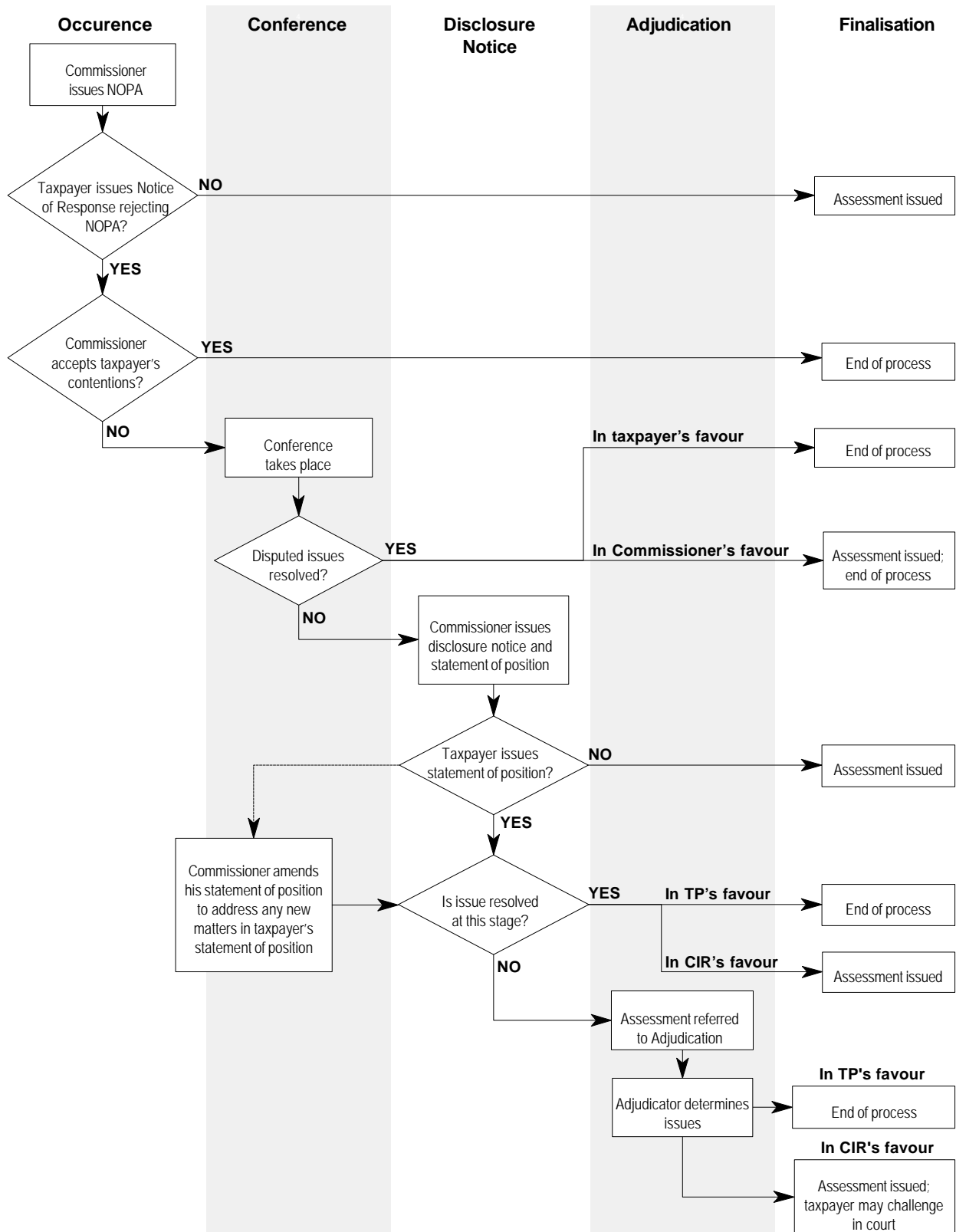


Diagram 2: Pre-Assessment phase - taxpayer issues a Notice of Proposed Adjustment

This diagram shows the procedures usually followed when the taxpayer proposes an adjustment to a return. (There may be variations according to the circumstances.)

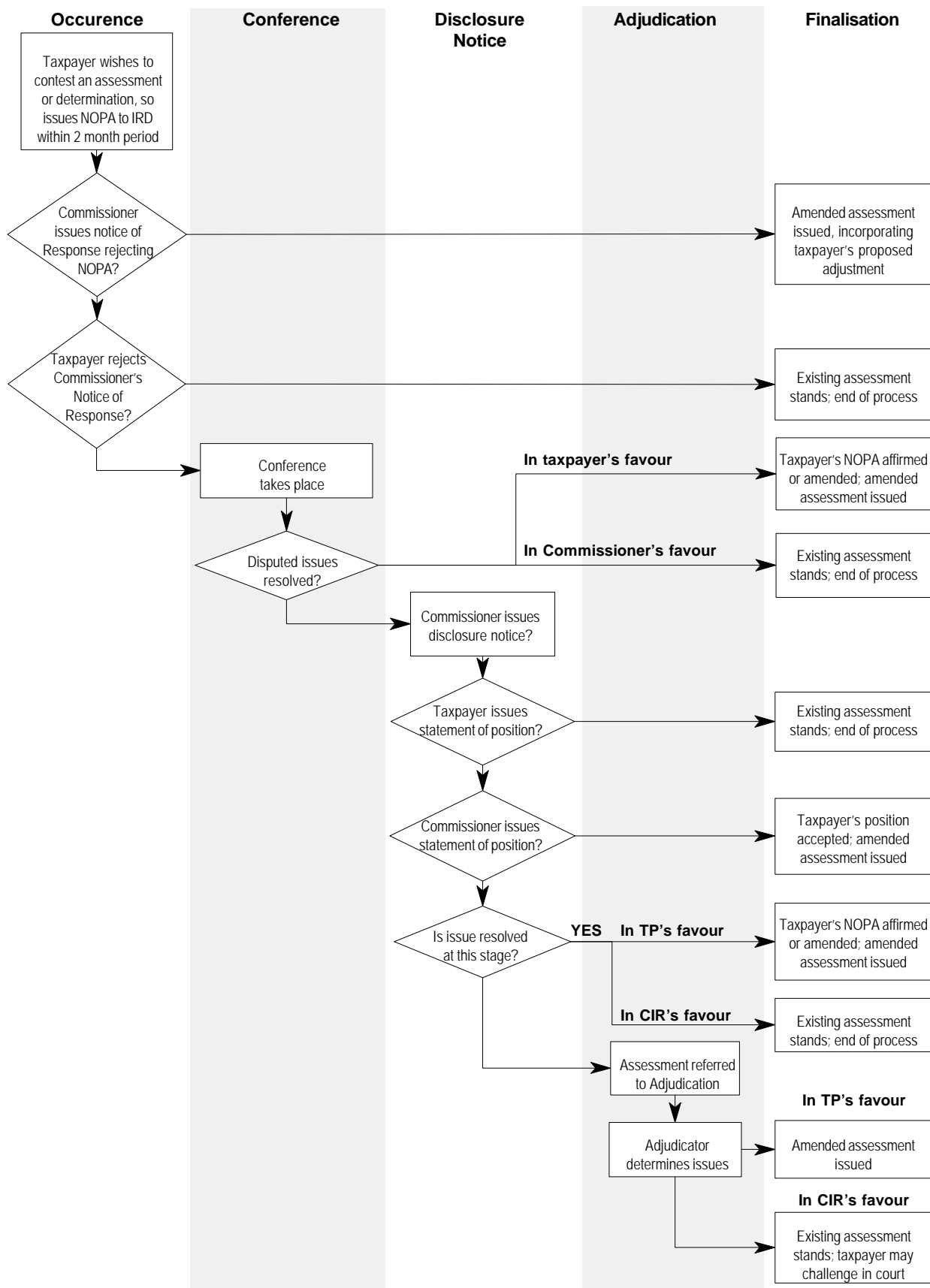
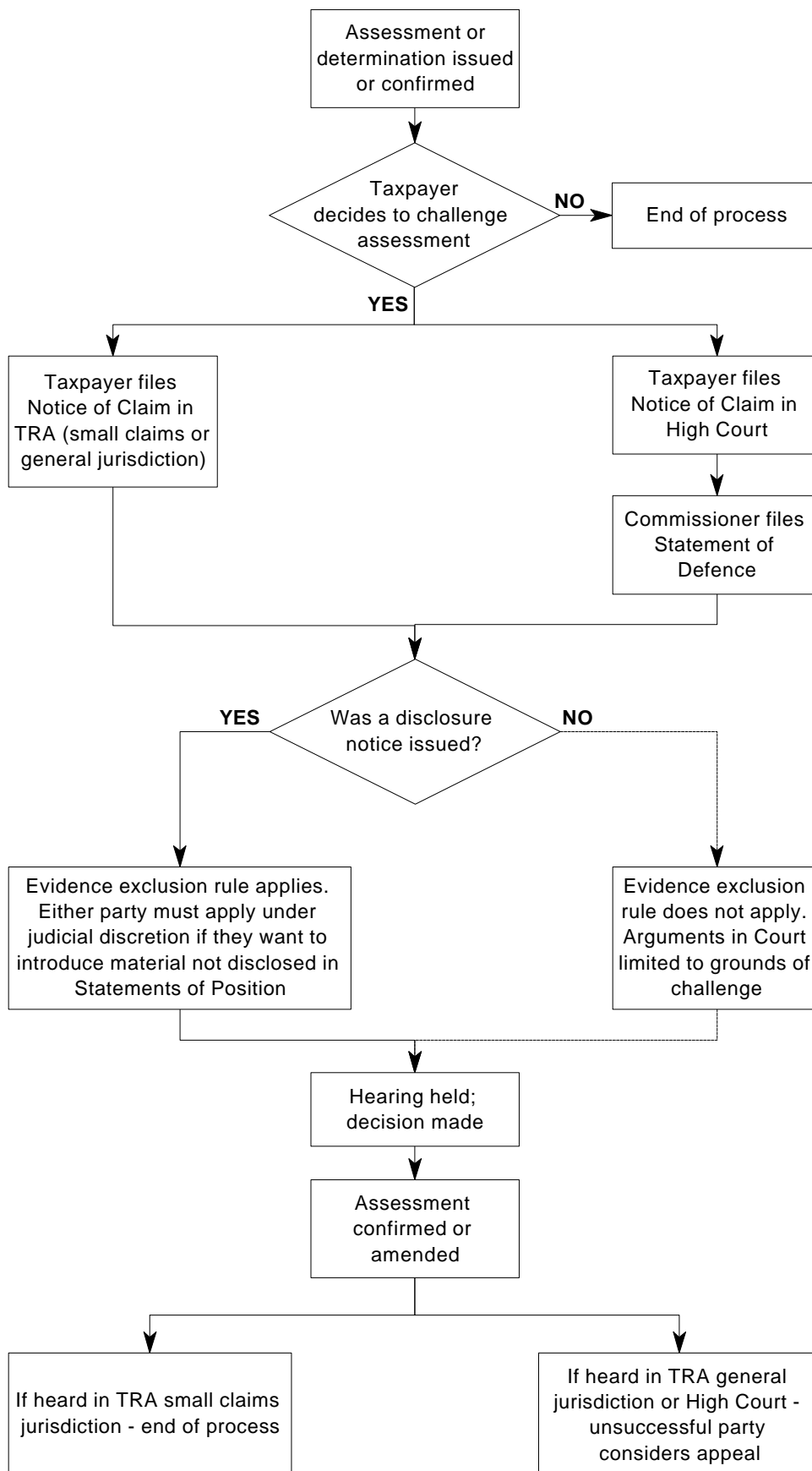


Diagram 3: Post-Assessment Disputes Resolution procedures

This diagram shows the procedures usually followed when the taxpayer wishes to pursue an assessment or determination to a Court.



Summary chart - time limits in disputes resolution process

This chart sets out the time limits that taxpayers and the Commissioner must meet in the new disputes resolution process, and the consequences of failing to meet any of them.

Issue/action	Time limit	Consequences if time limit not met
Taxpayer who disagrees with an assessment must issue a Notice of Proposed Adjustment	Two months from date assessment issued	Assessment becomes final unless exceptional circumstances exist or section 113 Tax Administration Act applies
Commissioner must respond to taxpayer's Notice of Proposed Adjustment	Two months from date taxpayer issued Notice of Proposed Adjustment	Taxpayer's Notice of Proposed Adjustment deemed accepted unless exceptional circumstances apply
Taxpayer must reject Commissioner's Notice of Response	Two months from date Commissioner issued Notice of Response	Commissioner's Notice of Response deemed accepted
Taxpayer who disagrees with a Notice of Proposed Adjustment issued by the Commissioner must issue a notice of response	Two months from date Commissioner issued Notice of Proposed Adjustment	Commissioner's Notice of Proposed Adjustment deemed accepted unless exceptional circumstances apply
Taxpayer wishes to continue with a dispute after Commissioner issues a disclosure notice, so he or she must file a Statement of Position	Two months from date Commissioner issued Disclosure Notice	Commissioner's Notice of Proposed, Adjustment, Notice of Response, or Statement of Position deemed accepted
Commissioner must issue a statement of position in response to taxpayer's statement of position	Two months from date taxpayer issued Statement of Position to Commissioner	Taxpayer's Statement of Position deemed accepted, unless judicial discretion applies
Commissioner wishes to respond to new issues raised in taxpayer's Statement of Position, so must issue an addition to previous Statement of Position	Two months from date taxpayer issued Statement of Position.	Commissioner may not raise new facts, evidence, issues or propositions of law, unless judicial discretion granted.
Taxpayer wishes to lodge a Court challenge	Two months from date of notification of a disputable decision	A challenge cannot proceed, subject to judicial discretion

Comparison table - old and new disputes procedures

The following table shows the different phases of an audit under the old and new disputes procedures.

	Events under old process	Events under new process
Investigation	<i>Audit phase</i> Assessments issued	<i>Audit phase</i> Agreed assessments can be issued, section 17 notices are likely
Recognition of disagreement	<i>Objection</i>	<i>NOPA Phase</i> NOPA issued Notice of Response Formal Section 17 Notices
Crystallisation of issues	<i>Case Stated request</i>	<i>Conference/Disclosure</i> Conferences held Disclosure Notices Statements of Position issued Evidence Exclusion rule applies Agreed assessments can be issued.
	<i>Decision to state case</i>	<i>Adjudication</i> Assessments issued
Litigation	<i>Court</i>	<i>Court</i>

Disputes resolution process for audit cases

Introduction

Most disputes arise from audit activities and it is here that the new procedures have the greatest impact. A dispute arises when the taxpayer and the Commissioner have not reached agreement on a proposed adjustment at the completion of the field work. The new disputes resolution process emphasises early resolution of the dispute by encouraging full disclosure by both the Commissioner and the taxpayer to ensure the assessment is as correct as possible the first time.

