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Inland Revenue
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This *Tax Information Bulletin* is also available on the internet in PDF. Our website is at **www.ird.govt.nz**

The website has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

If you prefer to get the *TIB* from our website and no longer need a paper copy, please let us know so we can take you off our mailing list. You can do this by completing the form at the back of this TIB, or by emailing us at **tibdatabase@ird.govt.nz** with your name, details and the number recorded at the bottom of the mailing label.

THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

Inland Revenue produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents.

Because we are keen to produce items that accurately and fairly reflect taxation legislation, and are useful in practical situations, your input into the process—as perhaps a "user" of that legislation—is highly valued.

The following draft items are available for review/comment this month, having a deadline of 29 February 2008.

Ref.	Draft type	Description
QB0039	Question we've been asked	Self-assessment
DDP0009	Depreciation determination	Set-top boxes without hard drive, personal video recorders (PVRs) without hard drive, DVD recorders with, and without, hard drive

Please see page 58 for details on how to obtain a copy.

CORRECTION

In the November edition of the *Tax Information Bulletin*, there was an item on the Adjudication Unit. Unfortunately, an error was contained in that article, at page 10 of the TIB.

The introduction stated that it was a reproduction of an item published in the *Chartered Accountants Journal*. However, rather than reporting the number of weeks taken to complete disputes for the year to 30 June 2007, the *TIB* item reported these statistics for the nine months ended 31 March 2007.

The correct completion times for the full year are respectively 6, 12 and 26 weeks.

This error is regretted and has been corrected in the electronic copy of the *TIB*.

BINDING RULINGS

This section of the *TIB* contains binding rulings that the Commissioner of Inland Revenue has issued recently.

The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates tax liability based on it.

For full details of how binding rulings work, see our information booklet *Adjudication & Rulings, a guide to binding rulings (IR 715)* or the article on page 1 of *Tax Information Bulletin* Vol 6, No 12 (May 1995) or Vol 7, No 2 (August 1995).

You can download these publications free from our website at www.ird.govt.nz

NETHERLANDS SOCIAL SECURITY PENSIONS—TAXATION WHEN THE RECIPIENT IS A NEW ZEALAND RESIDENT

PUBLIC RULING – BR PUB 07/10

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 03/01 which was published in *Tax Information Bulletin*, Vol 15, No. 2 (February 2003) and applied until 30 November 2006. This was a re-issue of BR Pub 98/6, which was published in *Tax Information Bulletin*, Vol 10, No 12 (December 1998). This new ruling takes into account the Income Tax Act 2004 and other minor changes in legislation since BR Pub 03/01 was published. This ruling will apply for an indefinite period beginning on 1 December 2006.

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Law

All legislative references are to the Income Tax Act 2004 and to the Double Tax Convention between the Netherlands and New Zealand, which appears in Schedule 1 to the Double Taxation Relief (Netherlands) Order 1981, S.R. 1981/43 ("the Double Tax Convention").

This Ruling applies in respect of Article 19(2) of the Double Tax Convention.

The Arrangement to which this Ruling applies

The Arrangement is the periodic payment of a Netherlands social security pension to a person who is a resident of New Zealand for tax purposes.

This person may be a national of the Netherlands, or of New Zealand, or of both countries. For the purposes of this Ruling the word "national" has the meanings attributed to it by Article 3(1)(h) of the Double Tax Convention.

How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- When a New Zealand tax resident receives a Netherlands social security pension, and that person is also a New Zealand citizen, the pension is taxable only in New Zealand.
- When a New Zealand tax resident, who is not a New Zealand citizen, receives a Netherlands social security pension, the pension may be subject to tax in both the Netherlands and New Zealand; with the Commissioner giving a credit for tax paid in the Netherlands in accordance with New Zealand's foreign tax credit rules.

The period for which this Ruling applies

This Ruling will apply for an indefinite period beginning on 1 December 2006.

This Ruling is signed by me on the 21st day of December 2007.

Susan Price
Senior Tax Counsel

COMMENTARY ON PUBLIC RULING – BR PUB 07/10

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in public ruling BR Pub 07/10 (the Ruling).

Background

The subject matter covered in the Ruling was previously dealt with in Public Rulings BR Pub 03/01 (*Tax Information Bulletin*, Vol 15, No. 2 (February 2003)) and BR Pub 98/6 (*Tax Information Bulletin*, Vol 10, No 12 (December 1998)). The Ruling has been amended to take into account the introduction of the Income Tax Act 2004.

This Ruling clarifies New Zealand's jurisdiction to tax pensions paid by the Netherlands, including when New Zealand's right to do so is an exclusive right. There has been some confusion about the New Zealand tax treatment of social security pensions paid by the Netherlands Government to people living in New Zealand. Some taxpayers believe the pensions are not taxable in New Zealand if the recipients are not New Zealand citizens.

All legislative references are to the Income Tax Act 2004, unless otherwise specified.

Legislation

Section BD 1(2) reads as follows:

> **Exempt income**
>
> (2) An amount of income of a person is exempt income if it is their exempt income under a provision in subpart CW (Exempt income) or CZ (Terminating provisions).

Section CW 23(1) and (2) reads as follows:

> **Exempt income**
>
> (1) The following are exempt income:
>
> …
>
> (e) an overseas pension.
>
> **Meaning of overseas pension**
>
> (2) In this section, overseas pension means -
>
> (a) an overseas pension, to the extent of sums subtracted under section 70 of the Social Security Act 1964, by the department currently responsible for administering the Act, from –
>
> (i) a monetary benefit paid under Part 1 of the Act; or
>
> (ii) a monetary benefit, other than New Zealand superannuation or a veteran's pension, paid under the Social Welfare (Transitional Provisions) Act 1990:
>
> (b) an overseas pension to the extent to which it is subject to an arrangement under section 70(3) of the Social Security Act 1964 but not to the extent of the equivalent amount of New Zealand superannuation, veteran's pension, or income-tested benefit paid under section 70(3)(b) of the Act.

Article 19(2) of the Double Taxation Convention (in schedule 1 to the Double Taxation Relief (Netherlands) Order 1981) reads as follows:

> a. Any pension paid by, or out of funds created by, one of the States or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority and any pension paid to an individual under the social security scheme of one of the States, may be taxed in that State.
>
> b. However, such pension shall be taxable only in the State of which the individual is a resident if he is a national of that State.

Article 3(1)(h) of the Double Taxation Convention defines the term "national" to mean:

> 1. in the case of the Netherlands, any individual possessing the nationality of the Netherlands, and any legal person, partnership and association deriving its status as such from the laws in force in the Netherlands;
>
> 2. in the case of New Zealand, any individual possessing citizenship of New Zealand and any legal person, partnership and association deriving its status as such from the laws in force in New Zealand.

Article X of the Protocol to the Double Tax Convention states:

> X. With reference to Articles 18 and 19
>
> It is understood that the term "pensions and other similar remuneration" includes only periodical payments.

Application of the Legislation

Under the Income Tax Act 2004, persons who are resident in New Zealand are subject to New Zealand tax on their worldwide income. Double Tax Conventions and Agreements with other countries override the Income Tax Act and determine which country has jurisdiction to tax the income in question. Among other issues, the Double Tax Convention between the Netherlands and New Zealand determines the tax treatment of periodic pensions paid by an organisation in one country to residents of the other country.

Article 18 of the Double Tax Convention sets out which country has the jurisdiction to tax pensions paid by one country to the residents of the other country. This Article, however, does not apply to pensions paid out:

- under social security schemes; or
- for services rendered to the country paying the pension.

Article 19 deals with these two classes of pension. Article 19(2) states that a social security pension may be taxed by the country from which it is paid but the pension shall be taxed only in the country in which the recipient of the pension is resident if the recipient is also a national of the country of residence. Therefore, a social security pension paid to a New Zealand tax resident who is also a national of New Zealand may be taxed **only** in New Zealand.

However, if the recipient is a New Zealand tax resident, but is not a New Zealand citizen, New Zealand does not have an exclusive right to tax the pension. In those circumstances the Double Tax Convention does not restrict either the Netherlands or New Zealand from taxing the pension and the pension could be taxed in both the Netherlands and New Zealand under their domestic law. Persons who are not New Zealand citizens and have tax deducted by the Government of the Netherlands from their Netherlands social security pensions are entitled to tax credits under section LC 1. When this occurs the Commissioner will, in accordance with New Zealand's foreign tax credit rules, give the recipient a tax credit for the tax paid in the Netherlands. However, these tax credits cannot exceed the amount of tax due in New Zealand.

Residence and Nationality

Article 4 of the Double Tax Convention sets out rules for determining the residence (for the purpose of the Double Tax Convention) of a person who is resident for tax purposes in both the Netherlands and New Zealand under their domestic law. The term "national" in the case of New Zealand is defined in the Double Tax Convention as:

> … any individual possessing citizenship of New Zealand and any legal person, partnership and association deriving its status as such from the laws in force in New Zealand

(The rules determining how New Zealand citizenship is acquired are set out in the Citizenship Act 1977.) Hence, under the Double Tax Convention a person who is a citizen of New Zealand is a national of New Zealand.

Accordingly, under Article 19(2)(b) of the Double Tax Convention New Zealand has an exclusive right to tax a Dutch social security pension when the recipient is determined to be a New Zealand tax resident under Article 4 and is also a New Zealand citizen. (This will be so whether or not that person is also a Dutch national. In the case of dual nationality, the recipient will still satisfy the requirements of Article 19(2)(b) – New Zealand tax residency and New Zealand citizenship – and the additional fact of possessing Dutch nationality does not alter the conclusion that only New Zealand may tax the pension.)

Liability to tax under New Zealand domestic law

The Double Tax Convention need not be considered unless an amount of Netherlands pension is taxable under New Zealand domestic law. A Netherlands pension could be fully or partly exempt from tax under section CW 23 of the Income Tax Act 2004. Section CW 23(2)(a) may apply where the New Zealand benefit payable to a Netherlands pensioner has been reduced in terms of section 70(1) of the Social Security Act 1964.

Section 70(1) of the Social Security Act 1964 applies where the recipient of a Netherlands pension is also entitled to a benefit of a similar nature under New Zealand social welfare legislation. In that event the New Zealand benefit is to be reduced by the amount of a Netherlands pension and the effect of section CW 23(2)(a) is as follows:

- When the amount of the New Zealand superannuation or veteran's pension payable has been reduced by the amount of a Netherlands pension under section 70(1) of the Social Security Act 1964, section CW 23(2)(a) does not apply. Therefore, the full amount of the Netherlands pension is taxable under New Zealand domestic law.
- However, when an entitlement to another type of New Zealand benefit has been reduced by the amount of a Netherlands pension, the Netherlands pension is exempt income under section CW 23(2)(a) to the extent that the New Zealand benefit has been reduced. Therefore, when a deduction from a New Zealand benefit entitlement has been made under section 70(1) of the Social Security Act 1964 and the amount of a Netherlands pension exceeds the amount of the New Zealand benefit entitlement, the amount exceeding the New Zealand benefit entitlement is taxable under New Zealand domestic law.

(Note: the section CW 23 exemption does not apply to New Zealand superannuation and veterans' pensions. They are specifically excluded from this section and are assessable income).

Section CW 23(2)(b) applies when an arrangement has been made in respect of an overseas pension under section 70(3) of the Social Security Act 1964. Under section 70(3) of the Social Security Act 1964 an arrangement may be made to pay the full amount of an overseas pension to the chief executive of the department responsible for administering that Act (which is currently the Ministry of Social Development) in order to receive the full rate of a benefit payment under that Act, the Social Welfare (Transitional Provisions) Act 1990, Part 6 of the War Pensions Act 1954 or the New Zealand Superannuation and Retirement Income Act 2001. This option is available to recipients of Netherlands pensions from 1 July 2002 under the Social Security (Alternative Arrangement for Overseas Pensions) Amendment Regulations 2002. When such an arrangement is made, the Netherlands pension is not taxable under New Zealand domestic law (but the equivalent amount of the New Zealand benefit would be taxable under section CW 23(2)(b)).

Example 1
A taxpayer is a Dutch citizen who immigrated to New Zealand two years ago. He receives a Netherlands social security pension. He has not become a New Zealand citizen, but is a tax resident of New Zealand. Both New Zealand and the Netherlands may tax his pension. New Zealand will grant him a tax credit for the tax charged on the pension by the Netherlands.

Example 2
A taxpayer has Dutch nationality and immigrated to New Zealand five years ago. She receives a Netherlands social security pension. However, unlike the taxpayer in Example 1, she has become a New Zealand citizen. Only New Zealand may tax the social security pension that she receives from the Netherlands.

GST—LOTTERY OPERATORS AND PROMOTERS

PUBLIC RULING – BR PUB 07/11

Note (not part of ruling): This ruling is essentially the same as the "GST–lottery operators and promoters" item published in *Tax Information Bulletin* Vol 5, No 11 (April 1994). This updated an earlier item "GST–licensed lottery promoters" which was published in *Tax Information Bulletin* Vol 1, No 3 (September 1989). This ruling updates these items and takes into account the introduction of the Gambling Act 2003 and consequential amendments to the Goods and Services Tax Act 1985.

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Law

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

This Ruling applies in respect of sections 5(10), 9(2)(e), and 10(14), and the definition of "registered person" in section 2.

The Arrangement to which this Ruling applies

The Arrangement is the conducting of a lottery by any person, society, or corporate society and/or the promotion of any lottery by a licensed promoter, under the Gambling Act 2003.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- Under section 5(10), where a person pays an amount in money to participate in a lottery, the amount of money paid to participate is payment for the supply of services by the person, society, or corporate society that conducts the lottery, or licensed promoter who promotes the lottery under the Gambling Act.
- Under section 9(2)(e), if a supply is treated as having been made under section 5(10), the time of supply of the service to participate in a lottery is deemed to be when the first drawing or determination of a result commences.
- Under section 10(14), if a supply of services is treated as having been made under section 5(10), the consideration in money for the supply is the portion of the amount in money a person pays to participate in the lottery that represents the total proceeds (after deducting the amount of all prizes paid and payable in money) in respect of the lottery.
- If a lottery is conducted by any person, society, or corporate society that is registered (or required to be registered) for goods and services tax (GST):
  - output tax is payable on the amount of money paid to participate in the lottery less the amount of all prizes paid or payable in money; and
  - input tax credits can be claimed for expenses (such as purchases of non–cash prizes, fees paid to the promoter, and other expenses such as printing tickets).
- If a lottery is promoted by a licensed promoter who is registered (or required to be registered) for GST:
  - output tax is payable on any fees received; and
  - input tax credits can be claimed for expenses connected with the promotion.

The period for which this Ruling applies

This Ruling will apply for the period beginning on 21 December 2007 and ending on 21 December 2012.

This Ruling is signed by me on the 21st day of December 2007.

Susan Price
Senior Tax Counsel

COMMENTARY ON PUBLIC RULING – BR PUB 07/11

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 07/11 (the Ruling).

Background

The subject matter covered in the Ruling was previously dealt with in the "GST–lottery operators and promoters" item published in *Tax Information Bulletin* Vol 5, No 11 (April 1994), which was an updated version of the "GST–licensed lottery promoters" item published in *Tax Information Bulletin* Vol 1, No 3 (September 1989). The Ruling updates these items and takes into account the

introduction of the Gambling Act 2003 and consequential amendments to the Goods and Services Tax Act 1985 (GST Act).

The Ruling sets out the goods and service tax implications for lottery operators and promoters who are registered (or required to be registered) for GST. Sections 5(10) and 10(14) of the GST Act provide for the treatment of the supply of and consideration paid for gambling services. Section 9(2)(e) of the Act sets out the time of supply for gambling services made under section 5(10). Sections 5(11) and 10(15) of the Act provide that certain terms are as defined in section 4 of the Gambling Act.

Legislation

Goods and Services Tax Act 1985

Sections 5(10) and (11) provide:

(10) Despite anything in this Act, for the purposes of this Act if a person pays an amount in money to participate in gambling (including a New Zealand lottery), the amount of money paid to participate must be treated as payment for the supply of services by the person, society, licensed promoter, or organiser who under the Gambling Act 2003 conducts the gambling.

(11) For the purposes of subsection (10)—
- (a) the terms **gambling, New Zealand lottery, licensed promoter**, and society have the meanings set out in section 4(1) of the Gambling Act 2003:
- (b) the term **organiser** means the New Zealand Lotteries Commission continued by section 236 of the Gambling Act 2003.

Section 9(2)(e) provides :

(2) Notwithstanding anything in subsection (1) of this section, a supply of goods and services shall be deemed to take place -

...

- (e) if the supply is treated as having been made under section 5(10) on the date on which the first drawing or determination of a result of the gambling (including a New Zealand lottery) commences, provided that this paragraph does not apply to an instant game that is a **New Zealand lottery** or **gambling** played by means of a gaming machine (as those terms are defined in section 4(1) of the Gambling Act 2003).

Sections 10(14) and (15) provide:

(14) If a supply of services is treated as having been made under section 5(10), the consideration in money for the supply is the portion of the amount in money a person pays to participate in the gambling (including a New Zealand lottery) that represents the total proceeds (after deducting the amount of all prizes paid and payable in money) in respect of the gambling.

(15) For the purposes of subsection (14), the terms **gambling** and **New Zealand lottery** have the meanings set out in section 4(1) of the Gambling Act 2003.

Gambling Act 2003

Section 4 of the Gambling Act defines "corporate society", "gambling", "licensed promoter", "lottery" and "society" as follows:

corporate society means 1 society that is–
- (a) incorporated under the Incorporated Societies Act 1908; or
- (b) incorporated as a board under the Charitable Trusts Act 1957; or
- (c) a company incorporated under the Companies Act 1993 that–
  - (i) does not have the capacity or power to make a profit; and
  - (ii) is incorporated and conducted solely for authorised purposes; or
- (d) a working men's club registered under the Friendly Societies and Credit Unions Act 1982

gambling
- (a) means paying or staking consideration, directly or indirectly, on the outcome of something seeking to win money when the outcome depends wholly or partly on chance; and
- (b) includes a sales promotion scheme; and
- (c) includes bookmaking; and
- (d) includes betting, paying, or staking consideration on the outcome of a sporting event; but
- (e) does not include an act, behaviour, or transaction that is declared not to be gambling by regulations made under section 368

licensed promoter means a person who is granted a licence under section 201 to promote a class 3 gambling activity on behalf of a society.

Lottery
- (a) means a scheme or device involving multiple participants for which–
  - (i) a person pays consideration to participate, directly or indirectly; and
  - (ii) prizes of money are distributed according to a draw that takes place after all participants have entered; and
- (b) includes lotto, raffles, and sweepstakes

society means an association of persons established and conducted entirely for purposes other than commercial purposes

Section 5 defines "conducting gambling" as follows:

Meaning of conducting gambling
In this Act, conducting gambling includes any of the following activities:
- (a) organising, using, managing, supervising, and operating (but not playing) gambling or gambling equipment:
- (b) distributing the turnover of gambling (for example, by paying prizes, meeting costs, or making grants):
- (c) selling tickets to participate in gambling:
- (d) promoting gambling:
- (e) assisting in activities described in paragraphs (a) to (d).

Application of the legislation

The running of a lottery is controlled by the Gambling Act 2003. Sections 20 to 31 of the Gambling Act set out four classes of gambling and who may conduct gambling in each class. The key features of these classes are as follows:

- Class 1 gambling may be conducted by a "society" or a "corporate society" provided the society or corporate society conducts no more than 1 session of gambling per day, the total value of prizes and potential turnover involved in 1 session of the gambling activity does not exceed $500 and the net proceeds are applied to an authorised purpose.
- Class 1 gambling may also be conducted by a person (this includes individuals, and companies and other commercial entities). However, the criteria in respect of the proceeds differ from those for a "society" or "corporate society". When gambling is conducted by a person, the proceeds must be applied to reward the winners of the gambling or to actual expenses directly incurred in conducting the gambling activity. Therefore, a person may not retain any proceeds for any other purpose.
- Class 2 gambling may be conducted by a "society" or "corporate society". The total value of prizes in 1 session must not exceed $5,000, no more than 1 session of gambling may be conducted per week, and the potential turnover (in 1 session) must not exceed $25,000. The net proceeds must be applied to an authorised purpose.
- Class 3 gambling is where the total value of prizes (in 1 session) exceeds $5,000 (section 27 of the Gambling Act) and the net proceeds are applied to an authorised purpose. Class 3 gambling that is not conducted regularly may be conducted by a "society" or "corporate society". However, Class 3 gambling which is conducted regularly may be conducted only by a "corporate society".
- Class 4 gambling may be conducted only by a "corporate society". Class 4 gambling is gambling that is not gambling of another class. Currently that means gambling involving a gaming machine. The net proceeds must be applied to an authorised purpose.
- In addition to the requirements set out above, all classes of gambling must satisfy the relevant regulations and game rules, and the gambling must not utilise or involve a gaming machine (except where the gambling is Class 4 gambling). There are also certain restrictions surrounding the payment of commission or remuneration to a person who conducts gambling.

Although the Gambling Act does not expressly state that the meaning of "gambling" includes a "lottery", both the definition of gambling and the scheme of the Act support the view that conducting a lottery is a form of gambling. This is consistent with the scope and purpose of the Act, which are to regulate all forms of gambling. Therefore, anyone who is permitted to conduct one of the classes of "gambling" in terms of the Gambling Act can similarly conduct a "lottery" that comes within that class.

Licensed promoter

When a society conducts a "lottery", it may be promoted by a "licensed promoter". The "licensed promoter" is a person who is granted a licence to promote a class 3 gambling activity that is not conducted regularly, on behalf of a "society" or "corporate society", and who promotes the lottery for a reward.

Both sections 5(10) of the GST Act (which refers to a licensed promoter conducting gambling) and section 5(d) of the Gambling Act (which includes "promoting gambling" in the definition of "conducting gambling") might give the impression that a "licensed promoter" can conduct gambling under the Gambling Act. However, in terms of sections 28(3), 189, 203(2)(c) of the Gambling Act and the definition of "licensed promoter", a "licensed promoter" may promote class 3 gambling only on behalf of a "society" or "corporate society". In other words, apart from "promoting gambling", they cannot conduct gambling in terms of the Gambling Act. Therefore, under the Gambling Act it is the "society" or "corporate society" that conducts the lottery, not the "licensed promoter".

GST implications

Person, society, and corporate society

The GST implications for a person, a society, and a corporate society are as follows.

If a lottery is conducted by any person, society, or corporate society that is registered (or required to be registered) for GST:

- the time of supply of the service to participate in the lottery is deemed to be when the first drawing or determination of a result commences (under section 9(2)(e) of the GST Act);
- if a supply of services is treated as having been made under section 5(10), output tax is payable on the amount of money paid to participate in the lottery that represents the total proceeds (after deducting the amount of all prizes paid or payable in money) in respect of the lottery (section 10(14)); and
- input tax credits may be claimed for expenses such as purchases of non-cash prizes, fees paid to the promoter, and other expenses such as printing tickets.

Promoter

The GST implications for a promoter are as follows.

If a lottery is promoted by a licensed promoter who is registered (or required to be registered) for GST:

- output tax is payable on any fees received for promoting the lottery; and
- input tax credits may be claimed for expenses connected with the promotion.

PRODUCT RULING – BR PRD 07/05

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This ruling has been applied for by Tortis-International Fund.

Taxation Laws

All legislative references are to the Income Tax Act 2004 unless otherwise stated.

This Ruling applies in respect of sections CD 14, CD 18(1) and 18(2).

The Arrangement to which this Ruling applies

The Arrangement is the establishment and continued operation of a unit trust known as Tortis-International Fund ("Tortis-INTL" or the "Fund" or the "Trust") pursuant to a Deed of Trust dated 16 December 1996 and amended on 18 February 1997, 31 July 2000, 16 August 2001 and 12 July 2002 (the "Trust Deed"), and the Prospectus for the Fund dated 11 September 2006 (the "Prospectus").

Further details of the Arrangement are set out in the paragraphs below.

1. The Fund invests in the securities of those companies that make up the TOWER Global Index (the "Global Index" or the "Index"). The Global Index is a customised version of the Morgan Stanley Capital International World Index (the "MSCI World Index"). The Fund has been designed to provide investors with comprehensive coverage of global equities.

2. Tortis-INTL is a unit trust in terms of the Unit Trusts Act 1960 and meets the definition of a "unit trust" contained in section OB 1.

3. Tortis-INTL is a New Zealand tax resident. The trustee of Tortis-INTL is the Public Trustee (the "Trustee"). The manager of Tortis-INTL is TOWER Managed Funds Investments Limited (previously known under the name "TOWER Trust Services Limited") (the "Manager"). The investment manager of the Fund is State Street Global Advisors, Australia, Limited (the "Investment Manager" or "State Street").

4. The investment policy of the Fund is set out in clause 82.1 of the Trust Deed. It states:

   82. The investment policy of the Trust shall be:

   82.1 to only invest the Fund (other than the Cash Pool and Unmarketable Accumulations) in Index Shares in a manner that replicates the Adjusted MSCI and to only enter into transactions that are necessary to give effect to that policy;

   82.2 to invest the Cash Pool in deposits with banks registered under the Reserve Bank Act 1989 or other debt obligations or in the TOWER FirstRate Account upon terms that will allow the Manager to pay the anticipated Liabilities of the Fund and to manage the redemption of Units and the liquidity of the Trust;

   82.3 to invest Unmarketable Accumulations in Derivatives until the total value of investment in Derivatives reaches a Marketable Amount whereupon the Derivatives will be realised and the proceeds invested in accordance with clause 82.1 or 82.2; and

   82.4 to not take any action to hedge or manage foreign exchange risks or exposures that arise from the Investments being held in non New Zealand currencies.