The new procedures are designed to ensure that information and evidence gathering are completed during the pre-assessment phase. The procedures will not apply if an audit has started and the taxpayer makes a voluntary disclosure, which has been agreed to in writing. Resulting penal tax or shortfall penalties which are not agreed to will be dealt with under the new procedures.

The new procedures rely on a series of information disclosures between the Commissioner and a taxpayer, designed to ensure that each is fully informed of the facts, evidence, issues (including penalties if applicable), propositions of law and interpretations upon which their respective positions are based. Full knowledge of each other's position is expected to reduce the potential for disputes and to materially assist in the early resolution of disputes which do arise.

The main impact of the new procedures on field activity is the expectation of early disclosure of information. The procedures will also affect the timing of the issue of an assessment. When the field work has been completed but no agreement has been reached on some or all of the issues identified the Commissioner will not automatically issue an assessment. The next step will depend on the status of the issues identified.

Commencing the dispute process

Identifying the issues

Once the field work has been completed there are a number of possible outcomes:

- **All of the issues are agreed and no discrepancy results.** Inland Revenue will issue a letter finalising the audit once the case is independently approved, usually by the reporting officer.
- **All of the issues are agreed and a discrepancy arises.** The investigator and the taxpayer will record the adjustments in writing. The adjustments will then be independently approved, usually by the reporting officer. Inland Revenue will issue an assessment(s) incorporating the adjustments.
- **Some of the issues are agreed and others are disputed.** The investigator will issue a NOPA or series of NOPAs covering disputed issues. Issues which have not been agreed to in writing will be

addressed fully within a NOPA. If several return periods are involved and there are no disputes for some periods, Inland revenue will issue assessments for those periods. (These assessments cannot later be challenged). The remaining periods will generally proceed to the NOPA stage. We will not issue partial assessments for periods in which some issues remain in dispute.

- **The issues are identified but clarification is needed.** To continue the audit, the investigator may issue a section 17 request for any outstanding information or may issue a NOPA.
- **None of the issues are agreed.** The issues will be included in one or more NOPAs.

If a proposed adjustment results in tax to pay, the taxpayer can make a voluntary tax payment at any time to meet the proposed liability. This would reduce use of money interest (UOMI) that may accrue during finalisation of the audit.

Usually the Commissioner will issue a NOPA if there are unresolved issues at the end of the field work phase of an audit.

Generally, the auditor will advise the taxpayer that a NOPA is being issued. This can be by letter, phone call or fax. This pragmatic approach may not always be possible, so failure to advise the taxpayer or agent before issuing a NOPA does not render the NOPA invalid. We intend to adopt this approach for other notices issued by the Commissioner, such as the Disclosure Notice. We also expect that taxpayers and their agents will adopt this pragmatic approach.

Status and purpose of the NOPA

Section 89F Tax Administration Act 1994

The purpose of the NOPA is to ensure that both the Commissioner and the taxpayer are talking about the same issues and are aware of the arguments on which the other party is relying. This is achieved by setting out all of the following in writing:

- the items the Commissioner or taxpayer proposes to adjust
- the tax laws upon which the proposed adjustments are based
- the facts giving rise to the proposed adjustments
- the legal issues in respect of the proposed adjustments
- the propositions of law relied upon or distinguished in respect of the proposed adjustments.

Reducing these points to writing emphasises the need to review the positions taken and fosters open and frank discussion early in the resolution process.

When written agreement has been reached on some issues but others are unresolved, a NOPA will be issued

continued on page 12

from page 11

to incorporate all the issues still in contention. Agreement in writing may be on a standard form available from Inland Revenue or may be by a customised letter. Whatever its form, the agreement must set out the tax type and period, the adjustment, the name of the taxpayer and the name of the Inland Revenue officer who agreed with it.

The NOPA is the first formal step in the process of resolving issues. At this stage either party may amend its position as the dispute resolution process advances. The NOPA is not a binding document. However, resolving the dispute is more likely when both parties have fully disclosed their positions. This should prevent any misunderstanding and possible duplication of effort in preparing subsequent documentation if the dispute proceeds beyond the NOPA stage.

There is an example of a simple NOPA in the appendix to this TIB. You can get a pre-printed NOPA form from any Inland Revenue office.

In large or complex audits the Commissioner may issue a number of NOPAs as issues arise.

If the taxpayer wishes to deal with proposed adjustments as they arise the investigator may issue a series of NOPAs throughout the audit. When an audit involves several years and the time bar is pending for one or more of the years in question, the investigator may issue separate NOPAs for each individual period. This will ensure that the assessment can still be issued within the statute time bar period.

When several NOPAs are issued, each one must be responded to within two months of when it was issued. A single Notice of Response can be issued to respond to multiple NOPAs issued on different dates, but it must be issued within the two month response period of the earliest NOPA. At the disclosure notice stage, all NOPAs will be incorporated into the one Statement of Position.

When a further NOPA will be issued

A new NOPA will only be required for issues that weren't covered in a previous NOPA. This is because the NOPA is not binding. For example, if a motor vehicle expense is initially categorised as private expenditure but subsequent discussion or further evidence indicates that it is actually capital expenditure, no new NOPA is required because the deductibility of motor vehicle expenses is the issue, which is clarified after the initial NOPA. If the issue is not resolved, the issues raised in the NOPA will be clarified through the conference phase and formalised in the Statement of Position.

Additional NOPAs may be issued if issues arise which relate to amounts not previously contained in a NOPA and which are not agreed to by the parties. If the change is a refinement of an earlier adjustment (such as the motor vehicle expenses mentioned in the previous paragraph), no new NOPA will be needed. However, if a

new adjustment is proposed on the basis for the first adjustment has fundamentally changed a new NOPA may be issued. For example, when a NOPA contains a proposed adjustment related to depreciation deductions and discussion raises an issue related to calculation of depreciation recovered, a further NOPA will be issued. Another example could be when a case is referred back by Adjudication for rework as one or both of the parties to the dispute are arguing on an incorrect basis. For further discussion on this issue, see "What happens if key arguments are missed" on page 20 of this TIB.

When Commissioner may not issue a NOPA

There may be circumstances when the investigator has discovered an item which needs to be adjusted, but cannot issue a NOPA. The Commissioner cannot issue a NOPA in any of these situations:

- if the proposed adjustment is already the subject of a challenge
- after the statute time bar has expired.

When Commissioner may issue an assessment without issuing a NOPA *Section 89C Tax Administration Act 1994*

There may be circumstances in which an investigator finds a discrepancy and issues an assessment instead of a NOPA. Section 89C permits the Commissioner to issue an assessment without issuing a NOPA in limited circumstances. For audit cases this is likely to be in the following circumstances:

- if the assessment corrects a tax position taken by the taxpayer, in a way or manner agreed by the Commissioner and the taxpayer (sec 89C(c))
- if the assessment reflects an agreement reached between the Commissioner and the taxpayer (sec 89C(d))
- if the Commissioner has reasonable grounds to believe a NOPA may cause the taxpayer to:
 - leave New Zealand; and/or
 - take steps to make it more difficult for the Commissioner to collect the payment of tax from the taxpayer or an associated person (sec 89C(e))
- if the assessment corrects a tax position previously taken by a taxpayer which is, or is the result of, a vexatious or frivolous act or failure to act by the taxpayer (sec 89C(f))
- if the taxpayer has not provided a tax return as required by law (sec 89C(h))
- if the taxpayer has failed to make or account for a deduction required to be made (sec 89C(i))
- if the assessment is consequential to an error made by another taxpayer and an assessment has been, or is able to be, issued to that other taxpayer (sec 89C(k)).

The following examples show situations when the Commissioner would issue assessments in accordance with the above provisions without issuing a NOPA:

Section 89C(i):

- If a taxpayer has failed to account for NRWT or PAYE.

Section 89C(k):

- In the case of group loss offsetting - if a company has claimed losses to which it is not entitled and that company has been assessed (or is able to be assessed) to disallow those losses, the Commissioner may issue an assessment to the profit company which has offset the losses against its profits.
- In the case of GST if the parties have incorrectly assumed a transaction was exempt from GST - if the Commissioner agrees that one taxpayer is entitled to the input tax credit, the Commissioner may issue an assessment to the supplier requiring the supplier to account for output tax on the value of the supply.
- In the case of a partnership, if one partner has been reassessed following the dispute process, and the adjustments affect all partners, consequential adjustments to all partners will be made.

There are other examples and circumstances when an assessment can be issued without first issuing a NOPA. These are noted under "Taxpayer Initiated Resolution of Disputes" on page 17 of this TIB.

Section 89D Tax Administration Act 1994

When the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can still dispute the assessment. To dispute the assessment, the taxpayer must issue a NOPA to the Commissioner. A taxpayer-issued NOPA is in the same form as one issued by the Commissioner. The process to be followed for a taxpayer-issued NOPA is discussed under "Taxpayer Initiated Resolution of Disputes" on page 17.

If a taxpayer has failed to file a return and the Commissioner issues an assessment, known as a default assessment, the taxpayer will not have to issue a NOPA, but must file the return for which the default assessment was issued.

What to do once a NOPA is received

When a taxpayer or agent receives a NOPA, the taxpayer can accept the proposed adjustments in writing, reject the adjustments by issuing the Commissioner with a Notice of Response, or do nothing.

Acceptance of NOPA

Section 89I Tax Administration Act 1994

The taxpayer can accept a NOPA by agreeing in writing or by doing nothing. If the taxpayer does not respond to the NOPA within the two month response period, the taxpayer is deemed to have accepted the adjustments proposed in the NOPA.

If a taxpayer intends to accept a NOPA, we recommend doing so in writing. This will ensure an assessment is issued sooner, with any resultant interest and/or additional tax reduced to a minimum.

If the taxpayer accepts any proposed adjustment or fails to respond to the notice within the two month response period, the investigator or other officer has responsibility for issuing an assessment including the adjustment.

If the taxpayer has accepted the adjustments or is deemed to have accepted them, he or she may not the assessment.

Rejection of Commissioner's NOPA - Notice of Response

Section 89G Tax Administration Act 1994

If a taxpayer does not accept the proposed adjustment(s), the taxpayer or agent must issue a Notice of Response to the Commissioner, within two months of the date of issue of the Commissioner's NOPA.

The Notice of Response must state all of the following with sufficient detail to fairly inform the recipient:

- which items are not agreed with and how those items should be changed
- the tax laws relied upon
- the facts contained in the NOPA which are in error
- any additional facts relied upon
- any additional legal issues the taxpayer believes arise from the NOPA including, for the sake of completeness, any tax laws relied upon
- the propositions of law relied on.

A taxpayer will not be able to merely state that the proposed adjustments are not accepted or are incorrect. If the notice does not contain the requisite information it will be invalid.

If possible the Commissioner will contact the taxpayer and advise that the notice cannot be accepted and that a further notice should be issued within the response period. If the response period has expired the only avenue open to the taxpayer is to make an application for exceptional circumstances.

The taxpayer is not bound by the contents of the Notice of Response. However, to be a valid Notice of Response it *must* contain the requisite information. If it is incomplete and the response period expires, the taxpayer will be deemed to have accepted the adjustments proposed by the Commissioner.

Pre-printed Notice of Response forms are available from Inland Revenue.

Small claims election at Notice of Response stage

Taxpayers may indicate in their Notice of Response that they would like any unresolved issues to be heard before the small claims jurisdiction of the Taxation Review Authority.

continued on page 14

from page 13

Because of the nature of small claims cases (i.e. they have no precedential effect and the facts are clear and not in dispute), the pre-assessment exchange and analysis of evidence and issues will often not require the same degree of time. We anticipate that in some cases the pre-assessment process for small claims cases may be fast tracked compared to the usual dispute process. For example, this may involve the Commissioner not issuing a disclosure notice and proceeding straight to adjudication following the NOPA stage. In addition, the documentary evidence will be likely to be produced very early in the process. The time taken to respond to various notices, both by the taxpayer and the Commissioner, should be reduced.

Exceptional circumstances - taxpayer's late response

Section 89K Tax Administration Act 1994

If the taxpayer responds to a NOPA outside the two month response period, the Commissioner can treat the late Notice of Response as having been received within the response period when exceptional circumstances apply.

Any request for consideration of a late Notice of Response should be in writing and include:

- a full explanation as to why the Notice of Response is late, together with any supporting evidence
- the Notice of Response which the Commissioner would have received had it been issued on time. The Notice of Response must accompany the request for late acceptance because there is no provision to allow additional time to issue the Notice of Response.

The legislation provides a balance between certainty as to time limits and fairness when exceptional circumstances have prevented the taxpayer from responding to a NOPA within the response period.

A taxpayer must make a request for late acceptance as soon as reasonably practicable after becoming aware that the response period has elapsed. If the Commissioner accepts the taxpayer's request for a late Notice of Response, the Notice is deemed to have been received within the response period. If the Commissioner does not accept the late Notice of Response, an assessment incorporating the adjustments proposed will be issued. If a Notice of Response is not received with the letter of request, the Commissioner is not able to accept the request and an assessment confirming the NOPA will be issued in due course (if not already issued).

The legislation defines exceptional circumstances very narrowly. We anticipate that late Notices of Response will be accepted only on rare occasions. This reflects the onus on taxpayers to meet their tax obligations.

Exceptional circumstances are defined as an event or circumstance outside the control of the taxpayer that provides reasonable justification for not responding within the response period. An act or omission of an agent is not an exceptional circumstance unless the act

or omission was caused by an event or circumstance beyond the control of the agent that meets both of these conditions:

- It could not have been anticipated.
- It could not have been avoided by compliance with accepted standards of business organisation and professional conduct.

Examples of exceptional circumstances are covered in the Questions and Answers section on page 26 of this TIB.

Considering taxpayer's Notice of Response

Once the Commissioner has received the taxpayer's Notice of Response, it will be considered by the investigator or other Inland Revenue officer dealing with the matter. That officer will consider the merits of the taxpayer's notice and accept or reject, in full, or in part, the taxpayer's argument.

- If fully accepted, the Commissioner will make any appropriate adjustments.
- If partly accepted, the Commissioner will advise the taxpayer of those issues which he has accepted. The remainder of the issues will progress to the conference phase.
- If fully rejected, the Commissioner will advise the taxpayer or agent that the Notice of Response has been rejected in full. The issues will progress to the conference phase.