5. The investment objectives of the Fund are as follows:

   - To track the adjusted MSCI Index, called the TOWER Global Index, to provide broad international coverage of approximately 1,000 companies;
   - The Global Index includes only "grey listed" countries to New Zealand, so that double taxation issues do not occur. These include companies resident in the United Sates, United Kingdom, Germany, Canada, Japan, and Australia. These companies provide coverage of 80% of all international companies contained within the total MSCI Index;
   - The Investment Manager cannot diversify investments of the Fund, or take prudent steps in respect of the mix of the Fund's investments.

6. The Trust Deed states that:

   It is not the Fund or the Trustee's intention to profit from holding, acquiring or selling constituent company securities.

7. Tortis-INTL is an open fund and new investors are able to subscribe for units from time to time. The beneficial interest in Tortis-INTL is divided into units. Each unit confers an equal interest in Tortis-INTL (other than a fractional unit which will confer a proportionate interest) but does not confer any

interest in any particular part of the fund or any particular investment of the fund.

8. Tortis-INTL has confirmed that all aspects of the previous rulings (BR Prv 96/135, BR Prv 96/136, BR Prv 01/15 and BR Prv 04/22), relating to the Fund, have been complied with. There has been no change to the Trust Deed of the Fund (except for the changes noted above), nor any change to the management or operation of the Fund since its establishment.

The MSCI World Index

9. The TOWER Global Index is a customised version of the MSCI World Index.

10. The tracking of the Global Index is undertaken by the Investment Manager.

11. The document *MSCI Global Investable Market Indices Methodology: Index Construction Objectives, Guiding Principles and Methodology for the MSCI Global Investable Market Indices and Plan for the Transition of the Current MSCI Standard and Small Cap Indices* dated and effective from 28 March 2007 ("the Methodology Book") states the objective of MSCI, with respect to its Equity Index Series, as being the construction of global benchmark indices which serve as a gauge for measuring performance of a market and investment strategy, effective research tools for purposes such as strategic asset allocation, and as the basis for investment vehicles designed to replicate the performance of a market or to implement and manage an investment policy. MSCI consistently applies its equity index construction and maintenance methodology across regions and developed and emerging markets, making it possible to aggregate individual country and industry indices to create meaningful regional and composite benchmark indices.

12. The MSCI Standard Index Series adjusts the market capitalisation of index constituents for free float and targets for index inclusion 85% of free float-adjusted market capitalisation in each industry group, in each country. Currently, MSCI calculates the Standard Index Series for 48 countries globally in the developed and the emerging markets.

13. As of December 2003, the MSCI World Index comprises the 23 developed market country indices.

14. The Methodology Book describes MSCI's index construction objective (see paragraph 11 above), guiding principles, and the methodology for the Standard Index Series.

Guiding principles

15. MSCI adheres to the following principles in the design and implementation of its index construction and maintenance methodology:

- Broad and fair representation of the total underlying market
- Investability and replicability;
- Consistent application of the methodology across all markets;
- Continuity and relatively low turnover while reflecting the evolution of the markets in a timely fashion;
- Disciplined approach: principles, rules and guidelines to ensure all decisions MSCI makes are consistent with a benchmark index;
- Transparency;
- Independence and objectivity.

Index construction process

16. The index construction process involves:

- Defining the equity universe – about 99% of the world's total equity market capitalisation is included;
- Adjusting the total market capitalisation of securities in the universe for free float available to foreign investors;
- Classifying the universe of securities under the Global Industry Classification Standard;
- Selecting securities for inclusion according to MSCI's index construction rules and guidelines.

Index constituent eligibility rules and guidelines

17. MSCI targets an 85% free float-adjusted market representation level within each industry group, within each country. The security selection process within each industry group is based on the careful analysis of:

- Each company's business activities and the diversification that its securities would bring to the index.
- The size (based on free float-adjusted market capitalisation) and liquidity of securities. All other things being equal, MSCI targets for inclusion the most sizeable and liquid securities in an industry group. In addition, securities that do not meet the minimum size guidelines and/or securities with inadequate liquidity are not considered for inclusion.
- The estimated free float for the company and its individual share classes. Only securities of companies with an estimated overall and/or security free float greater than 15% are, in general, considered for inclusion. The only exception is where not including a security of a large company would compromise the index's ability to fully and fairly represent the characteristics of the underlying market.

18. Differences in the structure of industries, and other considerations, may lead to over- or under-

representation in certain industries. In these cases, the indices are constructed with a view to minimising the divergence between the industry group representation achieved in the index and the 85% representation guideline.

Maintaining the MSCI Standard Index Series

19. The MSCI Standard Index Series is maintained with the objective of reflecting, on a timely basis, the evolution of the underlying equity markets. Emphasis is also placed on continuity, replicability and on minimising turnover in the indices. Overall, index maintenance can be described by three broad categories of implementation of changes:

- Annual full country index reviews that systematically reassess the various dimensions of the equity universe for all countries and are conducted on a fixed annual timetable.
- Quarterly index reviews, aimed at promptly reflecting other significant market events.
- Ongoing event-related changes, such as mergers and. acquisitions, which are generally implemented in the indices rapidly as they occur.

Potential changes in the status of countries (standalone, emerging, developed) follow their own separate timetables. These changes are normally implemented in one or more phases at the regular annual full country index review and quarterly index review dates.

In this Ruling, index maintenance is referred to as Structural Change (quarterly and annual review changes) and Market Driven Change (ongoing event-related changes).

The Adjusted MSCI World Index: the TOWER Global Index

20. The Global Index is a customised version of the MSCI World Index. The Global Index replicates the MSCI World Index, with one qualification: it only contains grey list countries, which comprise at least 2% of the MSCI World Index. The Global Index does not alter the MSCI World Index in any other way.

21. If any of the countries included in the Global Index leave the grey list then securities held in companies resident in that country will be immediately divested. If any company in which Tortis-INTL holds securities ceases to be resident in a grey list country, then securities held in that company will be immediately divested.

Trust Deed and Prospectus

Two classes of units

22. The Fund offers two classes of units: Class A and Class B. Class A units are standard retail units. Class B units are issued on exactly the same terms as Class A units, however holders of Class B units, due to the size of their investment, are able to negotiate reduced management and trustee fees.

Date of Adjustments

23. The Fund is rebalanced in the following circumstances:

- If any security, any country index, or the entire Index has a deviation of greater than +/- 0.5% of the total Fund; and
- Due to the Structural Changes in the MSCI, currently quarterly; and
- If there is a Market Driven Change such as a merger, takeover, new listing or reduction or increase in capital affecting any Index company on the Global Index.

24. Such rebalancing will occur as soon as possible after the above events have occurred and in any event within 2 business days.

Rights Issues

25. The Global Index may be adjusted from time to time because of rights issues.

26. In the event of any rights issue by an Index Company, the Manager will hold the entitlement if the entitlement is included in the Index. If the entitlement is not included in the Index, but the securities the subject of the entitlement will be immediately included in the Index, the Manager will retain the entitlement and take up the securities. If the Manager does not know whether the securities the subject of the entitlement will be included in the Index the Manager will sell the entitlement at the earliest possible time and reinvest the proceeds in the Index Companies to track the Index.

Mergers, Takeovers and Share Buy-backs

27. The Global Index may be adjusted from time to time because of mergers, takeovers or share buy-backs.

28. With the exception of any situation where shares in an Index company are compulsorily acquired pursuant to any companies legislation, listing rules or takeover code requirements, in the event of a merger or takeover of an Index Company, the Manager will adjust the Fund portfolio at a time as close as practicably possible to the time the Index is adjusted. The Fund will not accept an offer unless as a consequence of not accepting the offer the Fund would track the Index less accurately than if it had accepted the offer.

29. The Manager will not elect to participate in a share buy-back scheme of a Index Company.

Cash investments held by the Fund

30. Although it is not an objective of the Fund to hold cash, the Manager and the Investment Manager (on behalf of the Fund) may hold cash to facilitate the easier administration of the Fund. The cash held by the Manager and the Investment Manager is on "call". Wherever possible, the Manager will enter into futures contracts to cover the cash held by the Fund. This is known as "equitised cash".

31. The Investment Manager (on behalf of the Fund) will hold cash in the following circumstances:

- Following the sale of securities in the course of tracking the Index, pending the reinvestment of that cash;
- Following a contribution to the Fund, pending the investment of that contribution;
- Following the sale of securities to meet a request for withdrawal by a Manager on behalf of a unit holder;
- To accumulate the minimum amount of cash required to allow for minimum trade sizes and to obtain a reasonable representation of the number of securities on the Index, which is presently $US3 million ("the minimum investment level").

32. The Investment Manager may hold up to an amount equivalent to the minimum investment level in cash (including both free and equitised cash). This threshold may be exceeded in the following circumstances:

- for up to 10 working days preceding a MSCI structural change;
- for up to 3 working days after a MSCI structural change; or
- for up to 10 working days prior to a pending withdrawal in respect of which it has received a withdrawal request.

33. In addition to any funds held by the Investment Manager, the Manager may hold cash. The amount of cash held by the Manager will not be greater than what strictly arises out of the circumstances described below, and in any event will not exceed 2% of the total assets of the Fund. Those circumstances are:

- Following a contribution to the Fund, pending the investment of that contribution;
- Following the sale of securities to meet a request to redeem units in cash; and
- To fund the expenses, fees and taxation for the Fund;

34. The 2% threshold of cash held by the Manager may be exceeded in the following circumstances:

- For up to one business day if there is rapid inflow to the Fund, or the Fund has notice of a substantial pending withdrawal ;
- For up to one calendar month if the Manager receives a formal notice of a forthcoming obligation of subsequent performance (ie payment due on partly paid shares) affecting the constituent securities in the Index; or
- For up to one calendar month if the Manager is aware of a forthcoming distribution to unit holders at the scheduled date of distribution.

35. However, in any event, if the 2% threshold of cash held by the Manager is exceeded, the Fund will take immediate action to remedy the situation within the shortest practicable time.

36. At all times, there is a limit on the total cash (including cash held by the Manager and free and equitised cash held by the Investment Manager) which is the greater of 5% of the total value of the Fund and the sum of 2% of the total value of the Fund and the minimum investment level (except if there is a significant withdrawal or investment).

37. The Investment Manager will use best endeavours to equitise all cash, subject to futures contract size constraints.

38. The following futures contracts are currently used:

Country	**Contract**
Australia	SPI200
Canada	S&P/TSE60
Japan	Nikkei 225, TOPIX
Germany	DAX
United Kingdom	FTSE100
United States	S&P500

39. In the event that alternative futures contracts in one or more markets enable improved tracking of the Global Index, or that one or more of the above contracts ceases to exist, the Investment Manager will use such alternative contract or contracts.

Hedging

40. The Fund does not take any action to hedge or remove foreign currency risks or exposures that arise from the investments of the Fund in non-New Zealand currencies.

Foreign Currencies

41. The Investment Manager may enter into spot foreign exchange contracts where these are necessary in order to purchase or divest the foreign currencies necessary to purchase or dispose of Index securities. These contracts are not speculative and are settled within 2 business days.

Borrowing

42. The Fund may only borrow in the following circumstances:

- To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days;
- Where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary;
- To temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary; or
- For advances (not to exceed total borrowings of $5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.

Events that trigger acquisitions or realisations

43. The Fund will only sell or otherwise dispose of securities in the following circumstances:

- If the Fund is voluntarily or involuntarily wound up;
- If there is a change in the Index composition due to either Structural Changes or Market Driven Changes so that the composition of the Fund no longer tracks the Index, or when the Fund is otherwise required to buy and sell securities to rebalance the Fund in order to maintain tracking;
- Funding redemptions to the extent that these cannot be met out of cash held by the Fund;
- Transferring securities to a unit holder if the unit holder redeems units for securities;
- If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

Issue and redemption of Units

44. Investors wishing to subscribe for units may do so for cash or, alternatively, above a certain prescribed level, investors may subscribe for units by transferring to Tortis-INTL an appropriately weighted basket of securities, and will receive units in Tortis-INTL in exchange.

45. When a unit holder wishes to dispose of an investment in the Fund, the unit holder is able to elect that the units be either redeemed by the Trustee, or repurchased by the Manager.

Notwithstanding any provision in the Prospectus or the Deed of Trust, it is the invariable practice of the Fund that where such an election is made by the unit holder, the units will be either redeemed by the Trustee, or repurchased by the Manager, in strict accordance with that election.

In the absence of an election by the unit holder, the units will in all instances be repurchased by the Manager.

Where units are repurchased by the Manager, the price paid to the unit holder by the Manager will be the same amount as would be received by the unit holder if the unit holder had elected the direct redemption method. In all instances where units are repurchased by the Manager, whether pursuant to an election by a unit holder or not, the Manager will redeem those units with the Trustee for the same price as paid to the unit holder.

46. A unit holder may redeem units subject to the conditions in Article C of the Trust Deed. Article C gives the Manager a discretion to refuse to redeem units where the amount to be redeemed is less than the minimum number acceptable by the Manager at that time. Currently the Manager has set a minimum withdrawal at $500.

47. Unit prices may be published in newspapers. Tortis-INTL has an Internet site which will be used principally to publish prices at which the Manager will repurchase or redeem units, and as a means for transferring units only by purchase from the Manager, and redemption or repurchase by the Manager.

Same day unit redemption policy

48. When units are repurchased, the Manager is required to pay the aggregate value of the units to the investor within 21 business days of the relevant time (as described in the Trust Deed). However when possible the Fund operates a same day unit redemption policy. The Fund will endeavour to redeem the units requested by any unit holder and redeem and pay for those units on the same day as the unit holder's request is made.

49. If the Fund has insufficient cash in the cash pool, the Fund will always in the first instance attempt to borrow (on suitable commercial terms) sufficient funds in order to meet the redemption request. In situations where the Fund is not able to borrow such sufficient funds, the Fund may suspend the withdrawal of units in the Fund. The only exception to the Fund always attempting to borrow in the first instance where a redemption request is made and there is insufficient cash in the cash

pool, is where a redemption request is made by a unit holder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unit holders. In such a case the Fund will always suspend the withdrawal of units.

Suspension of issuing and redeeming units

50. A suspension from issuing or redeeming units (including any deferral notice with regard to Class B units) may be necessary in exceptional circumstances, being the following situations:

    (1) if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed;

    (2) if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Shares from the Stock Exchanges on which those Index Shares are listed;

    (3) where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests; or

    (4) where there is insufficient cash in the cash pool and a redemption request is made by a unit holder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unit holders; or

    (5) in the case of any deferral notice in respect of class B units, the Trustee reasonably forms the opinion that to fund redemptions may prejudice the Fund's obligations to Class A unit holders.

    Where suspension occurs because of termination of the Fund, the suspension will be for a maximum of 3 months from the giving of the notice to terminate by the Manager.

    In other circumstances, if a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event. However in the case of a deferral notice, with regard to Class B units, the period of the deferral notice may be extended until the Trustee reasonably forms the opinion that to fund redemptions is no longer prejudicial to the Fund's obligations to Class A unit holders.

    The Fund has suspended the issuing and redeeming of units only once, for 3 days after the World Trade Center was destroyed, as the US market was closed and so valuations were not available.

Assumption made by the Commissioner

This ruling is subject to the following assumption:

(a) That the re-issued Prospectus dated 11 September 2006 is the same in all material respects as the Prospectus dated 11 September 2003.

Conditions stipulated by the Commissioner

This Ruling is subject to the following conditions:

(a) The predetermined rules used by the Investment Manager to ascertain the Global Index constituents, and the predetermined rules used by MSCI to calculate the MSCI World Index, will not be made with or influenced by any intention of seeking higher rates of return or capital growth.

(b) No material changes will be made to the way in which the Global Index tracks the MSCI World Index.

(c) No material changes will be made to the way in which MSCI constructs and maintains the MSCI World Index.

(d) The proportion of Tortis-INTL's assets to be held as cash (including all "free" cash and "equitised" cash) will not exceed what is strictly necessary in order to fulfil the purposes stated in paragraph 30 of this ruling, and will not in any event exceed the greater of 5% of the value of the Fund and the sum of 2% of the value of the Fund and the minimum investment level.

    This condition will not be regarded as being breached if, pending investment of contributions or disbursement of withdrawal proceeds, the Fund is forced to hold cash in excess of the greater of 5% of the value of the Fund and the sum of 2% of the value of the Fund and the minimum investment level. The Fund will immediately invest or disburse such cash, except where immediate investment to track the Index is not possible due to the unavailability of appropriate equities, in which case the excess cash may be held for only so long as is strictly necessary and in any event no longer than two business days.

(e) When the cash held by the Investment Manager reaches the minimum investment level (presently $US 3 million), it will be immediately applied to track the Index.

(f) The Investment Manager will rebalance the Fund in the following circumstances:

    i. If any security, any country index, or the entire Index has a deviation of greater than +/- 0.5% of the total Fund; and

    ii. Due to Structural Changes in the MSCI, currently quarterly; and

iii. If there is a Market Driven Change such as a merger, takeover, new listing or reduction or increase in capital affecting any Index company on the Global Index.

Such rebalancing will occur as soon as possible after the above events have occurred and in any event within 2 business days.

(g) When rebalancing the Fund the Investment Manager will use its best endeavours to track the Index as exactly as possible. Any rebalancing of the Fund that does not achieve an exact match of the Index will only occur where it is not possible to obtain or sell the securities necessary to exactly replicate the Index. In any case the tracking deviation will not exceed 1% of the value of the Fund.

(h) In the event of any rights issue by an Index Company, the Manager will hold the entitlement if the entitlement is included in the Index. If the entitlement is not included in the Index, but the securities the subject of the entitlement will be immediately included in the Index, the Manager will retain the entitlement and take up the securities. If the Manager does not know whether the securities the subject of the entitlement will be included in the Index the Manager will sell the entitlement at the earliest possible time and reinvest the proceeds in the Index Companies to track the Index.

(i) With the exception of any situation where shares in an Index company are compulsorily acquired pursuant to any companies legislation, listing rules or takeover code requirements, in the event of a merger or takeover of an Index Company, the Manager will adjust the Fund portfolio at a time as close as practicably possible to the time the Index is adjusted (but in any event within 2 business days). The Fund will not accept an offer unless as a consequence of not accepting the offer the Fund would track the Index less accurately than if it had accepted the offer.

(j) The Fund Manager will not elect to participate in a share buy-back scheme of any Index Company.

(k) When the Fund is given the option of re-investing its dividends into any Index Company, the Fund invariably accepts the cash dividend.

(l) The Fund can only borrow in the following circumstances:

i. To temporarily fund the redemption of units when the cash pool has insufficient funds; this borrowing must be repaid as soon as possible, and in any event any such borrowing will be repaid within three business days;

ii. Where a security is sold and another purchased and a settlement mismatch occurs resulting in the Fund becoming inadvertently overdrawn, and in this event for no longer than strictly necessary;

iii. To temporarily fund the purchase of securities in order to rebalance following a merger, where pursuant to the merger payment due to the Fund for securities that have been disposed of has been delayed (such delay being beyond the control of the Fund), and in this event for no longer than strictly necessary; or

iv. For advances (not to exceed total borrowings of $5,000) by the Manager to the Fund to meet expenses of the Fund, where the Manager's expense account is insufficient to enable the Manager to meet such expenses.

(m) The Fund will not take any action to hedge or remove foreign currency risks or exposures that arise from the investments of the Fund in non-New Zealand currencies.

(n) The Fund will only sell or otherwise dispose of securities in the following circumstances:

i. If the Fund is voluntarily or involuntarily wound up;

ii. If there is a change in the Index composition due to either Structural Changes or Market Driven Changes so that the composition of the Fund no longer tracks the Index, or when the Fund is otherwise required to buy and sell securities to rebalance the Fund in order to maintain tracking;

iii. Funding redemptions to the extent that these cannot be met out of cash held by the Fund;

iv. Transferring securities to a unit holder if the unit holder redeems units for securities;

v. If there is a claim on the Trustee in respect of the Fund that cannot be met by the cash held by the Fund or cash held in the Manager's expense account.

(o) The Fund will not be wound up with a view to enhancing the performance of the Fund or to minimise losses of the Fund in any way. This condition will not be breached if:

i the Manager decides to wind up the Fund for reasons unrelated to the performance of the investments of the Fund; or

ii if the unit holders independently resolve to wind up the Fund.

(p) This Ruling shall cease to apply if at any time:

i. there is a unit holder, or two or more unit holders that are associated with each other, or are acting in concert in relation to their

investments in the Fund, who hold/s more than 75% of the issued units of the Fund; and

ii. if that unit holder, or one or more of such unit holders, ordinarily hold securities on revenue account or the disposal of securities by that unit holder, or one or more of such unit holders, would ordinarily give rise to gross income for income tax purposes.

For the purposes of this condition unit holders are associated with each other if they are "associated persons" within the meaning of section OD 7 or OD 8(3).

(q) This Ruling only applies while this Fund remains a widely-held trust (as that term is defined in section OB 1), and the Fund units are offered to the public.

(r) Apart from the Trust Deed and the Prospectus of the Fund that were supplied to Inland Revenue as part of the application for Ruling BR Prd 04/07, there is no agreement, arrangement or understanding between the Fund or the Trustee or the Manager (or any party acting on behalf of the Fund) and any unit holder (or any person associated with or acting on behalf of any unit holder) regarding the control of the Fund, the nature and timing of its investments, or the timing of the investing or withdrawal of funds.

This condition shall not be regarded as breached by virtue only of:

i. the fact that a unit holder has the ability to invest, or withdraw at any time; and/or

ii. the entry into of any agreement, arrangement or understanding contemplated by the Trust Deed for the purpose of enabling investment or withdrawal; and/or

iii. the appointment by the Trustee of the Manager; and/or

iv. any agreement, arrangement or understanding entered into by the Trustee in a capacity other than as trustee of the Fund, or the Manager in a capacity other than as manager of the Fund, in the ordinary course of the Trustee or the Manager conducting an independent investment advisory or investment portfolio management business.

(s) The Fund will not exercise any voting rights associated with the holding of Index Company securities.

(t) If the Fund is resettled this Ruling shall not apply from the date of resettlement.

The Fund will not be resettled in order to enhance the performance of the Fund or to minimise losses of the Fund in any way.

(u) The Fund will not be involved in any securities lending.

(v) The Fund will not utilise the power to suspend the issuing or redeeming of units (including any deferral notice with regard to Class B units) except in exceptional circumstances, being the following situations:

i. if the Fund is to be terminated and notice has been given to the Trustee pursuant to clause 198 of the Trust Deed;

ii. if extreme financial, political, or economic conditions occur and prevent the acquisition or redemption of Index Shares from the Stock Exchanges on which those Index Shares are listed;

iii. where the Fund has received redemption requests that exceed the available cash pool and the Fund is unable to borrow (on suitable commercial terms) sufficient funds to meet such redemption requests;

iv. where there is insufficient cash in the cash pool and a redemption request is made by a unit holder who holds 5% or more of the value of the Fund and to borrow rather than suspend the withdrawal of units in the Fund would prejudice other unit holders; or

v. in the case of any deferral notice in respect of class B units, the Trustee reasonably forms the opinion that to fund redemptions may prejudice the Fund's obligations to Class A unit holders.

Where suspension occurs because of termination of the Fund, the suspension will be for a maximum of 3 months from the giving of the notice to terminate by the Manager.

In other circumstances, if a suspension from issuing or redeeming units occurs, the period of suspension will not exceed 3 business days, except if the situation is beyond the control of the Manager of the Fund, in which case the suspension shall be only for such period as is strictly necessary for the Fund or the Manager to recover from that event. However in the case of a deferral notice, with regard to Class B units, the period of the deferral notice may be extended until the Trustee reasonably forms the opinion that to fund redemptions is no longer prejudicial to the Fund's obligations to Class A unit holders.

(w) The Manager will not redeem units as a means of correcting tracking errors.

(x) The Trustee will not exercise its power under clause 87.7 of the Trust Deed to promote or carry on any scheme or undertaking in any country upon such terms and conditions as the Trustee deems fit.

(y) The Fund will not invest in derivatives, with the exception of futures contracts entered into for the purposes of tracking the Index and spot foreign exchange contracts (which have a settlement period of no longer than two business days) to acquire or dispose of the necessary foreign currency so as to purchase or dispose of Index securities.

(z) The Manager has the power to purchase units from unit holders when unit holders wish to redeem their units. The Manager will always use this power when the unit holder specifically requests that the Manager purchase the units and in any instance where the unit holder does not specifically request that the Trustee redeem the units. The Manager will not purchase units from any unit holder, where to do so would be inconsistent with the unit holder's election to redeem their units with the Trustee. The Manager will not use this power to enhance the profit of the Fund.

(aa) The Global Index will only include countries that are listed in Schedule 3, Part A.

(bb) The foreign companies included in the Global Index are resident and liable for tax in a country listed in Schedule 3, Part A.

(cc) For the purposes of section EX 33, in the case of an interest, in relation to a foreign entity, of a kind specified in section EX 30(2), the foreign entity is not a foreign entity, or a member of a class of foreign entities, specified in Part B of Schedule 4.

(dd) The Fund will not acquire or hold any income interest or any control interest in any company that is a CFC under section EX 1.

(ee) There is no arrangement between the Trustee and any unit holders to effect the redemption of units in substitution for dividends.

(ff) Any cancellation of units will not be part of a pro-rata cancellation as that term is defined in section OB 1.

(gg) The Trust units will not be quoted on the official list of any recognised exchange as that term is defined in section OB 1.

(hh) The Trust units are issued on such terms that their redemption is subject to the ordering rule as stated in section CD 14(2).

(ii) All distributions received by the Fund will be paid out to investors net of any expenses incurred by the Fund.

(jj) In relation to amounts paid as consideration for a cancellation upon liquidation, the recipient will not be a person that is related to Tortis-INTL within the meaning of sections CD 33(15) to 33(17).

(kk) The Fund has deferred the application of the new Foreign Investment Fund rules until 1 October 2007 by giving the required notice to the Commissioner of Inland Revenue before 1 April 2007.