Conferences

Purpose

The purpose of a conference is to:

- identify and clarify the facts or issues in dispute
- facilitate resolution of any disputed facts
- facilitate resolution of any disputed issues;
- state the facts and define the issues in a clear and concise manner for consideration by the Adjudication Unit if they cannot be resolved.

The conference phase is an administrative practice of the Commissioner. It is not mandatory to have a conference. It is the Commissioner's responsibility to ensure that the disputes process moves to the conference stage as required.

Conduct of a conference

Conferences will be kept as flexible as possible, consistent with the taxpayer's wishes and other factors such as the scope of the audit. Conferences may range from a phone call to several meetings, both before and after the disclosure stage.

For complex cases, discussions or conferences are likely to be more formal. If necessary the conference may

adhere to a set agenda with one or more face to face meetings. The meetings may involve not only the taxpayer and the Inland Revenue officers dealing with the matter, but also lawyers and other appropriate Inland Revenue officers, accountants and lawyers representing the taxpayer, and, if necessary, other experts advising either party. The experts will be people such as valuers, academics, engineers, bankers, etc. who can provide specialist advice.

Legal and other advisers attending a conference

If a dispute is not settled during the audit or NOPA stage, both the Commissioner and the taxpayer may want to obtain further expert legal or technical advice. The Commissioner accepts that, in these circumstances it is appropriate for a certain amount of "back tracking" to take place. Some items that have already been discussed between the parties may need to be revisited by the newly-introduced advisers. This approach is consistent with the overall objective of the new procedures, which is to ensure a correct assessment. If this were not the case, it would put pressure on the parties in many disputes to involve expert advisers at an earlier stage than is actually required.

It is not possible to revisit items that have previously been agreed in writing or have not been rejected within the applicable response period.

Conference not held or abridged

The Commissioner considers the conference phase to be a vital part of the disputes resolution process. Only in rare circumstances will the Commissioner not hold a conference, or decide to end or abridge a conference that is already in progress.

The Commissioner will not prolong the conference phase, even if agreement has not been reached.

The conference may be abridged or dispensed with if any of the following apply:

- The Commissioner is satisfied that the taxpayer or the taxpayer's agent is acting in a frivolous or vexatious manner, such as when the taxpayer or agent is setting unreasonable demands as to the time and place or terms of such meeting or refusing to conduct themselves reasonably at any meeting.
- revenue losses may result from delaying tactics on the part of the taxpayer.
- the taxpayer or agent and the Commissioner agree to disagree.

Any decision to dispense with or abridge the conference process will be made by an appropriate officer. The decision will be communicated in writing to the taxpayer or agent within five working days of when it is made. A decision to dispense with or abridge the conference process may be changed at the discretion of the reporting officer.

If issues remain unresolved after a conference, the Commissioner will invoke the disclosure procedures.

After the disclosure phase, a further conference may be held if it is likely to help resolve the dispute.

Disclosure procedures

Section 89M Tax Administration Act 1994

Purpose

The disclosure procedure will generally occur towards the end of the discussion/conference process if agreement has not been reached. During this part of the disputes resolution process the Commissioner will issue the taxpayer with a Disclosure Notice.

A Disclosure Notice can be issued at the same time as or any time after the taxpayer or Commissioner has issued a NOPA. If a Disclosure Notice is issued with a NOPA or before a response to a NOPA is due, a response must be issued in relation to both the NOPA and the Disclosure Notice. It would be rare to issue a Disclosure Notice at the same time or within the response period for a NOPA.

The purpose of the disclosure process is to require both parties to state their respective positions on issues still in dispute, in a Statement of Position. The effect of the Statement of Position is to bind each party to the facts, evidence, issues and propositions of law which they disclose. Full disclosure in writing is essential; the Statement of Position forms the basis on which the issues will be argued if the case proceeds to court.

The Commissioner will dispense with the disclosure process in some instances, such as when the personal safety or security of an informant is in issue. Authority not to issue a Disclosure Notice will be at a senior level within the Service Centre or National Office.

Disclosure Notice

The Disclosure Notice is issued by the Commissioner and requires the taxpayer to provide a Statement of Position, covering all issues in dispute.

An example of a Disclosure Notice is shown in the sample forms at the back of this TIB, and in the appendix.

Statement of Position

The Statement of Position is a prescribed form, and must contain all of the following details:

- the facts and evidence being relied upon
- the issues considered to arise
- the propositions of law to be relied upon.

If the taxpayer's Statement of Position does not contain the requisite information, and the response period has expired, the taxpayer will be deemed to have accepted the Commissioner's NOPA or Statement of Position. If there is still time available in the response period, the taxpayer will be able to issue a valid taxpayer Statement of Position. If possible, the Commissioner will contact the taxpayer and advise that the Statement of Position is deficient or invalid, as the case may be.

continued on page 16

from page 15

An example of a Statement of Position is shown in the appendix.

When the disclosure procedures are followed both the taxpayer and the Commissioner will be limited in any court challenge to the facts, evidence, issues and propositions of law disclosed in the Statements of Position. However, the Notice of Assessment and the basis for this notice (e.g. the Adjudicator's report) meet the requirements for admission to Court. There will be no need to seek approval for admission of these documents into Court, as this is the Commissioner's disputable decision.

Taxpayer's Statement of Position

The taxpayer's Statement of Position must be filed within two months of the date of issue of the disclosure notice. However, the taxpayer can apply to the High Court for additional time within which to issue a Statement of Position, if:

- The taxpayer applies before the expiry of the response period, and
- The taxpayer considers the two month response period unreasonable as the disputed issues have not previously been discussed between the Commissioner and the taxpayer or agent.

When the High Court considers a taxpayer's application it will have regard to the conduct of the parties to the dispute and the purpose of the new disputes procedures.

Pre-printed Statement of Position forms are available from Inland Revenue offices

Commissioner's Statement of Position

When the Commissioner issues the NOPA, the Commissioner's Statement of Position will be issued at the same time as the disclosure notice. The disclosure notice will require the taxpayer to provide a Statement of Position within two months of the date of issue of the disclosure notice.

The Commissioner has a right of reply to the taxpayer's Statement of Position. If the Commissioner exercises his right of reply he must do so within two months of the date of issue of the taxpayer's Statement of Position.

The Commissioner may apply to the High Court for more time to reply to a taxpayer's Statement of Position if:

- The Commissioner applies before expiry of the response period, and
- The Commissioner considers it unreasonable to reply within the response period owing to the number, complexity or novelty of the matters raised in the taxpayer's Statement of Position.

The need to apply to the High Court may arise when the taxpayer's Statement of Position refers to facts, issues, evidence or propositions of law which have not previously been disclosed.

Although the taxpayer has no right of reply the Commissioner may agree to the taxpayer including further information in the taxpayer's Statement of Position. This should be rare, particularly we expect that material which is in the taxpayer's domain can and should have been disclosed earlier in the disputes resolution process.

If taxpayer fails to respond to a Disclosure Notice

If the taxpayer fails to respond to the Disclosure Notice within the response period, the taxpayer is deemed to have accepted the Commissioner's NOPA, or Statement of Position. An assessment will be issued accordingly.

Issues remaining unresolved

If the taxpayer responds to a Disclosure Notice within the response period, and the issues remain in dispute, the unresolved issues will usually be referred to the Adjudication Unit. Conferences can still be held before the issues are referred to Adjudication, if this supports the possible resolution of a dispute.

Penal tax, shortfall penalties and prosecution

One of the objectives of the new disputes resolution process is the prompt and efficient resolution of disputes. To be consistent with this objective, the Commissioner will raise the issue of penal tax or shortfall penalties as soon as is practicable, which in most cases will be at the time the substantive issues are being discussed. A discussion of the new shortfall penalties will be covered in a separate TIB.

A NOPA will be issued before any assessment or amendment of penal tax or shortfall penalties unless there is full agreement with taxpayer before issue of the NOPA or a court has directed the adjustment. In summary penal tax and shortfall penalties will follow the disputes resolution process in the same way as the substantive issues, with the underlying shortfall determining the amount of penal tax or shortfall penalty.

Penal tax or shortfall penalty will be assessed or amended in the following circumstances:

- if sufficient admissible evidence is held to support imposition of the penalty, and
- the taxpayer agrees with the penalty or is deemed to accept the penalty, and/or
- a court has directed an adjustment to an existing penalty, or
- the Adjudication Unit supports imposition of the penalty (in any case when the penalty remains disputed.)

If the Commissioner intends to prosecute this action must be completed before the imposition of any penal tax or shortfall penalty. Imposition does not occur until an amount is notified by an assessment notice. Accord-

ingly, if penal tax or a shortfall penalty is to be imposed in addition to prosecution action, it may proceed through the new disputes procedures up to, but not beyond, finalisation of the Commissioner's decision. If both prosecution and penal tax or a shortfall penalty are intended, imposition will be held up pending completion of prosecution action.

Partnerships and income tax

The procedure for auditing partnerships is similar to other types of tax returns. In most cases the Commissioner will be dealing with the partnership's agent or manager. A NOPA will be issued to the partnership agent or manager for the partnership, and all the partners will be joined in this NOPA. This requires agreement between the Commissioner and the partners.

If this agreement is not forthcoming, a NOPA will be issued to the partner representing the partnership, or to another partner in the partnership. The dispute will follow the usual procedure to resolution or adjudication, whichever is the earlier.

Once an issue is resolved for one partner, the remaining partners will be assessed in terms of section 89C(k) - consequential adjustments. Individual partners who have not been kept informed by the partnership's agent or manager can still contest the assessment by issuing a NOPA to the Commissioner. It is likely that a shortened procedure will apply in these circumstances, as the material for sustaining the adjustment will have been obtained during the review of the partnership itself.

When a partnership or an individual partner has initiated an adjustment by way of NOPA, and the Commissioner agrees to the adjustment, all of the partners will be reassessed.

Taxpayer-initiated resolution of disputes

Sections 89D, 89F, 89H, 89L, Tax Administration Act 1994

Introduction

The Legislation requires a taxpayer to issue a NOPA when requesting an adjustment to an assessment or determination. There may be circumstances when a NOPA is not required, such as when the requested adjustment is one that the Commissioner agrees should be made. Therefore, when a taxpayer wants an amendment made to an assessment, Inland Revenue recommends that initial contact be made by way of telephone, letter, counter enquiry or an IR 960A (agent's form). If we agree with the proposed amendment the taxpayer won't have to issue a NOPA. Such agreement would be made in terms of section 113 of the TAA, which is a section enabling the Commissioner to amend returns to ensure their correctness. However, it is essential that the taxpayer contacts Inland Revenue immediately upon receiving an assessment or determination, and does not leave it until later in the two month period. This will allow enough time to issue a NOPA if no agreement is reached between the Commissioner and the taxpayer (or agent).

This procedure will provide the taxpayer or agent with an early opportunity to explain why they think the assessment is wrong and how it should be amended. If the Commissioner agrees with the request, the amendment will be made and an assessment issued. If the Commissioner does not agree with the amendment requested or it is likely that the issue will take some time to resolve, the Commissioner will, if possible, advise the taxpayer or agent accordingly. The taxpayer

or agent will then have to formally initiate the disputes resolution process by issuing the Commissioner with a NOPA.

Inland Revenue guidelines require us to respond within 21 days to correspondence (e.g., telephone queries, letters, IR 960A). If we cannot give a substantive reply within 21 days, we will give an interim response. We will make every effort to resolve a taxpayer-proposed amendment to an assessment, but we will not extend the response period to issue a NOPA. Therefore, if there is any doubt on a taxpayer or agent's part as to whether the Commissioner will agree to an adjustment, they should issue a NOPA, especially if there is not much time remaining in the response period. For example, if there is less than 4 weeks remaining before the expiry of the response period, the taxpayer or agent should issue a NOPA.

Failure to issue a NOPA, even though a taxpayer or agent may have queried an adjustment with Inland Revenue, will not constitute exceptional circumstances. The ability to issue a NOPA is still within the taxpayer's or agent's control.

[Note: form IR 960A is a new form, designed with the new disputes resolution procedures in mind. It is mainly for dealing with account maintenance amendments/queries and simple adjustments (such as missing donations receipt or IR 12 certificate, or dividend income not returned). The former IR 960 form can still be used for a limited time, to dispute assessments under the former objection process, but not the new disputes resolution process]

continued on page 18

from page 17

Assessments Without NOPAs

Section 89C Tax Administration Act 1994

Section 89C allows the Commissioner to issue an assessment without first issuing a NOPA in any of these situations:

- if the assessment corresponds with a tax return that has been provided by the taxpayer (sec 89C(a))
- if the Commissioner considers the assessment corrects a simple or obvious mistake or oversight contained in the tax return (sec 89C(b))
- if the assessment reflects an agreement between the Commissioner and the taxpayer correcting a tax position previously taken by the taxpayer (sec 89C(c))
- if the assessment otherwise reflects an agreement reached between the Commissioner and the taxpayer (sec 89C(d))
- If the Commissioner has reasonable grounds to believe the notice may cause the taxpayer to -
 - leave New Zealand; or
 - take steps to make it more difficult for the Commissioner to collect payment of tax (sec 89C(e))
- if the assessment corrects a tax position taken by a taxpayer which is, or is the result of, a vexatious or frivolous act or failure to act by the taxpayer (sec 89C(f))
- if the assessment is issued as a result of a direction or determination of a Court or the Taxation Review Authority (sec 89C(g))
- if the taxpayer has not provided a tax return as required by law (sec 89C(h))
- if the taxpayer has failed to make or account for a deduction required to be made (sec 89C(i))
- if the taxpayer is entitled to issue, and has issued, a NOPA to the Commissioner in respect of a return (sec 89C(j))
- if the assessment is consequential to an error made by another taxpayer and an assessment has been, or is able to be, issued to that other taxpayer (sec 89C(k)).

The following examples illustrate when the Commissioner will continue to issue assessments without NOPAs:

Section 89C(b)

- if the calculations in a taxpayer's tax return are incorrect, the Commissioner will correct the calculation and issue an assessment based on the corrected amount.

Section 89C(c)

- if a taxpayer sends in another tax deduction certificate and asks for the relevant return to be amended, the Commissioner will issue an assessment including the new deduction certificate.

Section 89C(d)

- If a taxpayer comes to the Inland Revenue office with a valid rebate receipt for a donation, the Commissioner will issue an assessment including the rebate.

Section 89C(h)

- If a taxpayer has not filed the required income tax return, PAYE return, GST return or any other necessary return, the Commissioner will issue a default assessment.

In each of the above examples the current procedures fairly, efficiently and effectively identify and address the issues.

If disputes arise from assessments issued in these circumstances, the new procedures for resolution of these disputes apply. However, the taxpayer, not the Commissioner, would have to issue a NOPA.

Commencing the dispute process

Taxpayer-issued NOPAs

Sections 89D, 89F Tax Administration Act 1994

When a taxpayer wants an amendment made to an assessment and the Commissioner does not agree with the amendment, the taxpayer must issue the Commissioner with a NOPA. Taxpayers may also elect in the NOPA that they would like any unresolved issues to be heard in the small claims jurisdiction of the Taxation Review Authority. The NOPA must be issued within two months of the date of issue of the assessment.

If a taxpayer receives a default assessment, he or she can only dispute the assessment by filing a return for that assessment period. The taxpayer cannot dispute the default assessment by issuing a NOPA.

The NOPA requirements are cumulative; failure to include all elements will result in an invalid NOPA. If a taxpayer files an invalid NOPA and there is time available within the response period, the Commissioner will try to contact the taxpayer and advise that the NOPA is invalid. This will give the taxpayer an opportunity to make the NOPA comply with the legal requirements within the response period.

If the taxpayer does not issue a NOPA

Section 89I Tax Administration Act 1994

If the taxpayer does not issue a NOPA within the response period the taxpayer is deemed to have accepted the assessment and may not challenge it in court.

However, a taxpayer who considers that he or she is entitled to an adjustment, notwithstanding that the two month response period has expired, may contact Inland Revenue and request that the adjustments are made. This request will not take the form of a NOPA. If the Commissioner agrees that the taxpayer is clearly entitled to the adjustment requested, the Commissioner may make the adjustment under section 113 of the Tax Administration Act 1994. The Commissioner's policy on the application of section 113 has not changed.

Section 113 permits the Commissioner to adjust a return in order to ensure it is correct. If the Commissioner does not consider that the taxpayer is clearly entitled to the adjustment, the taxpayer must request that the Commissioner accept a late NOPA under the exceptional circumstances rule as explained below.

An example of the application of section 113 is contained in appendices.

If the taxpayer issues a late NOPA

Section 89K Tax Administration Act 1994

When the taxpayer issues a NOPA outside the two month response period, the legislation deems the late NOPA to have been received within the response period if exceptional circumstances existed.

Any request for consideration of a late NOPA must be in writing and include:

- a full explanation as to why the NOPA is late, together with any supporting evidence, and
- the NOPA which the Commissioner would have received had it been filed on time. The NOPA must accompany the request for late acceptance because there is no provision to allow additional time to issue the NOPA.

The taxpayer must make a request for late acceptance as soon as reasonably practicable after becoming aware that the response period had ended. If the Commissioner accepts the taxpayer's request for a late NOPA, the NOPA is deemed to have been received within the response period. If the Commissioner does not accept the late NOPA, the taxpayer will be notified in writing and an assessment incorporating the adjustments proposed will be issued (if not already issued). If a NOPA is not received with the request for consideration of a late NOPA, the Commissioner cannot accept the request, and the assessment will be final.

Exceptional circumstances are defined as an event or circumstance outside the control of the taxpayer that provides reasonable justification for not responding within the response period. An act or omission of an agent is not an exceptional circumstance unless the act or omission was caused by an event or circumstance beyond the control of the agent that:

- could not have been anticipated, and
- could not have been avoided by compliance with accepted standards of business organisation and professional conduct.

Examples of exceptional circumstances are covered in the Questions and Answers section on page 26.

Commissioner's response to taxpayer's NOPA

Section 89G Tax Administration Act 1994

Once the Commissioner has received the taxpayer's NOPA it will be referred to the officer dealing with the file for a response.

If the officer agrees with the adjustment proposed in the taxpayer's NOPA, he or she will advise the taxpayer in writing and issue an assessment. If the officer does not agree with the proposed adjustment, the Commissioner will issue a Notice of Response outlining why the Commissioner rejects the proposed adjustment.

If the Commissioner does not respond *Sections 89J, 89L Tax Administration Act 1994*

If the Commissioner does not respond to the taxpayer's NOPA within the two month response period, the Commissioner is deemed to have accepted the proposed adjustment and must issue an assessment to include the taxpayer's proposed adjustment.

However, the Commissioner is permitted to apply to the High Court for an order allowing the Commissioner to issue a late Notice of Response rejecting a proposed adjustment, if:

- The Commissioner considers that exceptional circumstances apply, and
- The application is made before the Commissioner actually issues an assessment including the proposed adjustment.

If the taxpayer rejects the Commissioner's Notice of Response

Section 89H Tax Administration Act 1994

Once the taxpayer receives the Commissioner's Notice of Response, he or she may agree with the Commissioner's response and accept that no adjustment should be made, or reject the Commissioner's Notice of Response.

To reject the Commissioner's Notice of Response, the taxpayer must advise the Commissioner in writing within two months of the date of issue of the Commissioner's Notice of Response. There is no specific format for the rejection notice - a simple letter will suffice. At this point the issue will generally proceed to the conference stage.

Failure to reject the Commissioner's Notice of response results in a deemed acceptance by the taxpayer of a Notice of Response as if it were a NOPA.

Conference stage

A conference is held to further clarify the positions of both the Commissioner and the taxpayer. It may be as formal or informal as the circumstances require.

Disclosure procedure

If the dispute has not been resolved during the conference phase, the Commissioner may issue a Disclosure Notice to the taxpayer. This part of the process is the same as that for disputes originating from an audit. The significant difference is that when the taxpayer or agent has issued the NOPA, the taxpayer will be required to provide his or her Statement of Position first. The Commissioner will then respond to the taxpayer's Statement of Position with the Commissioner's Statement of Position, within the two month response period.

If the issues remain unresolved once the Statements of Position have been completed, the unresolved issues will usually be referred to the Adjudication Unit.

Adjudication

Function of the Adjudication Unit

If agreement has not been reached on all issues at the end of the conference/disclosure stage, the case will generally be sent to the Adjudication Unit for consideration, regardless of the issue or amount of tax involved.

The Adjudicator is an impartial officer within Inland Revenue, independent of the audit functions. The Adjudicator is required to take a fresh look at the application of the law to the facts of the case.

What goes to the Adjudication Unit

On completion of the pre-Adjudication disputes resolution process, the following documents will be sent to the Adjudication Unit:

- Notice of Proposed Adjustment
- Notice of Response
- rejection of the Commissioner's Notice of Response (if applicable)
- notes of conferences
- the taxpayer's Statement of Position;
- the Commissioner's Statement of Position
- any relevant documentary evidence.

A cover sheet will be attached giving details of the taxpayer's (or taxpayer's agent) and investigator's names and addresses and the documents attached. A copy of the cover sheet will be sent to the taxpayer or agent together with a letter asking if they would like any other material already disclosed to be sent to the Adjudication Unit. Taxpayers can request copies of any documents they do not already have, such as notes of conferences. Taxpayers will be given 10 working days to respond, after which the file will be sent to the Adjudication Unit.

At the back of this TIB there is a sample cover sheet.

Limited fact finding

It is possible that the Adjudicator may need to contact a party involved in the dispute, in order to clarify a point. However, this should be extremely rare.

If the Adjudicator contacts either party the contact will be recorded in writing. The reason for the contact will be noted, and the other party will be notified as follows:

- If contact is to be made with the investigator or other officer, an internal memo will be written to the investigator outlining the reason for the contact. The taxpayer or agent will receive a copy of the memo.
- If contact is to be made with the taxpayer or agent, a letter will be written to the taxpayer or agent outlining the reason for the contact. The investigator or other officer will receive a copy of the letter.

If there is a written response from either party, the Adjudicator will forward a copy to the other party.

If the Adjudicator requests a meeting, the other party to the dispute will have an opportunity to attend that meeting.

Timeframes

The Adjudication Unit will attempt to determine the outcome of a case within four to six weeks, subject to workloads and complexity of cases. Complex cases may take longer than four to six weeks to complete. The timeframe within which decisions are anticipated to be made in will be periodically reviewed.

What happens if a key argument is missed

On rare occasions the Adjudicator may believe that the assessment will be materially incorrect if he or she accepts either line of argument, because some important legal issue has been missed by both parties, or has not been pursued. In these circumstances, the Adjudicator will refer the case back to the investigator or other officer for rework. In this situation another conference may need to be held or a new NOPA may need to be issued. The Adjudication Unit will prepare a "reference back" letter to the taxpayer or agent advising that the file has been referred back to the investigator or other officer. This letter will state the reasons why the file has been referred back.

For cases referred back for rework, the procedure to refer the case back to Adjudication will start at the disclosure notice phase, as the earlier Statement of Position may no longer be valid for the issues referred back. In some instances the taxpayer and the Commissioner may agree to amend their Statements of Position, having regard to the reasons for the case being referred back to the investigator.

These procedures are intended to meet the objective of issuing correct assessments first time.

Adjudicator's decision

In all cases a copy of the Adjudicator's decision will be sent to the taxpayer or his/her agent, and the investigator or other officer involved with the case.

If the Adjudicator agrees with the taxpayer's position

If the Adjudicator determines all of the issues in favour of the taxpayer, then:

- if the Commissioner issued the NOPA, the query will be at an end. (Note: If any issues were agreed to before the case was referred to Adjudication and an assessment is required, the Adjudication Unit will issue the assessment).

- if the taxpayer issued the NOPA, any assessment action will be undertaken by the Adjudication Unit, taking into account any issues agreed upon before the case was referred to adjudication.

If the Adjudicator agrees with the Commissioner's position

If the Adjudicator agrees with the adjustments proposed by the Commissioner, the Adjudication Unit will issue an assessment on that basis.

If the Adjudicator agrees with the Commissioner's position not to accept a taxpayer's proposed adjustment, he or she will issue a disputable decision. Any challenge

to that assessment or disputable decision (section 138B), must be filed in the appropriate hearing authority within two months of the date of issue of the assessment or disputable decision.

If the Adjudicator agrees in part with the taxpayer's position

If the Adjudicator agrees in part with the taxpayer and in part with the Commissioner, the Adjudication Unit will issue any assessment required to be made.

When the Adjudicator determines an issue/adjustment in favour of the taxpayer, the investigator has no ability to challenge that decision.

Challenges - Taxation Review Authority or High Court

Introduction

A taxpayer who disagrees with the Adjudicator's decision, or an assessment issued following the disputes process, may challenge that decision by filing proceedings in the Taxation Review Authority (in either its small claims or general jurisdiction) or in the High Court, provided that both of these conditions are met:

- The assessment includes an adjustment proposed by the Commissioner which the taxpayer has rejected, or which was the subject of an adjustment proposed by the taxpayer which the Commissioner has rejected.
- The proceedings are filed with the Taxation Review Authority or the High Court within two months of the date of the assessment or determination. If the taxpayer issued a NOPA and the Commissioner decided not to amend the assessment, proceedings must be issued within two months of the date that the taxpayer is notified of that decision.

Proceedings before the Taxation Review Authority

Limitation period

Sections 138B, 138C, 138D Tax Administration Act 1994

Taxpayers must issue proceedings within two months of whichever of these dates applies:

- the issue date of an amended assessment, if the Commissioner issued the NOPA and the adjustment imposes a fresh liability or increases an existing liability.
- the issue date of an amended assessment, if the taxpayer has issued the NOPA and the Commissioner has rejected some part of it.
- the date the Commissioner issued a written notice that the adjustment will not be made, if the taxpayer issued the NOPA and the Commissioner's rejection does not result in an amended assessment.

If a hearing authority considers that exceptional circumstances have prevented a taxpayer or their agent from

issuing proceedings within the two month period, the taxpayer or agent will be allowed to start a challenge.

Evidence exclusion rule

Section 138G Tax Administration Act 1994

When the Commissioner issues a disclosure notice to a taxpayer, the Commissioner and the taxpayer cannot introduce any further facts, evidence, issues or propositions of law in any subsequent challenge, unless both parties agree otherwise.

If agreement is not reached, either party may apply to a hearing authority to have the further facts, evidence, issues or propositions introduced. If the new material is to be introduced, the hearing authority must be satisfied that both of the following apply:

- The party concerned could not, with due diligence, have discovered the facts or evidence, or issues or discerned those propositions of law, at the time of delivery of the Statement of Position.
- Having regard to section 89A (the purpose behind the dispute procedures), and to the conduct of the parties, the hearing authority considers the admission of those facts or evidence or issues or propositions of law is necessary to avoid manifest injustice to the Commissioner or taxpayer.

The evidence exclusion rule imposes a very high threshold for the introduction of new evidence, and reinforces the need to disclose all relevant matters at the early stages of the disputes resolution process.

Paying half of the tax in dispute

Sections 7A, 128A & 138IA Tax Administration Act 1994

The legislation requires a disputant to pay the non-deferrable tax (50% of the tax in dispute).

If the taxpayer cannot pay the non-deferrable tax, he or she may provide acceptable security to the Commissioner instead. This security could take the form of a mortgage or other encumbrance over any asset or right, and a guarantee or indemnity given to the Commissioner to meet any tax obligation.

continued on page 22

from page 21

If a taxpayer has already paid all of the tax in dispute, the taxpayer can ask the Commissioner to refund one half of it.

The authorisation for the Commissioner to take securities is contained in section 7A of the Tax Administration Act. That section enables the Commissioner to accept securities on whatever terms and conditions may be required by the Commissioner, to call for replacement securities if the existing securities become inadequate or insufficient, and to enforce a security if the taxpayer defaults in the performance of his or her tax obligation.

If a taxpayer is not able to pay the non-deferrable tax or provide security for it but nevertheless has a dispute that should be resolved through the courts, section 128A of the Tax Administration Act allows the Commissioner to waive the requirement for payment or security if, in the Commissioner's view, both of the following apply:

- paying the tax assessed before the dispute is resolved will unduly prejudice the taxpayer's business or personal circumstances.
- there is no material risk to the revenue in waiving payment or the provision of security.

In order for the Commissioner to be satisfied that the conditions outlined above have been met, an affidavit of assets and liabilities together with any relevant information will be required.

A waiver of the requirement to pay the non-deferrable tax, or to provide security for it, is only provisional. If the taxpayer's circumstances change, the requirement to pay or provide security may be reinstated. In addition, the waiver extends only for the period during which there is a dispute.

The discretion to waive the requirement for payment or to accept securities will be exercised by an appropriate officer of Inland Revenue in conjunction with the Litigation Management Unit.

Litigation Management

Inland Revenue's Litigation Management Unit will be responsible for managing the litigation of all tax cases and ensuring their timely outcome.

Once a case has been filed, but before counsel is appointed, all contact with Inland Revenue by the taxpayer or the taxpayer's agent must be made through the Litigation Management Unit, unless the unit has specifically authorised contact with some other Inland Revenue officer.