(ll) The Fund currently tracks the MSCI World Index. The Fund has not elected to track a new or provisional index ahead of the transition plan contained in the Methodology Book.

(mm) The Fund will continue to track the MSCI World Index as in their previous rulings until at least 30 September 2007.

How the Taxation Laws apply to the Arrangement

Subject in all respects to the assumption and any conditions stated above, the Taxation Laws apply to the Arrangement as follows:

- Income distributed by the Trustee will be treated as a dividend pursuant to section CD 3(1).
- Any amount received by unit holders on redemption of units in the Fund will be excluded from the definition of dividend in sections CD 2 to CD 13, by section CD 14, to the extent that that amount does not exceed the available subscribed capital per share cancelled. The Commissioner is satisfied that, in terms of section CD 14(2), the distribution is not in lieu of the payment of dividends. The procedure of publicising buy-back and redemption prices on the Internet does not constitute a "recognised exchange" in terms of the definition of that phrase in section OB 1.
- If the Fund is liquidated, sections CD 18(1) and 18(2) will apply.

The period or income year for which this Ruling applies

This Ruling will apply for the period from 1 July 2007 until 30 September 2007.

This Ruling is signed by me on the 18th day of October 2007.

John Trezise
Sector Manager

LEGISLATION AND DETERMINATIONS

This section of the TIB covers items such as recent tax legislation and depreciation determinations, livestock values and changes in FBT and GST interest rates.

DETERMINATION DEP64: TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 64

1. Application

This determination applies to taxpayers who own items of depreciable property of the kinds listed in the table below that have been acquired on or after 1 April 2005.

This determination applies for the 2007/2008 and subsequent income years.

2. Determination

Pursuant to section 91AAF of the Tax Administration Act 1994 I set in this determination the economic rates to apply to the kinds of items of depreciable property listed in the table below by:

- Adding into the "Leisure" industry asset category, the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates, listed in the table below.

General asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
LED Screens (fixed, in use 24 hours per day)	8 years	25%	17.5%
LED Screens (mobile and transportable)	10 years	20%	13.5%
LED Screens (fixed)	15.5 years	13%	8.5%

- Adding into the "Shop" industry category and "Building Fit-out" asset category, the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates, listed in the table below.

General asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
LED Screens (fixed, in use 24 hours per day)	8 years	25%	17.5%
LED Screens (fixed)	15.5 years	13%	8.5%

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 2004 and the Tax Administration Act 1994.

This determination is signed by me on the 6th day of December 2007

Susan Price
Senior Tax Counsel, Public Rulings

DETERMINATION DEP65: TAX DEPRECIATION RATES GENERAL DETERMINATION NUMBER 65

1. Application

This determination applies to taxpayers who own items of depreciable property of the kinds listed in the table below that have been acquired on or after 1 April 2005.

This determination applies for the 2007/2008 and subsequent income years.

2. Determination

Pursuant to section 91AAF of the Tax Administration Act 1994 I set in this determination the economic rates to apply to the kinds of items of depreciable property listed in the table below by:

- Adding into the "Building Fit-out" and "Transportation" asset categories the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed in the table below.

General asset class	Estimated useful life (years)	DV rate (%)	SL rate (%)
Speed humps (plastic)	5	40	30
Speed humps (rubber)	10	20	13.5

3. Consequential change

As a consequence of this determination, the existing asset class "metal speed humps" is renamed "speed humps (metal)" in the "Building Fit-out" and "Transportation" asset categories.

1	2	3	4	5	6
General asset class	**Estimated useful life (years)**	**DV rate before 1/4/05 (%)**	**SL rate before 1/4/05 (%)**	**DV rate from 1/4/05 (%)**	**SL rate from 1/4/05 (%)**
Speed humps (metal)	5	33	24	40	30

4. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 2004 and the Tax Administration Act 1994.

This determination is signed by me on the 5th day of December 2007.

Susan Price
Senior Tax Counsel, Public Rulings

DETERMINATION PROV18: TAX DEPRECIATION RATES PROVISIONAL DETERMINATION NUMBER 18

1. Application

This determination applies to taxpayers who own items of depreciable property of the kind listed in the table below that have been acquired on or after 1 April 2005.

This determination applies for the 2005/2006 and subsequent income years.

2. Determination

Pursuant to section 91AAG(1) of the Tax Administration Act 1994 I set in this determination the provisional rates to apply to the kinds of items of depreciable property listed in the table below by:

- Adding into the "Hotels, Motels, Restaurants, Cafés, Taverns and Takeaway Bars", "Residential Rental Property Chattels", and "Telecommunications" industry categories the provisional asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed in the table below.

Provisional asset class	**Estimated useful life (years)**	**DV rate (%)**	**SL rate (%)**
Set-top boxes with hard drive and personal video recorders (PVRs) with hard drive	4	50	40

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 2004 and the Tax Administration Act 1994.

This determination is signed by me on the 22nd day of January 2008.

Susan Price
Senior Tax Counsel, Public Rulings

NEW LEGISLATION

ORDERS IN COUNCIL

Student Loan Scheme – repayment threshold for the 2008–09 tax year

The student loan scheme repayment threshold, which sets the income level at which compulsory repayments begin for New Zealand-based borrowers, will increase from its current level of $17,784 to $18,148 for the 2008–09 tax year.

The threshold is reviewed annually in December. It has been inflation adjusted by the annual movement in the September 2007 CPI and rounded up so that it is divisible into whole dollars on a weekly basis.

Student Loan Scheme (Repayment Threshold) Regulations 2007

Family Tax Credit income amount increased

The Income Tax (Family Tax Credit) Order 2007, made on 12 November 2007, increases the net income level guaranteed by the family tax credit.[1] The net income level will rise from $18,044 to $18,460 a year from 1 April 2008.

The net income level is the amount that is used when calculating the amount that a person may be allowed as a credit of tax under sections KD 3(3) and (5) of the Income Tax Act 2004 (section ME 1(3)(a) of the Income Tax Act 2007). The increase applies for the 2008–09 and subsequent tax years.

The order also amends the Income Tax (Family Tax Credit) Order 2006 to limit its application to the 2007–08 tax year.

Income Tax (Family Tax Credit) Order 2007 (SR 2007/349)

[1] A change of name from "family tax credit" to "minimum family tax credit" was given effect by enactment of the Taxation (Business Taxation and Remedial Matters) Act 2007 and applies for the tax year beginning 1 April 2007.

STANDARD PRACTICE STATEMENTS

These statements describe how the Commissioner will, in practice, exercise a discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

ED0099 DRAFT STANDARD PRACTICE STATEMENT

DISPUTES RESOLUTION PROCESS COMMENCED BY COMMISSIONER OF INLAND REVENUE

Introduction

1. This Standard Practice Statement ("SPS") sets out the Commissioner's rights and responsibilities with a taxpayer in respect of an adjustment to a tax liability when the Commissioner commences the disputes resolution process.

2. Where a taxpayer commences the disputes resolution process, the Commissioner's practice is set out in SPS 08/XX – Disputes resolution process commenced by a taxpayer.

3. This SPS has been updated due to changes made to the law under:

   (a) the Taxation (Savings Investment and Miscellaneous Provisions) Act 2006, and

   (b) the Taxation (Depreciation, Payment Dates Alignment, FBT, and Miscellaneous Provisions) Act 2006, and

   (c) the Taxation (Business Taxation and Remedial Matters) Act 2007, and

   (d) the relevant case law decided since SPS 05/03 Disputes resolution process commenced by the Commissioner of Inland Revenue was published.

4. The Commissioner regards this SPS as a reference guide for taxpayers and Inland Revenue officers. Inland Revenue officers will follow the practices outlined in this SPS.

Application

5. This SPS applies from XX XXXX 2008. *SPS 05/03 Disputes resolution process commenced by the Commissioner of Inland Revenue* continues to apply from its commencement date up to XX XXXX 2008.

6. Unless specified otherwise, all legislative references in this SPS refer to the Tax Administration Act 1994 ("TAA").

Background

7. The aim of the disputes resolution process is to resolve disputes regarding tax liability in a fair, effective and timely manner. **This is achieved by ensuring that there is a full and frank communication between the parties in a structured way within strict time limits** for the legislated phases of the process. The disputes resolution process is designed to encourage an "all cards on the table" approach and the resolution of issues without the need for litigation. It ensures that all the relevant evidence, facts, and legal arguments are canvassed before a case proceeds to court.

8. **The disputes resolution process was introduced in 1996 and reviewed in July 2003. Recent legislative amendments and cases since 2005 have further improved and clarified the disputes resolution process.**

9. In accordance with the objectives of the disputes resolution process, the Commissioner (unless a legislated exception applies under section 89C or 89N(1)(c)) must go through the disputes resolution process before the Commissioner can issue an assessment.

10. The early resolution of a dispute is intended to be achieved through a series of steps specified in the TAA. The main elements of those steps are:

    (a) A notice of proposed adjustment ("NOPA"): this is a notice that either the Commissioner or taxpayer issues to the other advising that an adjustment is sought in relation to the taxpayer's assessment, the Commissioner's assessment or disputable decision.

    (b) A notice of response ("NOR"): this is issued by the recipient of a NOPA if they disagree with it.

    (c) A disclosure notice and statement of position ("SOP"): the issue of a disclosure notice by the Commissioner triggers the issue of a SOP. A SOP provides an outline of the facts and

propositions of law with sufficient details to support the position taken. Each party must issue a SOP. It is an important document because it limits the facts and propositions of law that either party can rely on if the case proceeds to court (unless a hearing authority makes an order that allows a party to raise new facts or evidence under section 138G(2)).

11. There are also two administrative phases in the process – the conference and adjudication phases. The conference can be a formal or an informal discussion between the parties to clarify and, if possible, resolve the issues. Adjudication involves an independent review of the dispute by Inland Revenue and is the final phase in the process before the taxpayer's assessment is amended (**if it is to be amended**) following the exchange of the SOPs.

12. If the dispute has not been already resolved **after the NOR phase, the Commissioner's practice will be to hold a conference, unless the parties agree to abridge the conference phase (please see paragraphs 205 to 208 of the SPS). If the dispute remains unresolved after the SOP phase, the Commissioner will refer the dispute to adjudication, except in rare circumstances.**

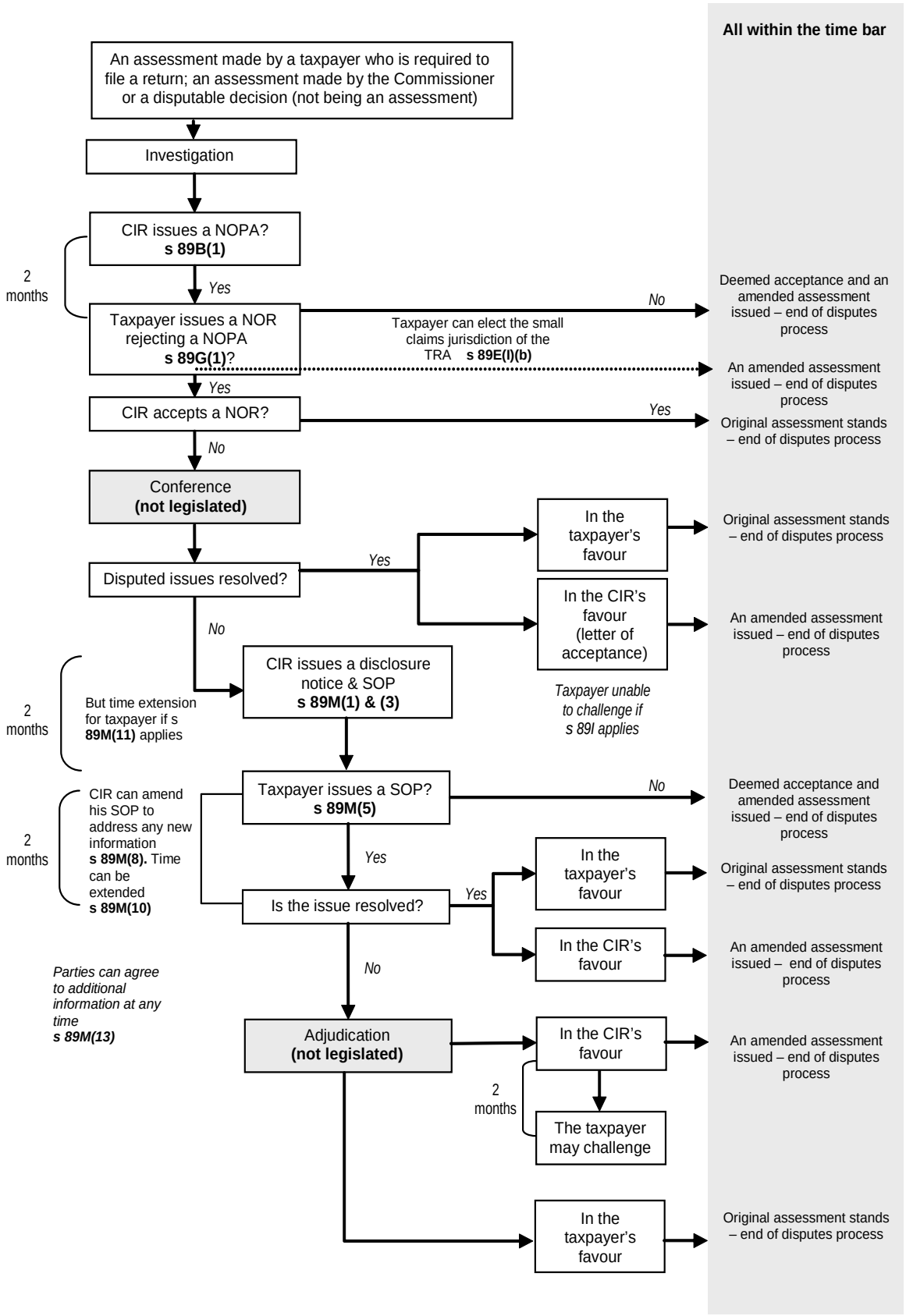
STANDARD PRACTICE AND ANALYSIS

Contents

Disputes resolution process commenced by the Commissioner of Inland Revenue

The disputes resolution process is set out in the following diagram.