Following appointment of counsel, all contact must be made directly with counsel.

Service of proceedings is discussed on page 24.

Taxation Review Authority small claims jurisdiction

Sections 89E, 138B & 138C Tax Administration Act 1994

Amendments to Taxation Review Authorities Act 1994

An optional and simple "fast track" non-precedential procedure for dealing with small claims has been introduced as part of the jurisdiction of the Taxation Review Authority. The procedure is intended to deal with simple cases with small amounts of tax in dispute.

Key elements of the Taxation Review Authority small claims jurisdiction

The key elements of this jurisdiction are as follows:

- There is a \$50 filing fee payable by the taxpayer.
- It can hear cases in which the tax in dispute is up to \$15,000.
- It can only hear simple cases, in which the facts are clear and not in dispute.
- Its decisions do not set precedents.
- There is no right of appeal.
- The taxpayer can appear in person or use an agent.
- It is a fast track system for hearing disputes.
- Its decisions are not published.

The Commissioner may apply to have small claims cases transferred to the TRA's general jurisdiction if any of the following apply:

- The facts are not clear.
- The case may have precedential implications for other taxpayers.
- There are recurrent amounts of less than \$15,000 involving the same taxpayer.

The small claims procedure is as informal as possible within the bounds of natural justice.

How to elect the small claims procedure

A taxpayer can elect in either the NOPA or Notice of Response that the case is to proceed as a small claim if not resolved. If the taxpayer so elects Inland Revenue may follow an abridged pre-assessment procedure (e.g. an expedited conference phase). The taxpayer is bound by the election and cannot later choose to file the case in the Taxation Review Authority's general jurisdiction or in the High Court.

If the taxpayer has not made a small claims election in the NOPA or Notice of Response, the taxpayer may still choose to file the case in the Taxation Review Authority's small claims jurisdiction. That action is binding upon the taxpayer.

Filing a small claims case in the TRA *Taxation Review Authority Regulations 1996*

When the taxpayer elects to have the case heard in the Taxation Review Authority, he or she will complete a Notice of Claim, including ticking the appropriate box on that form to indicate whether the case is to be heard by the Taxation Review Authority in its small claims or general jurisdiction. If neither box is ticked, the case will be proceed under the general jurisdiction.

The Notice of Claim is a cover sheet to be completed by the taxpayer. Copies are available from any Inland Revenue office. The taxpayer must complete and file three copies of both the Notice of Claim and the documents outlined below, with the Taxation Review Authority in Wellington. The filing fee is also payable at this time; it is \$50 for claims to be heard in the small claims jurisdiction and \$100 for claims to be heard in the general jurisdiction. Filing may be done either in person at the Authority's office in Wellington or by registered mail.

The Authority will travel to centres outside Wellington to hear cases.

The following documents must be attached to the Notice of Claim:

- If a Disclosure Notice has been issued: The Adjudicator's report (if one is issued), the Commissioner's Statement of Position and the Taxpayer's Statement of Position. The Notice of Response and the NOPA may also be attached at the taxpayer's option.
- If no Disclosure Notice has been issued: The Adjudicator's report (if one is issued), the Notice of Response and the NOPA.

Inland Revenue to consider small claims application

The Taxation Review Authority will advise Inland Revenue's Litigation Management Unit that a Notice of Claim has been received requesting that the case be heard as a small claim. It will also supply one copy of the notice and attached documents to the Unit.

The Litigation Management Unit will consider the documents, and advise the taxpayer if the Commissioner considers the case should be heard under the Taxation Review Authority's small claims jurisdiction, or in some other authority.

Transfer to general jurisdiction or High Court

Sections 138M & 138N Tax Administration Act 1994

If the Commissioner considers that the case should not be heard as a small claim, the Commissioner will apply for the case to be transferred to the Taxation Review Authority's general jurisdiction or to the High Court.

The Commissioner will also have a similar discretion to request transfer of cases to the general jurisdiction of the Taxation Review Authority or the High Court if recurrent amounts of less than \$15,000 are involved.

The Commissioner will not meet the additional filing fees payable where a challenge is transferred to a higher jurisdiction.

The Commissioner may apply for a challenge filed with the Taxation Review Authority to be transferred to the High Court. Each hearing authority also may transfer a challenge to one of the other hearing authorities, other than to the Taxation Review Authority's small claims jurisdiction. When a case is transferred from one hearing authority to another, the Commissioner will not pay the taxpayer's costs of taking the case to the higher jurisdiction.

Hearings once filed

The Taxation Review Authority will arrange a hearing date and advise the taxpayer and the Commissioner accordingly.

Representation

The Taxation Review Authority is traditionally a forum where taxpayers can represent themselves or where accountants can represent their clients without the need to engage legal representation. This will continue to be the case under the Taxation Review Authority's small claims jurisdiction. Legal representation is permitted but is not obligatory.

Judges

The small claims procedure is part of the jurisdiction of the Taxation Review Authority and will be convened by Taxation Review Authority Judges.

Procedure

Hearings will be conducted with a minimum of procedural formality, within the bounds of natural justice. Cases will be determined according to the law.

The evidence exclusion rule will also apply to small claims cases.

Decisions

Decisions will not be published, and will have no precedential effect. It is likely that the Judge will often give an oral decision at the end of the hearing.

No right of appeal

There will be no right of appeal for a case heard under the small claims procedure.

continued on page 24

from page 23

Taxation Review Authority general jurisdiction

Sections 138B & 138C Tax Administration Act 1994

Amendments to Taxation Review Authorities Act 1994

This procedure is in general the same as the Taxation Review Authority's small claims procedure. The essential difference are:

- Decisions will be published.
- Decisions may be appealed.
- Decisions will be precedential.
- The filing fee is higher (\$100).

Transfer of cases from Taxation Review Authority to the High Court

In certain circumstances the Commissioner may apply to have a challenge filed by the taxpayer in the Taxation Review Authority transferred to the High Court. For example, the case may be extraordinarily complex or of general or public importance.

Application of evidence exclusion rule

The evidence exclusion rule will apply to cases heard in the general jurisdiction of the Taxation Review Authority.

Transcripts

In certain circumstances involving complex and protracted matters, the Authority may decide that a simultaneous transcript of proceedings is required.

Filing a claim in the general jurisdiction of the Taxation Review Authority

The procedure for filing a claim in the general jurisdiction of the Taxation Review Authority is the same as that outlined earlier for the small claims jurisdiction of the Taxation Review Authority.

High Court

*Sections 138B & 138C Tax Administration Act 1994
and the High Court Rules*

A new Part of the High Court Rules deals with tax disputes. The rules prescribe the initiation of tax disputes by Statement of Claim and ordinary proceeding processes, the evidence exclusion procedure and the availability of interlocutory steps such as discovery and interrogatories upon application to the Court.

Filing a case in the High Court

When a taxpayer elects for the case to be heard in the High Court, he or she must draft and file a Statement of Claim in the form identified in the High Court Rules. The Statement of Claim should be filed in the office of the Court closest to where the taxpayer lives. The taxpayer must also file a notice of proceeding along with every Statement of Claim, and pay a filing fee of

\$100. Copies of the Statement of Claim and all accompanying documents must be served on the Commissioner.

The Statement of Claim states the facts and propositions of law which the taxpayer is relying upon in support of the claim, and the issues which the taxpayer considers require determination by the Court. All of these items must be described in sufficient detail to fairly inform the Commissioner and the Court. If a disclosure notice has been issued, the Statement of Claim may only refer to those facts, evidence, issues and propositions of law which were referred to in either party's Statement of Position.

Commissioner's response to the statement of claim

Within 60 days from the date of service of the statement of claim and notice of proceeding, the Commissioner must file a statement of defence and serve it on the taxpayer.

The Statement of Defence either admits or denies the allegations of fact contained in the Statement of Claim. It also sets out any further facts and evidence which the Commissioner considers are relevant to the issues, any propositions of law which the Commissioner is relying upon, and the issues which the Commissioner claims require determination by the Court.

The Commissioner is limited to raising only those facts, evidence, issues and propositions of law which have been disclosed in either party's Statement of Position under the disclosure notice procedure.

Service of proceedings

For all proceedings, whether in the High Court or the Taxation Review Authority, any documents which are required to be served on the Commissioner must be served in one of the following ways:

- by registered mail addressed to:
Litigation Management Unit
Inland Revenue Department
P O Box 2198
WELLINGTON
- by delivery to the street address:
Ground Floor
Freyberg Building
Aitken Street
WELLINGTON

When the Commissioner is required to serve court documents on the taxpayer, service may be effected in any of these ways:

- personally
- by sending a copy to the taxpayer by registered post to the usual or last known place of abode or residence
- by service on a solicitor who accepts service in writing on behalf of the taxpayer
- by effective delivery to an address for service supplied by the taxpayer to the Commissioner.

Test case procedures

Sections 138P, 138Q Tax Administration Act 1994

When the Commissioner considers a challenge may be determinative of all or a substantial number of issues involved in other challenges, that challenge may be designated a test case. Test cases are to be heard in the High Court.

When a test case has been designated, the Commissioner may stay proceedings on other challenges by notifying the taxpayers concerned that:

- The test case is considered to be determinative of all or a substantial number of the issues in the challenge proposed to be stayed.
- The challenge proposed to be stayed has not yet been determined by the hearing authority.

The taxpayer may contest the stay at any time by issuing a notice requiring the challenge to be heard. The Commissioner may, within 14 days of receiving the taxpayer's notice, apply to the High Court for an order that the challenge be stayed.

Statute (time) bar

Sections 108, 108A, 108B Tax Administration Act 1994

Income Tax Act 1994

Changes have been made to the statute (time) bar provisions. These provisions apply if four years have passed from the end of the income year in which a return was filed. The Commissioner cannot alter the assessment to increase the amount of tax after the four year period unless one of the following applies:

- The return was fraudulent or wilfully misleading.
- The return omitted income which was of a particular nature or was derived from a particular source.

The change to the statute (time) bar applies to returns filed on or after 1 April 1997.

Goods and Services Tax Act 1985

If four years have passed from the end of the GST return period for which a GST return was provided or GST

was assessed, the Commissioner cannot make an assessment or alter any assessment made to increase the amount of tax, unless the taxpayer has knowingly or fraudulently omitted to make a full and true disclosure.

If four years have passed from the end of the GST return period for which a GST return was made under section 17 of the GST Act, or GST was assessed by the Commissioner under subsection (1A) or subsection (1B) of section 27 of the Act, the Commissioner cannot make an assessment or alter any assessment made to increase the amount of tax.

Suspension of statute (time) bar

The statute (time) bars in Sections 108 and 108A are to be suspended if at any time before the expiry of the statute (time) bar period, the taxpayer agrees to extend the statute (time) bar by a period or periods of up to six months.

Transitional issues

There will be many audits and disputes that will not have been resolved before 1 October 1996. These will be at various stages when the new procedures come into effect. Finalisation of these audits and disputes will depend upon what stage they are at on 1 October 1996.

Audits under way but no assessment issued

Regardless of what stage the audit is at, if no further assessment has been issued for the particular period, the new disputes resolution procedures will apply.

Assessment issued but no objection received or received but not determined

The taxpayer must file a notice of objection within the two month objection period. If the Commissioner either fully or partly disallows the objection and the taxpayer wishes to proceed with it, the taxpayer must do so under the case stated procedures under Part VIII of the Tax

Administration Act. Neither the small claims rules nor the disclosure stage of the new procedures will apply.

Objection received and fully or partly disallowed

If the objection has been either fully or partly disallowed and the taxpayer wishes to proceed with it, the taxpayer must proceed to court under the case stated procedures set out in Part VIII of the Tax Administration Act. Neither the small claims rules nor the new disputes procedures will apply.

Objection disallowed but case not yet requested

A taxpayer who wishes to challenge the assessment must request a case stated under the case stated procedures set out in Part VIII of the Tax Administration Act.

continued on page 26

from page 25

Case stated request already received under previous procedures

The case will continue to be dealt with under the case stated procedures set out in Part VIII of the Tax Administration Act.

Exceptions to the transitional provisions

Section 124A Tax Administration Act 1994

When the Commissioner and a taxpayer agree in writing, and an assessment or reassessment has been issued before 1 October 1996, it may be treated as having been issued after 1 October 1996. In this case the new disputes process will apply.

When the Commissioner and a taxpayer agree in writing, and an assessment or reassessment is issued after 1 October 1996, it may be treated as having been issued before 1 October 1996. In this case the objection procedures contained in Part VIII of the Act will apply.

An example of when the standard transitional procedures may not be followed is when an issue has been objected to in prior years but has not yet been determined by the Courts. In such a case, it may be preferable that the same issue be dealt with under the same disputes procedure. An alternative situation may be if the case is nearly finalised when the new disputes resolution procedures are implemented. The taxpayer and the Commissioner may agree that it would be preferable to deal with the case under Part VIII.

Questions and answers

Notices of Proposed Adjustment

Q. Does a new NOPA have to be issued each time one party changes the basis for issuing the initial NOPA?

A. If the change is a refinement of an earlier adjustment no new NOPA will be needed. However, if a new adjustment is proposed or the basis for the first adjustment has fundamentally changed then a new NOPA may be issued. This will be determined on a case by case basis.

Q. Will the adjustments referred to in NOPAs refer to income figures or tax figures?

A. NOPAs will generally refer to income figures unless otherwise specified e.g. the amount of penal tax proposed.

Determinations

Q. Are determinations subject to NOPAs?

A. A determination which is a "disputable decision" may be disputed using a NOPA. Disputable decision is defined in sec. 3(1) of the Tax Administration Act 1994.

Q. Is a PAYE deduction determination an assessment or a disputable decision?

A. A PAYE deduction determination is a disputable decision. Either the employer or the employee may challenge an assessment or reject a NOPA that relates to a PAYE deduction determination.

Assessments without NOPAs

Q. Will a NOPA be issued in every case in which the Commissioner does not agree with the return filed by the taxpayer?

A. No. Section 89C allows the Commissioner to issue an assessment without having to issue a NOPA in a number of cases. The most common examples are:

- the assessment equates with a return
- if the Commissioner and the taxpayer agree on the adjustment
- if the Commissioner considers that the return contains a simple or obvious mistake or oversight
- if the Commissioner considers that a taxpayer may hide assets or leave New Zealand to make collection of the tax more difficult.

Q. What is a simple mistake or oversight?

A. The Commissioner will generally treat the following as simple mistakes or oversights:

- arithmetical errors,
- transposition of numbers from one box to another,
- when a rebate has not been claimed which the taxpayer is entitled to or was incorrectly calculated, e.g. less than \$30,875 rebate.

Q. Can an assessment be issued before the response period for the NOPA has expired?

A. Technically section 89B(3) does not prevent the Commissioner from issuing an assessment before the expiry of the response period. However in practice the Commissioner will generally wait until the end of the response period before taking further action.

Q. In what circumstances will the Commissioner issue an assessment before the end of the response period?

A. The Commissioner will issue an assessment before the end of the response period if there is a risk to the revenue, such as if the taxpayer takes steps to leave New Zealand or to hide assets so that the collection of tax is made more difficult. In this instance the file will not be referred to the Adjudication Unit before the assessment is issued.

- Q. What happens if the Commissioner issues an assessment without a NOPA and none of the section 89C exceptions apply?
- A. When the Commissioner has issued an assessment and none of the exceptions in section 89C apply the taxpayer can issue the Commissioner with a NOPA to dispute the assessment (section 89D(1)(b) of the Tax Administration Act 1994).
- Q. Can the Commissioner reaudit an assessment if the taxpayer is deemed to have accepted the assessment?
- A. Yes. The Commissioner can reaudit a taxpayer at any time to ensure an assessment is correct. This applies to default assessments and ordinary assessments. The only limitation on the Commissioner reauditing the assessment is if the statute time bar has passed and the Commissioner proposes to increase the amount of the earlier assessment.

Taxpayer initiated adjustments

- Q. If a taxpayer or agent wants an adjustment made to a tax return or an assessment, does a NOPA have to be given to the Commissioner in every instance?
- A. No. If the Commissioner agrees with the adjustment requested by the taxpayer or agent, the taxpayer does not need to issue the Commissioner with a NOPA. This is because the Commissioner is still under a duty to ensure that the correct amount of tax is assessed. If the Commissioner does not agree, the taxpayer or agent will have to issue a NOPA. For that reason, it is important to contact Inland Revenue as soon as possible after the assessment is issued to ensure that the taxpayer has sufficient time in which to issue a NOPA before the expiry of the response period.

Examples of when the Commissioner is likely to accept requested adjustments include:

- omitted interest, dividend or IR 12 certificates
- omitted donation or housekeeper rebate claims

- Q. What is the procedure for a taxpayer or agent to request an adjustment?
- A. A taxpayer or agent may write to the Commissioner, make a telephone enquiry or visit an Inland Revenue office. If the Inland Revenue officer agrees with the request the adjustment will be made and an assessment issued. If the officer does not agree with the requested adjustment the taxpayer will be advised to seek independent advice or to issue a NOPA to the Commissioner. A blank NOPA form is available if required.
- Q. What should a taxpayer who receives a default assessment do ?
- A. The only way that the taxpayer can dispute the default assessment is by filing a return for that assessment period.

- Q. Will an Inland Revenue officer help a taxpayer to fill in a NOPA?
- A. No. It would not be appropriate for an Inland Revenue officer to assist a taxpayer in completing a NOPA and then to determine whether the contents of the NOPA should be accepted or not. The Inland Revenue officer may advise the taxpayer to seek independent advice.
- Q. Is there a central address for NOPAs, Notices of Response and Statements of Position to be sent to?
- A. No. Send the document to the address where the Inland Revenue officer actioning the case works and mark it to the attention of that officer. If a taxpayer issues a NOPA to the Inland Revenue without having discussed the proposed adjustment with an Inland Revenue officer, the NOPA should be addressed to the nearest Inland Revenue Office.

Agreements

- Q. What is the effect of accepting an adjustment proposed by the Commissioner?
- A. If the adjustment is verbally accepted a taxpayer is not precluded from subsequently challenging the adjustment. In an audit scenario, agreement will usually be recorded in writing. If the adjustment is accepted in writing, the taxpayer may not further challenge the adjustment.
- Q. What happens if a taxpayer claims to have been coerced into signing or did not know the effect of what was agreed to in writing?
- A. When a formal written agreement is entered into, a statement of the effect of the agreement will be included in the written document. The taxpayer will be advised to seek advice if he or she does not understand the document - Inland Revenue will not coerce taxpayers into signing agreements.
- Q. If the taxpayer agrees with the adjustment, will he or she always be required to sign a written agreement?
- A. No. However, Inland Revenue recommends that taxpayers do sign an agreement, as acceptance in writing brings finality to the issue.
- Q. What is the form of the written agreement?
- A. Written agreements could include:
- a letter requesting the Commissioner to make an adjustment.
 - a simple standard form for simple adjustments.
 - a letter of agreement tailored to meet the requirements of the issue being agreed upon. We expect that tailored agreements will be needed for more complex adjustments or when there are multiple adjustments being agreed upon, perhaps covering multiple types of taxes or multiple revenue periods.

continued on page 28

from page 27

- Q. Who can sign an agreement?
- A. The taxpayer or the taxpayer's authorised agent can sign the agreement.
- Q. If an agent signs the agreement will an authority to act be required?
- A. If an agent regularly acts for the taxpayer and has been involved in the pre-agreement discussions it is unlikely that proof of authority to act would be required. However, the agent would sign the agreement as duly authorised agent. An Inland Revenue officer may ask for proof of authority to act if the agent has not previously been acting for that taxpayer or the agent has had no involvement in earlier discussions.
- Q. What should an agreement contain?
- A. There are a number of items that should be included in a written agreement. These are: the taxpayer's name and IRD number, the date, the tax type in issue, the period in issue, details of the adjustment agreed upon, the implications of the agreement, the name and designation of the Inland Revenue officer signing the agreement, and the taxpayer's or agent's signature.
- Q. Can the Commissioner amend an assessment for an issue following written agreement or deemed acceptance of that issue?
- A. The Commissioner has an overriding duty to ensure assessments are correct, provided that this function is completed within the statutory four year time limit. A written agreement does not generally limit the Commissioner's ability to subsequently amend an assessment.
- Once a NOPA, Notice of Response, or a Statement of Position is accepted or deemed accepted, the Commissioner may not subsequently amend issues contained in it. Once an issue is determined by formal disputes procedures, under either the new or the old procedures, that determination is final unless the Commissioner has been wilfully misled or a fraud has been committed.

Extensions of time

- Q. If a taxpayer is concerned that the response period may expire can the Commissioner grant an extension of time?
- A. The legislation does not allow the Commissioner to grant an extension of time. Before the expiry of the two month period the Commissioner has no power to consider a request from the taxpayer for permission to issue a late notice. The Commissioner may only consider an application for a late notice to be treated as having been received in time after the response period has expired. The notice will only be treated as having been received within the response period if the exceptional circumstances test is met.

- Q. How long is the response period - two calendar months or 60 days?
- A. The response period is defined as two months starting on the date of issue of the originating document. For example, the response period for a NOPA issued on 15 February 1997 expires on 15 April 1997.
- Q. Will the response period be strictly adhered to?
- A. Yes. The Commissioner has no authority to grant an extension of time, and exceptional circumstances are likely to be rare.

Exceptional circumstances

- Q. What happens if a taxpayer issues a NOPA after the two month response period and the Commissioner agrees to the adjustments requested by the taxpayer?
- A. The Commissioner has a duty to ensure that assessments are correct. If the Commissioner considers that an adjustment is required, he will issue an assessment incorporating the adjustment provided it meets the Commissioner's policy on the application of section 113, TAA. The request will not be treated as an acceptance of a late NOPA, but a recognition by the Commissioner of his duty to ensure that assessments are correct in terms of section 113.
- Q. What happens if a taxpayer issues a NOPA after the two month response period and the Commissioner does not agree to the adjustments requested by the taxpayer?
- A. The Commissioner cannot accept a late NOPA unless exceptional circumstances apply. If exceptional circumstances do not apply, the adjustments cannot be made.
- Q. What are exceptional circumstances?
- A. Exceptional circumstances are events or circumstances beyond the control of the taxpayer that provide the taxpayer with a reasonable justification for not issuing the NOPA or Notice of Response within the response period. If the taxpayer has an agent, an act or omission of the agent will not amount to an exceptional circumstance unless the act or omission was beyond the control of the agent, could not have been anticipated and could not have been avoided by compliance with accepted standards of business organisation and professional conduct.
- The following situations are not exceptional circumstances:
- A taxpayer completes her own GST returns but her agent completes her income tax return. An adjustment is made to a GST return which the taxpayer does not dispute. The adjustment will affect the taxpayer's income tax position but the taxpayer does not discuss the issue with her agent. When the agent completes the taxpayer's income tax return six months later, he discovers

- the GST adjustment and wishes to issue a late Notice of Response well outside the response period. This is not an exceptional circumstance because it was not beyond the taxpayer's control. She could have taken professional advice when the GST adjustment was made, but she chose not to.
- A taxpayer files a return but doesn't claim a rebate to which he is clearly entitled. Eight months later, he discovers his error and asks the Commissioner to allow his rebate. The Commissioner agrees that the taxpayer is clearly entitled to the rebate and makes the adjustment. The Commissioner is not required to consider whether exceptional circumstances occurred in this scenario because he is under a duty to ensure that assessments are correct.
 - A taxpayer is selected for an audit. During the course of the audit, the taxpayer is sent a number of letters outlining the matters being investigated and speaks to the investigator several times on the phone and is told that a NOPA is about to be issued. The taxpayer then decides to travel overseas for six months. She does not appoint anyone to handle her tax affairs. The Commissioner issues the NOPA and the taxpayer does not issue a Notice of Response within the response period. An assessment is issued. When she returns, three months after the response period has elapsed, she issues a Notice of Response. The taxpayer does not satisfy the exceptional circumstances test. It was not beyond her control. She was aware that she was being audited and should have appointed someone to manage her tax affairs if she was not going to be able to do so herself. Alternatively, she could have made arrangements with the Inland Revenue officer to suspend the issue of the NOPA until after her return.
 - A taxpayer is audited and a dispute arises as to the deductibility of certain losses. The Commissioner considers that the losses were not deductible and issues a NOPA proposing to disallow the losses. The taxpayer contacts his agent who advises him that the losses are not deductible. The taxpayer does not issue a Notice of Response so is deemed to have accepted the adjustment disallowing the losses. An assessment is issued. The following year the Court of Appeal issues a judgment which makes it clear that the losses would have been deductible. The taxpayer requests the Commissioner to accept a late Notice of Response. The Commissioner does not accept that this is an example of exceptional circumstances. It was within the taxpayer's control to issue the Notice of Response within the time frame required, or alternatively it was within the agent's control to advise the taxpayer that there was a pending appeal which may affect the taxpayer's affairs. Section 89I overrides section 113 in these circumstances.
 - A taxpayer is issued with a NOPA. Two weeks before the response period ends, the taxpayer is admitted to hospital for a hip replacement which she has scheduled some months previously. The taxpayer does not issue a Notice of Response within the response period and seeks to rely upon her hospitalisation as an exceptional circumstance. This is not an exceptional circumstance. The failure to issue a Notice of Response within the response period was not due to an event beyond the taxpayer's control. The taxpayer had time to organise for her tax affairs to be looked after or could have advised the Commissioner at an earlier time that she would be unable to run her tax affairs at that time.
- The following situation would count as an exceptional circumstance:
- A taxpayer is issued with a NOPA. Two days before the response period ends, the taxpayer suffers a severe heart attack and is not able to provide a Notice of Response. Three months later, the taxpayer is well enough to go through his tax affairs and wishes to issue a late Notice of Response. The Commissioner accepts the Notice on the basis that the failure to respond in time was due to an exceptional circumstance. The Notice is treated as having been received in time and progresses through the new procedures in the usual manner.

Conference

- Q. What is the status of pre-assessment discussion in evidence?
 - A. Notes of pre-assessment discussions may be used in evidence. The discussions may also be held on a without prejudice basis, but if the taxpayer's explanations vary widely this may affect the credibility of the taxpayer.
- Q. In what circumstances will the Conference stage be dispensed with?
 - A. If the Inland Revenue officer considers that the taxpayer or the agent is employing delaying tactics, approval may be sought to dispense with the conference. However if a taxpayer or agent is not available because of authentic work commitments, alternative conference arrangements may need to be considered such as the use of conference calls. In addition, suspension of the statute (time) bar may be sought.
- Q. Who decides whether to dispense with the Conference stage?
 - A. If the Inland Revenue officer considers that the conference stage should be dispensed with approval will be sought from his or her reporting officer. If the reporting officer agrees that the conference stage

continued on page 30

from page 29

should be dispensed with that decision will be related to the taxpayer forthwith.

Q. Can further discussions or conferences be held after the Statements of Position are exchanged?

A. Yes. In some cases once Statements of Position have been exchanged, further discussion may resolve one or more of the outstanding issues. If all the issues are resolved, the appropriate assessment will be issued. If all of the issues are not agreed at the post disclosure discussion, only those unresolved issues will be sent to Adjudication for final determination.

Disclosure Notices

Q. Will there be a Disclosure Notice in every case?

A. The legislation states the Commissioner may issue a disclosure notice. In practice the Commissioner will issue a disclosure notice in most cases if the dispute cannot be resolved before the adjudication phase. There will be limited exceptions such as if the personal safety of an informant is at risk or if investigations into an alleged offence may be jeopardised by full disclosure.

Q. When can a Disclosure Notice be issued?

A. A disclosure notice can be issued at any time on or after the issue of a NOPA.

Q. If a Disclosure Notice is issued before the NOPA response period expires, does a Notice of Response still have to be given within the response period?

A. Yes. The Notice of Response must be given within the response period for the NOPA and the Statement of Position must be given within the response period for the Disclosure Notice.

Statement of Position

Q. What happens if the taxpayer's Statement of Position does not contain all the requisite information listed in section 89M(6)?

A. The Statement of Position will be invalid. If a valid Statement of Position is not issued within the response period, the issues cannot be disputed any further, unless exceptional circumstances apply. The taxpayer will be deemed to have accepted the Commissioner's NOPA or Statement of Position as the case may be. If possible, the Commissioner will contact the taxpayer and advise that the Statement of Position is deficient, provided there is still time within which a valid Statement could be issued.

Evidence exclusion

Q. What is meant by "all cards on the table"?

A. The 'all cards on the table' approach is designed to ensure that all the information relied upon by each party to support their respective position is disclosed

to the other party at an early stage. The disclosure of all the information being relied upon by each party means both parties are better able to determine the correct amount of tax to be paid and can do so on a more timely basis.

Q. What is evidence exclusion?

A. The evidence exclusion rule limits the parties to only those facts, evidence, issues and propositions of law that have previously been disclosed to the other party in a Statement of Position. The evidence exclusion rule prevents either party from attempting to admit further information at the last minute.

Q. When does the evidence exclusion rule apply?

A. The evidence exclusion rule only applies when a dispute is taken to court. However, the point in time at which final disclosure must occur is at the Statement of Position stage.