Disputes resolution process commenced by the Commissioner of Inland Revenue



The Commissioner must issue a NOPA before making an assessment

13. The Commissioner must issue a NOPA before making an assessment (including an assessment of shortfall penalties but excluding other civil penalties and interest), unless an exception to the requirement that a NOPA be issued applies under section 89C.

14. Nevertheless, even if the Commissioner, in a very unlikely event, made an assessment in breach of section 89C, the assessment would be regarded as being correct under section 109(b) (except in objection or challenge proceedings) and valid under section 114(a).

15. Each exception can apply independently or together depending on the circumstances. The Commissioner can choose to issue a NOPA irrespective of whether an exception applies.

A disputable decision

16. The Commissioner will generally issue a NOPA before issuing an assessment that takes into account a disputable decision.

17. **For example, the Commissioner issues a notice of disputable decision to a taxpayer who is a director and shareholder of a company advising that the company's loss attributing qualifying company election for the 2007 tax year is invalid because it is received late. However, the company's loss calculation and assessment for the 2007 tax year are not affected. The Commissioner intends to issue an assessment to the taxpayer that takes into account the notice of disputable decision by disallowing the company's losses that the taxpayer has claimed. The Commissioner will issue a NOPA to the taxpayer before making the assessment.**

Exceptions

Exception 1: The assessment corresponds with a tax return

18. Section 89C(a) reads:

> The assessment corresponds with a tax return that has been provided by the taxpayer.

19. **The application of section 89C(a) is limited under the self-assessment rules. Generally, a taxpayer files a tax return and makes their assessment. If the assessment matches the tax return, there is no dispute or need for the disputes resolution process. Then, the Commissioner will issue a notice of account to the taxpayer to confirm those assessments. The Commissioner will not issue an assessment in this case.**

20. Sometimes, if there is a deficiency in the taxpayer's tax return, the Commissioner will issue an assessment **without first issuing a NOPA to the taxpayer because section 89C(a) applies**. For example, the Commissioner can issue an assessment, where the taxpayer has provided all their income details but omitted to calculate the income tax liability in the tax return.

Exception 2: Simple or obvious mistake or oversight

21. Section 89C(b) reads:

> The taxpayer has provided a tax return which, in the Commissioner's opinion, appears to contain a simple or obvious mistake or oversight, and the assessment merely corrects the mistake or oversight.

22. This exception is intended to apply to a simple calculation error or oversight that Inland Revenue's Processing Centres generally discover with computer edits and simple return checks. This maintains the status quo for the many assessments arising in this situation.

23. The Commissioner will generally treat the following as a simple mistake or oversight:

    (a) an arithmetical error, and

    (b) an error in transposing numbers from one box to another in a tax return, and

    (c) double counting, such as inadvertently including in the taxpayer's income the same item twice, and

    (d) not claiming a rebate to which the taxpayer is entitled or that was incorrectly calculated, for example, the low income rebate for a taxpayer.

24. A "simple or obvious mistake or oversight" can be determined on a case-by-case basis with no dollar limit. Where the Commissioner issues an assessment to correct a taxpayer's simple or obvious mistake or oversight, the Commissioner can consider imposing shortfall penalties on the taxpayer, if there is a tax shortfall and the taxpayer has committed one of the culpable acts, for example, lack of reasonable care.

25. However, a "simple or obvious mistake or oversight" cannot include the situation where a taxpayer takes a tax position because of:

    (a) a new, beneficial interpretation of, or favourable new case law, or

    (b) a regretted choice (for example, a taxpayer decides to claim tax depreciation on an asset, when their previous tax position was to elect that the asset is not depreciable property.)

Exception 3: Agreement to amend previous tax position

26. Section 89C(c) reads:

> The assessment corrects a tax position previously taken by the taxpayer in a way or manner agreed by the Commissioner and the taxpayer.

27. This situation can occur if the issue is raised by either the Commissioner or the taxpayer. There is no need to issue a NOPA because no dispute arises.

28. If the Commissioner proposes the adjustment, this exception cannot apply unless the taxpayer accepts the adjustment. For the purpose of section 89C(c), the agreement between the parties can be oral, although, generally, the Commissioner's practice will be to seek written agreement. Section 89C(c) applies if Inland Revenue officers can demonstrate that the Commissioner and taxpayer have agreed on the proposed adjustments.

29. However, if the parties agree on only one adjustment and dispute others, the Commissioner cannot issue an assessment on the basis of the agreed adjustment.

30. Where a taxpayer proposes an adjustment outside the disputes resolution process and the Commissioner agrees, for example a taxpayer makes a request to amend an assessment, the particulars must be recorded in writing and state that the assessment is made in accordance with the Commissioner's practice on exercising the discretion under section 113. (Please see *SPS 07/03 Requests to amend assessments.*) The Commissioner must also consider if shortfall penalties are applicable.

Exception 4: The assessment otherwise reflects an agreement

31. Section 89C(d) reads:

> The assessment reflects an agreement reached between the Commissioner and the taxpayer.

32. The same procedures apply for sections 89C(c) and (d). However, the agreement that the parties reach does not have to relate to a tax position that the taxpayer has previously taken. For example, the taxpayer has disputed but now agrees that they are a "taxpayer" for the purpose of the definition in section OB 1 of the Income Tax Act 2004 ("ITA 2004") and has not taken a tax position. The Commissioner will issue an assessment to the taxpayer under section 89C(d) to reflect this agreement. The Commissioner must also consider whether shortfall penalties are applicable.

33. **An example is where, pursuant to section 6A, the Commissioner settles a tax case that has not been through the disputes resolution process. In such cases, the Commissioner will usually enter into an agreed adjustment in writing or an individual settlement deed with the taxpayer to confirm the settlement. The Commissioner will then give effect to that agreed adjustment or settlement deed by issuing an assessment to the taxpayer under section 89C(d) without first issuing a NOPA. This is notwithstanding that the assessment does not necessarily reflect the Commissioner's own view of the correct tax position. (The Commissioner can also issue an assessment under section 89C(c).) The taxpayer is not precluded from later issuing a NOPA on an issue that was agreed to in writing by the Commissioner outside the disputes resolution process.**

Exception 5: Material facts and law identical to court proceeding

34. Section 89C(db) reads:

> The assessment is made in relation to a matter for which the material facts and relevant law are identical to those for an assessment of the taxpayer for another period that is at the time the subject of court proceedings.

35. This exception applies where the assessment relates to a dispute in which the material facts and issues are the same as those for another period where the assessment has gone through the disputes resolution process and is now the subject of court proceedings.

36. Pursuant to section 89C(db), the Commissioner can issue an assessment to the taxpayer in relation to the other period, without first issuing a NOPA. The Commissioner does not have to follow the disputes resolution process for the same issue in the other period because the matter is before the court to resolve. A dual process towards resolution does not need to be adopted. The Commissioner will also consider whether shortfall penalties are applicable.

37. However, a taxpayer who has been issued with an assessment in relation to another period under section 89C(db), can also dispute that assessment by issuing a NOPA to the Commissioner under section 89D within the applicable response period.

38. Section 89C(db) is intended to reduce compliance costs. Notwithstanding this provision, the Commissioner can elect to issue a NOPA in respect of the other period in order to resolve the dispute through the disputes resolution process.

Exception 6: Revenue protection

39. Section 89C(e) reads:

> The Commissioner has reasonable grounds to believe a notice may cause the taxpayer or an associated person –

(i) To leave New Zealand; or

(ii) To take steps, in relation to the existence or location of the taxpayer's assets, making it harder for the Commissioner to collect the tax from the taxpayer.

40. This exception is intended to ensure that the revenue is protected in the relevant circumstances. Section 89C(e) does not require that the taxpayer has physical possession of their assets.

41. If Inland Revenue officers apply the exception under section 89C(e), this should be supported by evidence of the "reasonable grounds" relied on (for example, the taxpayer's correspondence with third parties, application to emigrate overseas and any transcripts of interviews with the taxpayer, etc.)

Exception 7: Fraudulent activity

42. Section 89C(eb) reads:

> The Commissioner has reasonable grounds to believe that the taxpayer has been involved in fraudulent activity.

43. **This exception is intended to ensure that the revenue is protected where there are reasonable grounds for believing that a taxpayer has been involved in fraudulent activity.**

44. Pursuant to section 89C(eb), a taxpayer has been involved in fraudulent activity if they have:

(a) **engaged or participated in, or has been connected with, any fraudulent activity that would have tax consequences for them, and**

(b) **acted deliberately with the knowledge that they were acting in breach of their legal obligations and did so without an honest belief that they were so entitled to act.**

45. For example, t**he Commissioner receives a referral from the New Zealand Police advising that a taxpayer is suspected of committing money laundering offences under section 243(2) of the Crimes Act 1961. The Commissioner discovers that the taxpayer has not returned all their assessable income in their recently filed 2007 income tax return. The Commissioner also knows that the New Zealand Police has commenced prosecution proceedings against the taxpayer in respect of the money laundering offences.**

46. **In this circumstance, the Commissioner can issue to the taxpayer an assessment of income tax for the 2007 year that includes all the taxpayer's assessable income without first issuing a NOPA pursuant to section 89C(eb). This is because the Commissioner has reasonable grounds to believe that the taxpayer has been involved in fraudulent activity based on the police's referral and confirmation that they have commenced prosecution proceedings against the taxpayer in respect of the money laundering offences under section 243(2) of the Crimes Act 1961.**

47. If Inland Revenue officers apply the exception under section 89C(eb), this should be supported by sufficient evidence of the "reasonable grounds" relied on. For example, **evidence that verifies that the taxpayer may have or has committed an offence and, therefore, has been involved in fraudulent activity. The evidence does not have to be absolute proof but, merely sufficient to verify the "reasonable grounds".**

Exception 8: Vexatious or frivolous

48. Section 89C(f) reads:

> The assessment corrects a tax position previously taken by a taxpayer that, in the opinion of the Commissioner is, or is the result of, a vexatious or frivolous act of, or vexatious or frivolous failure to act by, the taxpayer.

49. If Inland Revenue officers apply this exception, this should be supported by documentation that evidences:

(a) the action or inaction giving rise to the tax positions previously taken, and

(b) why that action is considered to be vexatious or frivolous and any shortfall penalties/ prosecution consideration. Examples of a tax position taken as result of a vexatious or frivolous act are a tax position that is:

(i) clearly lacking in substance, for example, where the taxpayer continues to take the same position that has previously been finalised, or

(ii) motivated by the sole purpose of delay.

50. Where this exception applies, the Commissioner must also consider the imposition of shortfall penalties in respect of the taxpayer's tax position resulting from a vexatious or frivolous act.

Exception 9: Taxation Review Authority or court determination

51. Section 89C(g) reads:

> The assessment is made as a result of a direction or determination of a court or the Taxation Review Authority.

52. For the purpose of section 89C(g), a direction or determination includes a court or Taxation Review Authority ("TRA") decision that affects

the particular taxpayer in relation to a specific tax period and a court decision on a "test case" that applies to the taxpayer. This exception may not apply where the taxpayer has taken a similar tax position to that taken by another taxpayer in respect of whom a judgment has been issued and the case involved is not a "test case" that applies to the first-mentioned taxpayer.

53. The Commissioner must retain a copy of the direction or determination to support the application of this exception. In these circumstances, the Commissioner will generally make an assessment including imposing shortfall penalties, within two weeks after receiving the written direction or determination.

Exception 10: "Default assessments"

54. Section 89C(h) reads:

> The taxpayer has not provided a tax return when and as required by a tax law.

55. The Commissioner can make an assessment or amended assessment without first issuing a NOPA where a taxpayer fails to provide a tax return (commonly known as a "default assessment").

56. Where a taxpayer seeks to dispute a default assessment through the disputes resolution process, the taxpayer must, within the applicable response period (that is, four months from the date that the default assessment is issued):

    (a) provide a tax return in the prescribed form for the period to which the default assessment relates (pursuant to section 89D(2C) for GST and section 89D(2) for all other tax types) notwithstanding that the tax return will not include the taxpayer's assessment, and

    (b) issue a NOPA to the Commissioner in respect of the default assessment.