Q. How will the evidence exclusion rule be invoked?

A. Evidence exclusion is instigated by the Disclosure Notice. The Commissioner will issue a Disclosure Notice which requires the taxpayer to provide a Statement of Position within two months of the date of issue of the Disclosure Notice. If the Commissioner has issued the NOPA he will provide his Statement of Position with the Disclosure Notice. If the taxpayer has issued the NOPA the taxpayer must provide a Statement of Position first.

Q. What happens if a taxpayer discovers new material relevant to the case after the Disclosure Notice stage?

A. All requests for additional information to be added to the Statement of Position after the Disclosure Notice stage should be directed to the Inland Revenue officer handling the case. The officer will then determine whether the Commissioner should accept the new information. If the officer agrees to accept the new information it is deemed to be part of the taxpayer's original Statement of Position in accordance with section 89M(14). If the file has been passed to Adjudication the officer will forward the new information on to the Adjudication Unit to be added to the original Statement of Position. If the officer does not agree to accept the new information and the assessment is subsequently challenged in court the taxpayer may apply to the court for leave to include the new information.

Q. Does the evidence exclusion rule apply to information held by a third party?

A. Yes. It is important that both parties produce all the information which they hold or know of which leads them to the conclusion that their position is correct.

Q. What factors will an officer consider in deciding whether to accept additional information after the Statement of Position?

- A. The officer will consider the same factors that a court will have to consider if an application was made to include the information at hearing stage (section 138G(2)). Those factors are: whether with due diligence the information could have been disclosed earlier, and whether the admission of that information is necessary to avoid manifest injustice to the Commissioner or the taxpayer.
- Q. What is the procedure for asking a court to accept new evidence?
- A. The TRA operates in accordance with the District Court Rules which require a formal application to be made accompanied by an affidavit if the parties are represented by Counsel. If the taxpayer is unrepresented an informal oral application or letter may be allowed at the discretion of the Authority. For proceedings in the High Court, the High Court rules must be followed.
- Q. Does the evidence exclusion rule also apply to the Commissioner?
- A. Yes. Only those facts, evidence, issues or propositions of law raised in the Commissioner's or the taxpayer's Statement of Position can be used by him to support the assessment. If the Commissioner discovers new information after completing his Statement of Position, the Commissioner may add that information with the consent of the taxpayer or he may apply to the Court to have the new information added. In any application to the Court the Commissioner must meet the same test as the taxpayer for the addition of new information.
- Q. Do expert opinions, valuations, texts etc. need to be disclosed in the Statement of Position?
- A. Yes. All the information that a party seeks to rely on in support of their position must be disclosed at the earliest stage. This is to encourage resolution of any disputes. Encouraging this information to be obtained and disclosed earlier may lead to one party's position being recognised as the correct position at a much earlier stage.
- Q. How should the information be disclosed?
- A. The legislation requires that an outline of the information be given in sufficient detail to fairly inform the Commissioner or the taxpayer as the case may be. The Commissioner considers that this means an outline of all the information giving sufficient detail to ensure that both parties can identify each piece of information. For example, a list of documentary evidence providing a description of each document, the date of the document and the parties involved would be a sufficient outline to easily identify the document. An example of how the Commissioner proposes to disclose the information available is provided in the appendix.
- Q. Is it possible that more information will be disclosed in the Statement of Position than will actually be produced in Court?

- A. Yes. The information disclosed in the Statement of Position is that information which a party has relied upon in support of their position. It may be that if the dispute progresses to Court not all of that information will need to be produced in evidence.
- Q. Can the taxpayer raise matters contained in the Commissioner's Statement of Position in any Court challenge to a disputable decision ?
- A. Yes. In any Court challenge to a disputable decision, both the taxpayer and Commissioner can raise matters in both their own and the other party's Statement of Position.
- Q. What is due diligence in the context of the evidence exclusion rule?
- A. The first limb of the exception to the evidence exclusion rules requires a person to have exercised due diligence in trying to obtain the facts, evidence, issues and propositions of law before the date of the challenge. In that context a person will have exercised due diligence if that person has taken all reasonable care in the circumstances of the case and taking into account their personal situation.

Adjudication

- Q. How does the taxpayer's position get put fairly to the Adjudication Unit if it is being sent by the Inland Revenue officer? Can the taxpayer comment on the report prepared by the investigator? Can the taxpayer prepare his or her own report?
- A. The file that is sent to the Adjudication Unit comprises the NOPA, Notice of Response, Statements of Position and a schedule of adjustments remaining in dispute. If there is a significant amount of documentary evidence it is possible that not all the evidence would be included in the file that is sent to the Unit.
- Before the file is sent to the Adjudication Unit a letter will be sent to the taxpayer enclosing a list of all the material in the file. If the case is one in which there is significant evidence and not all of it has been included in the file, the letter will ask the taxpayer to advise whether any other disclosed evidence should be included. It is important to note that only disclosed evidence can be sent to the Adjudication Unit. Further, because of the disclosure procedure there should be nothing in the file which the taxpayer is not already aware of. The file is simply a collation of material used by the parties in support of their respective positions. The purpose of sending the taxpayer a list of what will be sent to Adjudication is to ensure the openness of the Adjudication process.
- Q. Will the Adjudicator talk to the Inland Revenue officer without notifying the taxpayer?
- A. No. The Adjudicator's role is to determine the technical and legal correctness of the proposed adjustment based on the position put by the Inland

continued on page 32

from page 31

Revenue officer and the taxpayer. The Adjudicator is not to do further investigation. Contact between the Adjudicator and the Inland Revenue officer or taxpayer should rarely be necessary. If it is necessary for a point of clarification the Adjudicator will always make contact in writing. The same procedure will apply when the Adjudicator wishes to talk to the taxpayer. A copy of the written request and a copy of the response will always be sent to the other party. In extraordinary cases the Adjudicator may need to call a meeting to clarify an issue. In this case both the Inland Revenue officer and the taxpayer will have the opportunity to be present at such a meeting.

Q. What will the Adjudicator base his or her decision on?

A. The Adjudicator's decision will be based on the information provided in the Statements of Position. The Adjudicator will consider the correct application of the law and determine whether the facts of the case in question meet the requirements of the legislation. The Adjudicator's role is to achieve the legally correct answer based on the information presented in the file.

Q. How will the Adjudicator decide on cases when the law is unclear? Will the Adjudicator let the Courts determine the issue?

A. The Adjudicator's concern is to ensure that the resulting assessment is legally sound. The Commissioner must have an opinion on the application of the law to be able to assess the amount of tax. He will do this by determining the better view of the law and applying it to the facts.

Q. How will the parties be notified of the Adjudicator's decision?

A. The Adjudicator will prepare a brief report indicating what the Commissioner's final decision is on each proposed adjustment. (Note that the Adjudicator will not review previously agreed adjustments). A copy of the report will be sent to both the taxpayer and the Inland Revenue officer. If the Adjudicator agrees with the proposed adjustments or any of them, an assessment will be raised in due course.

Q. Can the taxpayer discuss the Adjudicator's report with the Adjudicator?

A. No. If there is any ambiguity in the Adjudicator's report, then the taxpayer can raise the matter with the Inland Revenue officer involved in the pre-adjudication stage in the first instance. It will be up to this person to clarify anything in the Adjudicator's report. Contact with the Adjudicator will not be possible as the taxpayer has further rights to challenge the decision. In addition, contact with the Adjudicator may compromise the Adjudicator's impartiality.

Q. As both the Adjudicator's report and the Notice of Assessment are generated after the Statement of

Position, does the evidence exclusion rule prevent these documents from being raised in court?

A. No, the evidence exclusion rule does not prevent these documents from being raised in Court. The Adjudicator's report and assessment may be used in court as the final consideration of the reasons for the assessment, i.e. the disputable decision itself.

Q. How long will the Adjudicator take to issue a decision?

A. We anticipate that an Adjudicator's decision will be made within 4-6 weeks of receiving the file, subject to workloads. In less complex cases a decision may be able to be made in less time but in complex cases a decision may take longer.

Q. If the Adjudicator does not agree with the Inland Revenue officer's position will the officer be able to 'appeal' from the Adjudicator's decision?

A. No. The Commissioner has delegated his authority to determine disputed adjustments to the Adjudicator. The Inland Revenue officer and the Adjudicator are both acting under the Commissioner's authority. The Commissioner can only have one view of the law. The Adjudicator's decision will therefore be final.

Q. Will an Adjudicator follow the Commissioner's policy in all cases?

A. The Adjudicator will seek to determine which position is legally correct. If this does not accord with a previous interpretation statement, the Adjudicator will not follow that interpretation. We expect that recent interpretation decisions will be in accord with the legislation and will be correct. In addition there would have been extensive consultation processes used before their publication.

Q. Can a taxpayer contact the Adjudicator during the Adjudication phase?

A. No. To retain independence and objectivity any contact will be rare. If contact is necessary it will be initiated by the Adjudicator. An Adjudicator will determine if any contact needs to be made. Any contact will be in writing and a copy will go to the other party to the dispute; if a meeting is proposed both parties will be invited to attend. The taxpayer or agent's point of contact will remain the Inland Revenue officer they have been dealing with throughout the dispute.

Q. What happens if a taxpayer wants to add more information to their Statement of Position - should the information be sent straight to the Adjudicator?

A. No. The information should initially be sent to the Inland Revenue officer dealing with the case. That officer and his/her reporting officer will decide whether to agree to its inclusion in the Statement of Position in accordance with section 89M(14). If the officer agrees to its inclusion, the information will

be sent to Adjudication. If the officer does not agree to include the information the Adjudicator will not be influenced by information which was not available to the officer at the time the officer made his or her decision. If the Adjudicator decides against the taxpayer and the taxpayer subsequently wants to challenge the assessment in court the taxpayer can then request that the Court allow the new information to be admitted.

- Q. What happens if a new Court decision is released which is relevant to an issue which is still at Adjudication?
- A. If neither party has mentioned the underlying principles raised in the new case law, and they are seen as being material, the file will be sent back to the Inland Revenue officer for further discussion with the taxpayer. If the underlying principles have been mentioned in the Statements of Position, the Adjudicator will take the implications of the new case into account without the need to refer it back to the Inland Revenue officer.
- Q. What happens if there is a conflict of fact depending upon the issue of credibility?
- A. The Adjudicator will make a determination based on all the information and material presented.

Small claims

- Q. What does precedential mean in the context of the small claims jurisdiction of the TRA?
- A. A case is likely to be considered precedential if it is likely to affect the tax treatment used by other taxpayers or if it is likely to affect the tax treatment used by the disputant taxpayer in other tax periods.
- Q. Will decisions from small claims be published?
- A. No. Decisions from the small claims jurisdiction of the TRA are non-precedential so will not be published.
- Q. What happens if the taxpayer elects small claims at the NOPA stage because the tax in dispute is less than \$15,000 but with penalties and penal tax it exceeds \$15,000? Can a taxpayer still file in the small claims jurisdiction?
- A. Yes. The \$15,000 jurisdiction relates to the substantive tax in dispute, not to the penalties.
- Q. What if the taxpayer elects small claims and subsequently changes her/his mind?
- A. The taxpayer's election to have a case treated as a small claim is irrevocable. However, if the case changes so that the small claims jurisdiction is no longer appropriate the Commissioner or the TRA may apply to have the case transferred to another jurisdiction.
- Q. Is the small claims jurisdiction only \$15,000 for all types of taxes or for each revenue?

- A. The jurisdictional limit is \$15,000 per case, not per revenue type. Hence even if there are three types of taxes in issue for the same taxpayer, if the combined tax in dispute is greater than \$15,000 the dispute cannot be heard in the small claims jurisdiction.
- Q. If a disputed GST adjustment affects the taxpayer's income tax position can the taxpayer use the small claims procedure to challenge both adjustments?
- A. The answer will depend on the facts and issues in question. However, it is at least possible that the case may not be precedential but may be consequential.
- Q. Will a loss adjustment be able to be taken to small claims?
- A. Yes. The new section 13B(2)(b) of the Taxation Review Authorities Act 1994 includes loss adjustments within the jurisdiction of the small claims tribunal.
- Q. Can the Commissioner reject a small claims election?
- A. No. The Act does not allow the Commissioner to reject a small claims election if that election is made in the taxpayer's NOPA or Notice of Response. However, if the dispute proceeds to court, the Commissioner may make an application to have the case moved to a different jurisdiction.

The transfer will be requested if the case involves precedential issues, or if the facts are not clear or are still in dispute. The TRA could also transfer the case to another jurisdiction. Such transfers override the taxpayer's election.

- Q. Will a disclosure notice be issued for all small claims cases?
- A. When the facts and issues are clear, and there is no added benefit from using the disclosure notice procedure, a disclosure notice may be dispensed with.

Statute (time) bar

- Q. Has the statute (time) bar changed for GST returns?
- A. No. For GST returns the statute (time) bar runs from the end of the return period for which the return is provided or, if an assessment has been issued, from the date of the assessment.
- Q. How does the taxpayer waive the statute (time) bar?
- A. The taxpayer must sign a prescribed form setting out the taxpayer's name and IRD number, the revenue type and tax period in question, the date on which the statutory period commenced and the date on which it is due to expire, and the period of the suspension, being a period of up to 6 months. Any number of suspensions can be agreed to provided that the total period of the suspension is no longer than six months from the date on which the statutory period would otherwise have expired.

continued on page 34

from page 33

- Q. In what circumstances does the Commissioner consider a taxpayer is likely to waive the statute (time) bar?
- A. There are two probable situations - firstly when the dispute is not resolved and more time would allow completion of the disputes resolution procedures with the mutual agreement of the parties rather than the Commissioner having to issue an assessment, and secondly if there is another case before the courts which is likely to resolve the issue in the current dispute.

Duties assessments

- Q. Do the exclusions contemplated in section 89C take into account duties assessments?
- A. Yes. Section 89C(a) allows the Commissioner to issue an assessment that corresponds with a tax return provided by the taxpayer. A tax return is defined as any form or document that a taxpayer is required by law to complete and provide to the Commissioner. Consequently any document together with the prescribed form (IR 664) which must be submitted for stamping will be within the definition of a tax return. The Commissioner can therefore issue an assessment without first issuing a NOPA.
- Q. What happens if the self assessed duty is not correct?
- A. As with other types of assessments the Commissioner can issue an assessment without first issuing a NOPA in limited circumstances: if the return contains a simple mistake or oversight, if the taxpayer agrees with the adjustment or if the Commissioner thinks there is a risk to the revenue. In all other cases the Commissioner must first issue a NOPA before issuing an assessment which differs from that returned by the taxpayer.
- Q. What happens if the duty payable has not been calculated?
- A. If the document is presented for stamping and the prescribed form (IR 664) does not have an amount of duty payable calculated the Commissioner will issue an assessment based on the information provided. The Commissioner does not need to issue a NOPA because the assessment will correspond with the information provided.
- Q. Does the taxpayer have to issue a NOPA to challenge a stamp duty assessment?
- A. In the first instance the taxpayer should approach the Inland Revenue officer for an explanation of the altered assessment or to seek a change to the assessed duty. If the Inland Revenue officer does not agree with the change or the taxpayer does not like the explanation a NOPA must be issued by the taxpayer within the response period to dispute the duty assessed. The Commissioner is most likely to have issued an assessment in terms of section 89C(a) or (b).

- Q. Some contracts fall over after the payment of duty is made. In such circumstances a duty refund is currently sought by the taxpayer making a written application for a refund. Does a taxpayer now have to issue a NOPA?
- A. If the Inland Revenue officer agrees to refund the duty a NOPA will not need to be issued; the written application for a refund will suffice. However, if the Inland Revenue officer does not agree to the refund a NOPA must be issued.

Test cases

- Q. Can an Inland Revenue officer negotiate with the taxpayer not to issue an assessment until after the test case is heard?
- A. Subject to the statute (time) bar, nothing precludes a taxpayer and an Inland Revenue officer from reaching an agreement to delay an assessment until after a test case is heard.
- Q. When will test cases be identified?
- A. The Commissioner will not be in a position to know that the outcome of one case will affect a number of other cases until there have been two or more cases filed in Court on the same issue and raising the same arguments. Consequently, the Commissioner can only designate a test case and stay the other cases once they have been filed in court.

Penalties and prosecutions

[Penal tax refers to penalties that apply for returns filed up to the 1997 income year, i.e. 31 March 1997 for standard balance date taxpayers. Reference to shortfall penalties means those penalties that apply from 1 April 1997 as a result of the new compliance and penalty provisions. These will be detailed in a separate TIB. It is likely that both penalty systems will operate for a number of years while tax audits cover both pre- and post-1 April 1997 periods].

- Q. If the substantive issues have been agreed to but not any applicable penal tax or shortfall penalties, does a separate NOPA have to be prepared for these adjustments?
- A. Yes. If penal tax or shortfall penalties are proposed and there is no agreement as to chargeability or amount, a NOPA will be issued.
- Q. Does the Adjudication Unit decide on penal tax or shortfall penalties, or only the substantive adjustments?
- A. If penal tax or shortfall penalties are in issue and agreement has not been reached the issue will usually be referred to Adjudication as for any other disputed adjustment.
- Q. What penalties will be referred to in the NOPA?
- A. Penal tax or shortfall penalties adjustments will be referred to in detail. If it is considered that penal tax

or shortfall penalties may apply at the time the initial NOPA is prepared, they will be referred to in the initial NOPA. However, if it only becomes apparent as the audit progresses that penal tax or shortfall penalties could apply, a further NOPA may be issued dealing with the penal tax or shortfall penalties. Other consequential adjustments such as Use of Money Interest, additional tax, etc. will not be detailed in the NOPA. In the case of additional tax, Use of Money Interest and incremental tax, these figures will only be able to be determined once the dispute has been resolved and an assessment issued, as they continue to accrue until the date the outstanding tax is paid.

Payment of tax owing

- Q. If there is more than one adjustment but some are agreed to and others are not, can the taxpayer make a voluntary payment to avoid penalties?
- A. Yes. Under the new disputes procedures an assessment is not raised until all issues relating to that assessment are resolved. If the due date for payment is set as the original due date, significant additional tax may be incurred by the time all the issues are resolved. In that instance a taxpayer can make a voluntary payment at any time.
- Q. When will the due date for payment of tax, penal tax/shortfall penalties be mentioned?
- A. These will generally be covered in the NOPA and/or the referral cover sheet to Adjudication. For returns filed for the year starting 1 April 1997, a new due date will always be set but interest will be payable from original due date. Further details will be covered in the upcoming TIB on the new Taxpayer Compliance and Penalties regime.

Miscellaneous

- Q. What are propositions of law?
- A. A proposition of law is a statement regarding the application of the law. It may be based on statutes (tax laws) or case law, or other opinion. Propositions of law may also include a statement on the application of the law that has not been considered by the courts previously. Propositions of law should state the authority for the proposition relied upon, e.g. the particular case it is drawn from.
- Q. What happens if the taxpayer issues a NOPA, Notice of Response or Statement of Position, but the Commissioner does not receive it?
- A. Initially the Commissioner may require some proof from the taxpayer that a Notice was actually issued, particularly if the document was a NOPA. In the cases of Notices of Response or Statements of Position the Commissioner will be aware that there is a dispute in progress and will be monitoring the passing of the response period. If the taxpayer has

issued a Notice, and the Commissioner has taken all reasonable steps to ensure that he receives it but he does not actually receive it, the Commissioner may apply to the Court for approval to respond outside the response period.

- Q. What happens if the taxpayer does not receive the Commissioner's NOPA, Notice of Response or Disclosure Notice?
- A. All Notices sent out by the Commissioner will be recorded in the Inland Revenue computer system. The date of issue recorded in the computer system will be used as verification of the date of issue. The Commissioner will endeavour to advise the taxpayer when a notice is about to be issued. If the taxpayer does not receive the Notice, the taxpayer can file a NOPA and apply to the Commissioner for it to be accepted outside the response period due to exceptional circumstances.

In the case of the Commissioner's Notice of Response it is unlikely that failure to receive will amount to exceptional circumstances because the taxpayer will be aware that there is a dispute in progress and the status of the dispute. In that instance failure to verify whether the Notice has actually been issued may not give rise to exceptional circumstances.

In the case of a Statement of Position, failure to issue the Statement of Position within the response period prevents the taxpayer from proceeding further - the taxpayer is deemed to have accepted the Commissioner's position, unless he or she successfully seeks an extension under section 89M(11).

- Q. Will the Commissioner acknowledge receipt of the taxpayer's notices?
- A. Yes. Procedures have been established for prompt acknowledgment.
- Q. What will the Commissioner do if the taxpayer issues a NOPA or Notice of Response which does not meet the requirements of the legislation?
- A. If the Notice is manifestly inadequate it will be invalid. The Commissioner will contact the taxpayer if possible, and advise that the Notice cannot be accepted and that a further Notice should be issued within the response period. If the response period has expired the only avenue open to the taxpayer is to make an application for exceptional circumstances. However, if the taxpayer has prepared an inadequate Notice previously and has elected not to seek advice to prepare a valid Notice it is unlikely that this would, on its own, amount to exceptional circumstances.
- Q. If the Commissioner does not advise the taxpayer that the NOPA or Notice of Response is invalid within the taxpayer's response time, will it meet the exceptional circumstances test if a valid notice is provided later?

continued on page 36

from page 35

- A. No, because the requirements for exceptional circumstances are specifically set out in the legislation. There is adequate material available from Inland Revenue which explains to a taxpayer how to complete a valid notice.
- Q. If the Commissioner issues a disclosure notice soon after a NOPA, is the conference stage dispensed with?
- A. The need for a conference will depend on the issue in question. The purpose of the new procedure is to resolve disputes. If a conference is likely to help resolve the dispute the conference stage will not be dispensed with.
- Q. In tax avoidance cases at what stage will the Inland Revenue officer have to seek approval to use section BB 9?
- A. Approval to apply section BB 9 will be sought at the NOPA stage. Approval will be given by either National Office or Service Centre management. If the application of section BB 9 is disputed by the taxpayer the final decision will in most cases be made by the Adjudication Unit. If the application of section BB 9 is not disputed by the taxpayer final approval will be given by the Team Leader.
- Q. If the taxpayer does not agree with the proposed adjustment can the resolution process be put on hold while the taxpayer seeks a binding ruling?
- A. No. An application for a binding ruling can not be made while the Commissioner is undertaking an audit. However the dispute resolution process may be put on hold while advice is sought from other experts both within and outside Inland Revenue.
-

Notices issued by Inland Revenue - examples

The following are sample forms that will be issued by the Commissioner. The sample forms contain the sub-headings that are stated in the legislation, and that will be used for each type of form. They will be generated on Personal Computers, using pre formatted templates.

The length of each document will depend on the number of issues involved.

Pre printed NOPA, Notice of Response and Statement of Position forms are available from Inland Revenue for use by taxpayers and agents.

NOTICE OF PROPOSED ADJUSTMENT

TAXPAYER'S NAME:

IRD NUMBER:

DATE OF ISSUE:

PROPOSED ADJUSTMENTS

Notes to Proposed Adjustments

ADJUSTMENT:

FACTS

TAX LAWS

LEGAL ISSUES

PROPOSITIONS OF LAW

WHAT YOU MUST DO NOW

- (1) If you do not intend to accept this Notice of Proposed Adjustment you must :
 - (1) notify the Commissioner of Inland Revenue by Notice of Response that a proposed adjustment contained in this notice is rejected; and
 - (2) In your Notice of Response -
 - (a) specify the items in the NOPA that you consider are in error; and
 - (b) specify the tax laws on which you are relying; and
 - (c) outline the facts in the Commissioner's NOPA which are wrong; and
 - (d) state any further facts which may be relevant; and
 - (e) outline any further legal issues you wish to rely on; and
 - (f) state the propositions of law you are relying on.
- (2) Your Notice of Response must be issued to the Commissioner at the above address *within a two month period starting on the date of issue of this notice* . The date of issue is indicated above.
- (3) If you do not within a two month period starting on the date of issue of this notice notify the Commissioner by Notice of Response that you reject a proposed adjustment contained in this notice you are deemed to accept the proposed adjustment and you may not challenge the adjustment in any subsequent Court proceedings.
- (4) You may indicate in your Notice of Response whether you propose to treat the matter as one which may eventually be resolved by the small claims procedure. If the matter is to be treated by you as one to be dealt with under the small claims procedure then special procedures will apply designed to shorten the pre-assessment process. You are, however, advised that an election to use the small claims procedure will preclude you at a later stage from using the general jurisdiction of the Taxation Review Authority or the High Court.
- (5) Please note that the amounts referred to in this Notice of Proposed Adjustment refer to income figures not tax figures, unless otherwise stated. If these adjustments are accepted your ultimate tax payable may need to be adjusted to include consequential adjustments to such items as ACC levies, Family Support Tax Credits, Use of Money Interest, and Additional Tax.

NOTICE OF RESPONSE

TAXPAYER'S NAME:

IRD NUMBER:

DATE OF ISSUE:

ITEM IN ERROR

FACTS IN ERROR

ADDITIONAL FACTS

TAX LAWS

ADDITIONAL LEGAL ISSUES

PROPOSITIONS OF LAW

WHAT YOU MUST DO NOW

- (1) If you intend to reject this Notice of Response, you must notify the Commissioner of Inland Revenue of such rejection in writing; and
- (2) Your notice rejecting the Commissioner's Notice of Response must be issued to the Commissioner at the above address *within a two month period starting on the date of issue of this notice*. The date of issue is indicated above .
- (3) If you fail to respond within the two month period stated above, you will be deemed to have accepted the Commissioner's Notice of Response.

DISCLOSURE NOTICE

To: Tax Payer
P O Box 123
Wellington

IRD No: XX-XXX-XXX

Take Notice that the Commissioner of Inland Revenue hereby requires you to provide a Statement of Position on or before xxxxxxx 199X being two months from the date of issue of this Notice. The Commissioner has no power to accept a Statement of Position issued after that date. However, application may be made to the High Court for additional time to issue the Statement of Position, provided such application is made before the expiry date above.

In terms of section 89M(3) of the Tax Administration Act 1994, the Commissioner is required to advise you of section 138G, the evidence exclusion rule. The evidence exclusion rule has the effect of preventing any further facts, evidence, issues or propositions of law being argued in a challenge, subject to limited judicial discretion, or unless the Commissioner and the taxpayer agree to add material to the Statement of Position.

It is accordingly in your best interest to ensure all material that you consider relevant to a challenge is included in the Statement of Position.

This request is issued pursuant to section 89M of the Tax Administration Act 1994 and relates to your Notice of Proposed Adjustment issued on XXXXXX 199x.

If you fail to comply with the terms of this Notice within two months from the date of issue of this Notice you will be deemed to have accepted the Commissioner's position as stated in the Commissioner's Notice of Response dated xxx.

DATED at Wellington this _____ day of _____ 199x

for and on behalf of the
Commissioner of Inland Revenue

COMMISSIONER'S STATEMENT OF POSITION

TAXPAYER'S NAME:

IRD NUMBER:

DATE OF ISSUE:

ISSUE IN DISPUTE:

FACTS

LIST OF EVIDENCE

LEGAL ISSUES

PROPOSITIONS OF LAW

REFERRAL TO ADJUDICATION

COVER SHEET

TAXPAYER:

IRD NO:

ADDRESS:

TELEPHONE:

AGENT:

ADDRESS:

TELEPHONE:

INLAND REVENUE OFFICER:

OFFICE:

TELEPHONE:

ATTACHMENTS

NOTICE(s) OF PROPOSED ADJUSTMENT

NOTICE(s) OF RESPONSE

CIR REJECTION OF Notice of Response

CONFERENCE DETAILS

CIR STATEMENT OF POSITION

TAXPAYER STATEMENT OF POSITION

CIR STATEMENT OF POSITION REPLY

DOCUMENTARY EVIDENCE (As Listed)

SCHEDULE OF ADJUSTMENTS

Disputed Proposed Adjustments

Issue	Period	Amount
_____	_____	_____
_____	_____	_____

Other issues - Accepted or Deemed accepted

Issue	Period	Amount
_____	_____	_____
_____	_____	_____

Period	Extension of Time Bar	Date Return filed	Due date for payment of tax	Expiry Date of time bar
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

DOCUMENTARY EVIDENCE

Amended legislation references

The former Taxpayer Compliance, Penalties and Disputes Resolution Bill consists of the following eleven Acts:

- Tax Administration Amendment Act 1996
- Taxation Review Authorities Amendment Act 1996
- Income Tax Act 1994 Amendment Act 1996
- Goods and Services Tax Amendment Act 1996
- Stamp and Cheque Duties Amendment Act 1996
- Gaming Duties Amendment Act 1996
- Estate and Gift Duties Amendment Act 1996
- Student Loan Scheme Amendment Act 1996
- Accident Rehabilitation and Compensation Insurance Amendment Act 1996 (*administered by ACC*)
- Child Support Amendment Act 1996
- Summary Proceedings Amendment Act 1996 (*administered by the Justice Department*)