57. The requirement to provide a tax return in respect of a default assessment made under section 106(1) before issuing a NOPA is an additional requirement of the disputes resolution process. This ensures that the taxpayer has provided the information that is required by the tax law before they are entitled to dispute the assessment.

58. If the Commissioner agrees with the taxpayer's NOPA and tax return, the Commissioner will generally amend the default assessment by exercising the discretion under section 113 subject to the statutory time bar in section 108 and any other relevant limitations. However, if the Commissioner does not agree with the taxpayer's tax return and NOPA the Commissioner can decide to not amend the default assessment and issue a NOR instead.

59. **If a taxpayer cannot provide a NOPA because they are outside the applicable response period to dispute a default assessment or do not want to enter into the disputes resolution process they must still provide a tax return. Although the Commissioner does not have to amend the initial assessment on receipt of the tax return from a defaulting taxpayer, the Commissioner can exercise the discretion to amend under section 113 subject to the time bar in section 108 or 108A and any other relevant limitations on the exercise of that discretion.**

60. If the Commissioner decides not to amend the default assessment by exercising the discretion under section 113 on the basis of the tax return provided the Commissioner can issue a NOPA in respect of the default assessment under section 89B(1) where, for example, new information received from the taxpayer suggests that the default assessment is not correct.

61. The Commissioner is not precluded from further investigating an amended assessment issued on the basis of the taxpayer's tax return and, if necessary, issuing a NOPA to the taxpayer.

Exception 11: Failure to make or account for tax deductions

62. Section 89C(i) reads:

> The assessment is made following the failure by a taxpayer to make a deduction required to be made by a tax law or to account for a deduction in the manner required by a tax law.

63. This exception is intended to address a taxpayer's failure to deduct or account to the Commissioner for PAYE, non-resident contractor's withholding tax, resident withholding tax ("RWT") and other tax deductions. The Commissioner must also consider whether shortfall penalties are applicable.

64. The Commissioner may not apply this exception if there is a dispute regarding statutory interpretation (for example, whether a particular item attracts liability for RWT) and/or shortfall penalties.

Exception 12: Non-assessed tax return

65. Section 89C(j) reads:

> The taxpayer is entitled to issue a notice of proposed adjustment in respect of a tax return provided by the taxpayer, and has done so.

66. If a taxpayer proposes an adjustment in a NOPA with which the Commissioner agrees, the Commissioner can issue an assessment without first issuing a NOPA. This exception only applies to an adjustment that the taxpayer has proposed in their NOPA under section 89DA(1).

Exception 13: Consequential adjustment

67. Section 89C(k) reads:

> The assessment corrects a tax position taken by the taxpayer or an associated person as a consequence or result of an incorrect tax position taken by another taxpayer, and, at the time the Commissioner makes the assessment, the Commissioner has made, or is able to make, an assessment for that other taxpayer for the correct amount of tax payable by that other taxpayer

68. Where transactions affect multiple taxpayers, whether in the same way or in related but opposite ways, the Commissioner can reassess all consequentially affected taxpayers under section 89C(k), if an assessment is, or could be issued to some of the taxpayers for the correct amount of tax payable. This is notwithstanding that the amended assessments have not been agreed to by those taxpayers. **However, those taxpayers subject to the amended assessments can still issue a NOPA to dispute the consequential adjustment if they are within the applicable response period.** The Commissioner must also consider whether shortfall penalties are applicable.

69. Section 109(b) deems any assessment that the Commissioner makes to be correct and, therefore, the Commissioner can make any consequential amendment under section 89C(k) accordingly. However, the Commissioner must be satisfied that there is a direct consequential link between the taxpayers before making any consequential adjustment. For example:

    (a) Group loss offsets: if a loss company has claimed losses to which it is not entitled and the Commissioner has amended the loss company's loss assessment to disallow those losses, pursuant to section 89C(k), the Commissioner can also make a separate assessment for the profit company that has incorrectly offset the loss company's losses against its profits.

    (b) GST: the supplier and recipient of a supply have incorrectly assumed that a transaction was GST-exempt. The Commissioner later agrees that the recipient was entitled to a GST input tax credit and issues an assessment to them allowing the credit. The Commissioner can also issue an assessment to the supplier under section 89C(k) in respect of the output tax on the value of the supply.

70. However, in practice, the Commissioner can also issue a NOPA to all the taxpayers affected in such cases.

A taxpayer can dispute an assessment that is issued without a NOPA

71. The Commissioner can issue an assessment without first issuing a NOPA under section 89C **in the circumstances outlined above. (Furthermore, any assessment made in breach of section 89C is still treated as correct under section 109(b) (except in objection or challenge proceedings) and valid under section 114(a).)**

72. Where the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can dispute the assessment through the disputes resolution process under section 89D(1). (Please see *SPS 08/XX – Disputes resolution process commenced by a taxpayer*.)

73. However, where the Commissioner issues a NOPA to a taxpayer and they accept the proposed adjustment by written agreement or are deemed to accept the proposed adjustment, then section 89I(1) precludes the taxpayer from challenging the assessment.

74. However, section 89I does not apply when the Commissioner and taxpayer have agreed on an adjustment before entering into the disputes resolution process. The parties can dispute the amended assessment, notwithstanding the previous agreement.

When the Commissioner can issue a NOPA

75. Section 89B specifies when the Commissioner can issue a NOPA. Section 89B reads:

    (1) The Commissioner may issue one or more notices of proposed adjustment in respect of a tax return or an assessment.

    (2) The Commissioner may issue one notice of proposed adjustment in relation to more than one return period, if, in the Commissioner's opinion, -

        (a) The adjustments proposed to each tax return or assessment for the return periods relate exclusively to the same issues or arrangements; or

        (b) The adjustments proposed to each tax return or assessment for the return periods relate substantially to the same issues, and the issue of one notice is likely to expedite the issue of the assessments for all of the returns.

    (3) The Commissioner may issue a notice of proposed adjustment in relation to more than one return period, more than one issue, and more than one tax type.

76. The Commissioner can issue one NOPA for multiple issues, tax types and periods. Alternatively, the Commissioner can issue multiple NOPAs for the same issue and period, consistent with the obligation to correctly make an assessment within the four-year statutory time period.

77. A NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties. If possible, the taxpayer will be given the opportunity to settle a dispute by entering into an agreed adjustment with Inland Revenue before the Commissioner issues a NOPA. However, the Commissioner or taxpayer is not precluded from issuing a NOPA in respect of any amended assessment that the Commissioner issues to reflect the agreed adjustment within the applicable response period.

78. A NOPA forms a basis for ensuring that the Commissioner does not issue an assessment without some formal and structured dialogue with the taxpayer in respect of the grounds upon which the Commissioner will issue any assessment or amended assessment (*McIlraith v CIR* (2007) 23 NZTC 21,456).

79. Once an investigation has commenced, the intended approach will be discussed with the taxpayer. If the Commissioner decides to issue a NOPA to a taxpayer, the responsible officer will usually advise the taxpayer of this proposed approach within five working days before the date that the NOPA is issued. However, this advice can be given earlier.

80. The Commissioner should ensure that any issues relating to the same period and tax type are kept together in the dispute.

81. The Commissioner can also exercise certain statutory powers (for example, issuing a section 17 notice) after a dispute has commenced and will continue to investigate the facts that relate to the dispute.

82. Where the parties agree upon some and dispute other proposed adjustments for the same tax period and type, the Commissioner's practice is not to issue an assessment that reflects the agreed adjustment under section 89J(1) until all the remaining disputed issues are resolved (even if the Commissioner does not pursue the disputed issue further) or determined by the Adjudication Unit. That is, the Commissioner will not issue a "partial" or "interim" assessment under section 89J(1).

83. However, where the statutory time bar is about to fall due, the Commissioner can issue an assessment to reflect both the agreed and disputed adjustment, provided that the requirements in section 89N are met.

84. Where it is practicable, Inland Revenue officers will contact the taxpayer or their tax agent within 10 working days after the NOPA is issued to ensure that it has been received. Inland Revenue officers making written contact should comply with section 14.

Exceptions to the statutory time bar

(a) *Time bar waivers*

85. If it is contemplated that the disputes resolution process cannot be completed before the statutory time bar period for amending an assessment expires, the parties can agree in writing pursuant to section 108B(1)(a) to waive the time bar by up to 12 months to enable the full disputes resolution process to be applied.

86. The taxpayer can also give written notice to the Commissioner and waive the time bar for a further 6 months after the end of the 12-month period under section 108B(1)(b) to allow sufficient time for the dispute to progress through the adjudication process. This notice must be given to the Commissioner within the initial 12-month period.

87. The taxpayer must be advised in writing that:

    (a) a NOPA will be issued, and

    (b) the disputes resolution process will be followed.

88. To be effective, a statutory time bar waiver must be agreed in writing on the prescribed form (*IR775 – Notice of waiver of time bar*) and delivered to the Commissioner before the relevant four-year period epires.

89. The statutory time bar waiver only applies to those issues that the parties have identified and understood before the initial statutory time bar. Other issues not so identified will still be subject to the original statutory time bar, unless section 108(2) or 108A(3) applies. (Please see paragraph 95 in this SPS.)

(b) *The Commissioner's application to the High Court under section 89N(3)*

90. If a NOPA has been issued and the disputes resolution process cannot be completed before the statutory time bar period expires, the Commissioner can apply to the High Court for more time to complete the process (please see the discussion regarding section 89N(3) in paragraphs 158 to 160 of this SPS.)

91. However, where the Adjudication Unit has insufficient time (that is, before the statutory time bar arises or further time allowed under section 108B(1) to fully consider a matter submitted to it expires) the Adjudication Unit will return the matter to the responsible officer to decide whether to issue

an assessment or amended assessment or accept the taxpayer's position. (The Commissioner can amend an assessment at any time after the Commissioner has considered the taxpayer's SOP in relation to the particular period.)

(c) Exceptions under section 89N(1)

92. When a NOPA has been issued, the Commissioner will follow the disputes resolution process unless an exception under section 89N applies (the application of section 89N is discussed in detail later in paragraphs 125 to 166 of the SPS.) The Commissioner must obtain and document administrative approval for any departure from the full disputes resolution process.

Limitations on the Commissioner issuing a NOPA

93. The Commissioner cannot issue a NOPA where the proposed adjustment is the subject of a challenge or after the statutory time bar expires. Section 89B(4) reads:

> The Commissioner may not issue a notice of proposed adjustment-
>
> (a) If the proposed adjustment is already the subject of a challenge; or
>
> (b) After the expiry of the time bar that, under-
>
> (i) Sections 108 and 108B; or
>
> (ii) Sections 108A and 108B,-
>
> applies to the assessment.

94. **The time bar that arises under sections 108 and 108A prevents the Commissioner from issuing an assessment that increases the amount assessed. The Commissioner can still issue an assessment that decreases the amount of the initial assessment subject to the limitation on refunding overpaid tax under sections MD 1(1) of the ITA 2004 and 45(1) of the Goods and Services Tax Act 1985.**

95. However, the Commissioner is not subject to the statutory time bar that arises under sections 108 and 108A, if the Commissioner considers that the taxpayer has:

(a) provided a fraudulent or wilfully misleading tax return (section 108(2)(a)), or

(b) omitted income for which a tax return must be provided that is of a particular nature or source (section 108(2)(b)), or

(c) knowingly or fraudulently failed to make a full and true disclosure of the material facts necessary to determine their GST payable (section 108A(3)).

96. **The Commissioner accepts that the time bar is a key protection for most taxpayers and that these exclusions from its protection must be only invoked if there is an adequate basis in fact and law to support their operation. Section 89B(4)(b) requires that the Commissioner initially decides whether an exception to the time bar applies, for example, whether a tax return is fraudulent or wilfully misleading, before determining whether a NOPA can be issued under section 89B(1).**

97. **Any opinion that the Commissioner forms regarding the application of the exceptions to the time bar must be honestly held and reasonably justifiable on the basis of the evidence available and the relevant law. The decision must be clearly documented and include reference to the grounds and reasoning on which it is based. Any decision made under section 108A is not, in itself, a disputable decision.**

98. The Commissioner is generally limited to a four-year period within which a taxpayer's assessment can be increased following an investigation or in certain other circumstances. In respect of a dispute, the assessment is amended (if necessary) after the disputes resolution process is completed. The Commissioner will endeavour to undertake the various steps involved in the process within the four-year period.

99. Section 89B(4)(a) applies to individual proposed adjustments. Where the proposed adjustment is the subject of court proceedings, the Commissioner cannot issue a NOPA in respect of those proposed adjustments. However, the Commissioner can issue a separate NOPA to the taxpayer in relation to the same tax period provided it relates to a different adjustment.

100. For example, a taxpayer challenges the deductibility of feasibility expenditure in the 2006 tax year pursuant to section 138B. The Commissioner can also issue a NOPA to the same taxpayer in relation to the tax treatment of a bad debt in the same tax year.

Contents of the Commissioner's NOPA

101. A NOPA is the document that commences the disputes resolution process. It is intended to explain in legal or technical way the issuer's position in relation to the proposed adjustment. Section 89F(1) and (2) specifies the content requirements for any NOPA that the Commissioner may issue.

102. Section 89F reads:

> (1) A notice of proposed adjustment must—
>
> (a) contain sufficient detail of the matters described in subsections (2) and (3) to identify the issues arising between the Commissioner and the disputant, and

(b) be in the prescribed form.

(2) A notice of proposed adjustment issued by the Commissioner must—

(a) identify the adjustment or adjustments proposed to be made to the assessment; and

(b) provide a concise statement of the key facts and the law in sufficient detail to inform the disputant of the grounds for the Commissioner's proposed adjustment or adjustments; and

(c) state how the law applies to the facts.

103. A NOPA must be in the prescribed form as required under section 89F(1)(b). Any NOPA that the Commissioner issues must identify, in sufficient detail the adjustment proposed and explain concisely the facts and law that relate to the adjustment and how the law applies to the facts.

104. The law requires that the NOPA states the key facts and law concisely and in sufficient detail. This means that the document must be relatively brief and simple to enable the parties to quickly progress the dispute without incurring substantial expenses or excessive preparation time but also detailed enough to explain all the issues relevant to the dispute.

105. The Commissioner should identify (but not reproduce in full) the relevant legislation and legal principles derived from leading cases. These references should be in sufficient detail to clarify the grounds for the proposed adjustment. However, lengthy quotations from cases should be avoided.

106. The Commissioner considers that Inland Revenue has a statutory obligation to inform a taxpayer adequately, but recognises that the matters relevant to the dispute will be set out in greater detail at the SOP phase if the dispute is not resolved. Therefore, what is included in a NOPA or NOR is not conclusive as between the parties because they can introduce further grounds or information or adjust the quantum of the proposed adjustments later in the disputes resolution process (*CIR v Zentrum Holdings Limited* (2007) 1 NZLR 145). However, the parties cannot propose another adjustment involving new grounds and a fresh liability at the SOP phase.

107. The Commissioner will always seek to issue a NOPA that has sufficient details, is of a high standard and has been considered by a legal adviser. The Commissioner will endeavour to advise the taxpayer during the conference phase of any new grounds, information or change in quantum to be introduced in the SOP.

108. Although candid and complete exchanges of information are implicit in the spirit and intent of the disputes resolution process, the Commissioner's practice will be to ensure that the NOPA is, within those limits, as brief as practicable.

109. The content of any NOPA that the Commissioner issues must satisfy all the requirements specified in section 89F(2)(a) to (c).

Identify adjustments or proposed adjustments – section 89F(2)(a)

110. The Commissioner must identify in respect of each proposed adjustment:

(a) the income amount or impact of the adjustment, and

(b) the tax year or period to which the proposed adjustment relates, and

(c) whether use-of-money interest will apply, and

(d) whether shortfall penalties and/or other appropriate penalties of lesser percentages will apply. That is, where sufficient evidence is held to support the imposition of the penalties and this can be justified (by reference to any relevant guidelines.)

Shortfall penalties

111. Shortfall penalties are separate items of adjustment that must be explained and supported in the same manner as the underlying tax shortfall. Section 94A(2) also requires that shortfall penalties must be assessed the same way as the underlying tax. However, although assessments of shortfall penalties relate to the underlying tax they are not subject to the time bars arising under section 108 or 108A.

112. Where there is sufficient evidence to suggest that shortfall penalties should be imposed, then the shortfall penalties would usually be included in the same NOPA as the substantive issues. This practice is generally adopted, unless one of the following exceptions applies:

(a) if the evidence supporting the imposition of shortfall penalties does not become available until after the Commissioner has issued the NOPA on the substantive issues. In such circumstances, a separate NOPA may be issued in respect of the shortfall penalties at a later stage.

(b) if, before entering into the disputes resolution process, a taxpayer has accepted the proposed adjustment in relation to the substantive issues, but not accepted the imposition of the shortfall penalties, then the Commissioner may still issue a NOPA to the taxpayer for the proposed penalties.

(c) if the taxpayer makes a voluntary disclosure of the substantive issues to the Commissioner

and the only disputed issue relates to the imposition of the shortfall penalties.

(d) if prosecution action is being considered and shortfall penalties apply because the taxpayers have committed one of the culpable acts (for example, evasion) the Commissioner must impose shortfall penalties.

Pursuant to section 149(5), if shortfall penalties have been imposed the Commissioner cannot subsequently prosecute the taxpayer for taking the incorrect tax position **unless the shortfall penalties are imposed under section 141ED**. Therefore, the Commissioner may omit proposing shortfall penalties in a NOPA if prosecution is being considered as an option. However, shortfall penalties can be imposed after the prosecution.

113. Furthermore, the Commissioner cannot propose shortfall penalties at the SOP phase that were not previously proposed in the Commissioner's NOPA.

State the facts and law - section 89F(2)(b)

Facts

114. To provide a concise statement of facts, the Commissioner must focus on the material factual matters relevant to the legal issues. This includes, for each proposed adjustment, the facts relevant to proving all arguments made in support of the adjustment including any facts that are inconsistent with any arguments that the taxpayer has previously raised.

115. The Commissioner should endeavour to state all the material facts in brief, so as to avoid irrelevant detail or repetition. For example, where the parties both know the background to the disputed issues, a summary of the facts in the NOPA will suffice. Where possible, the Commissioner will refer to and/or append any documents that have previously set out the facts on which the Commissioner relies.

116. Although the Commissioner will make every attempt to be concise in the NOPA, it will sometimes be necessary to include a more detailed explanation of the material facts, depending on the complexity of the issues.

Law

117. The Commissioner must state the law concisely by including an outline of the relevant legislative provisions and principles derived from leading cases that affect the proposed adjustment.

118. It is sufficient that the Commissioner explains the nature of the legal arguments without providing lengthy quotations from the relevant case law.

How the law applies to the facts - section 89F(2)(c)

119. The Commissioner must apply the legal arguments to the facts to ensure that the proposed adjustment is not a statement that appears out of context. The application of the law to the facts must be stated concisely and logically support the proposed adjustment.

120. The Commissioner will outline all relevant materials and arguments (including alternative arguments) on which the Commissioner intends to rely. If more than one argument supports the same or similar outcome, the NOPA will include all the arguments.

121. The evidence exclusion rule under section 138G(1) **does not apply to the issues, facts, evidence and propositions of law that are raised in the Commissioner's NOPA. That is, the Commissioner is not restricted to raising the same issues, facts, evidence and propositions of law that are specified in the NOPA at the SOP phase or in challenge proceedings that the taxpayer has commenced where a disclosure notice has not been issued.**

Time frames to complete the disputes resolution process

122. If the Commissioner has commenced the disputes resolution process by issuing a NOPA to a taxpayer and not agreed with them to resolve the dispute, where practicable, the parties should negotiate a time line to ensure that the dispute is progressed in a timely and efficient way.

123. **Agreeing to a time line is not statutorily required but, rather, is a critical administrative requirement that requires both parties to be ready to progress the matter. The parties should endeavour to meet the agreed time line. Where there are delays in the progress of the dispute the responsible officer will manage the delay including any relationship with internal advisers and liaise with the taxpayer.**

124. **If the negotiated time line cannot be achieved, the Commissioner's practice will be to enter into a continuing discussion with the taxpayer to, either arrange a new time line, or otherwise keep them advised of when the disclosure notice will be issued. Therefore, the failure to negotiate or adhere to an agreed time line will not prevent a case from progressing through the disputes resolution process.**

125. In addition to the above administrative practice, the Commissioner is bound by section 89N(2). Under that provision, where the parties cannot agree on the proposed adjustment, the Commissioner

cannot amend an assessment without completing the disputes resolution process unless one of the exceptions in section 89N(1)(c) applies. These exceptions are explained in paragraphs 127 to 167 of this SPS. If one of these exceptions applies the disputes resolution process will end and the dispute will not go through the Adjudication phase.

126. Although not a statutory requirement, where practicable, it is the Commissioner's administrative practice to complete the adjudication phase for the purpose of resolving a dispute after the SOP phase. However, if the adjudication phase cannot be completed (for example, because the statutory time bar is imminent), the Commissioner can amend an assessment after considering the taxpayer's SOP. Inland Revenue officers will adequately consider the facts and legal arguments in the taxpayer's SOP before deciding whether to amend an assessment.

Section 89N - exceptions - when an assessment can be issued without completing the disputes resolution process

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

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

128. Section 89N(1)(c)(i) reads:

> (i) the Commissioner notifies the disputant that, in the Commissioner's opinion, the disputant in the course of the dispute has committed an offence under an Inland Revenue Act that has had an effect of delaying the completion of the disputes process:

129. The exception applies where the Commissioner may need to act quickly to issue an assessment because the taxpayer has committed an offence under an Inland Revenue Act that has caused undue delay to the progress of the dispute.

130. For example, in the course of a dispute a taxpayer obstructed Inland Revenue officers in obtaining information from the taxpayer's business premise under section 16. The Commissioner will advise the taxpayer in writing that the Commissioner considers that they have committed an offence under section 143H. The offence has the effect of delaying the completion of the disputes resolution process meaning that the Commissioner does not have to complete that process and can amend the taxpayer's assessment under section 113.

131. Another example of when the exception may apply is where in the course of a dispute a taxpayer wilfully refuses to attend an enquiry made under section 19 on the date specified in the Commissioner's notice. In these circumstances, the Commissioner will advise the taxpayer in writing that the Commissioner considers that they have committed an offence under section 143F that has had the effect of delaying the completion of the disputes resolution process. The Commissioner can then exercise the discretion to amend the taxpayer's assessment under section 113 without completing the disputes resolution process.

Exception 2: A taxpayer involved in a dispute, or person associated to them, may take steps to shift, relocate or dispose of the taxpayer's assets to avoid or delay the collection of tax, making the issue of an assessment urgent (section 89N(1)(c)(ii) and (iii)).

132. If the Commissioner has reasonable grounds to believe that the taxpayer or a person associated with them ("associated person") seeks to dispose of assets that could be needed to meet an outstanding tax liability, the Commissioner can issue an assessment to the taxpayer. Sections 89N(1)(c)(ii) & (iii) read:

> (ii) the Commissioner has reasonable grounds to believe that the disputant may take steps in relation to the existence or location of the disputant's assets to avoid or delay the collection of tax from the disputant:
>
> (iii) the Commissioner has reasonable grounds to believe that a person who is, under section OD 8(3) of the Income Tax Act 2004, an associated person of the disputant may take steps in relation to the existence or location of the disputant's assets to avoid or delay the collection of tax from the disputant:

133. The purpose of these provisions is to address circumstances where a taxpayer or person associated with them seeks to dispose of an asset that could be used to meet outstanding tax or a pending tax liability, making it necessary for the Commissioner to urgently issue an assessment.

134. The above exception will apply if the taxpayer or person associated with them sought to avoid or delay the payment of tax by taking steps in relation to the existence or location of the taxpayer's assets.

135. In order to issue an assessment on the basis of the above exception, Inland Revenue officers must record any relevant correspondence and evidence (for example, the directors' written instructions to

shift the company's assets overseas, evidence of electronic wiring of funds to overseas countries, transcripts of interviews with the taxpayer, etc) or other grounds for the reasonable belief.

Exception 3: The taxpayer involved in a dispute or a person associated with them involved in another dispute involving similar issues has begun judicial review proceedings in relation to the dispute (section 89N(1)(c)(iv) and (v)).

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

> (iv) the disputant has begun judicial review proceedings in relation to the dispute:
>
> (v) a person who is, under section OD 8(3) of the Income Tax Act 2004, an associated person of the disputant and is involved in another dispute with the Commissioner involving similar issues has begun judicial review proceedings in relation to the other dispute:

137. This exception applies to all judicial review proceedings that are brought against the Commissioner. In judicial review proceedings, the parties' resources are likely to be directed away from progressing the dispute through the disputes resolution process.

138. Section 89N(1)(c)(v) applies if all of the following requirements are met:

> (a) a taxpayer is involved in a dispute with the Commissioner, and
>
> (b) a person associated with the taxpayer is involved in a separate dispute, which concerns similar issues to those in the dispute between the taxpayer and Commissioner, and
>
> (c) the associated person has commenced judicial review proceedings in relation to their dispute.

139. For the purpose of section 89N(1)(c)(v), a person associated with a taxpayer may be involved in a similar issue to the taxpayer even if the issue relates to a different revenue type. In other circumstances, the revenue type may be the same. For example, if the dispute between the Commissioner and taxpayer relates to PAYE issues, but the dispute between the Commissioner and person associated with the taxpayer relates to income tax the taxpayer may still be involved in similar issues to the person associated with them.

140. Even if the two disputes relate to the same revenue type, section 89N(1)(c)(v) will not apply in some circumstances. For example, the dispute with the taxpayer relates to the tax treatment of entertainment expenditure, whereas the dispute with the person associated to the taxpayer relates to the capital and revenue distinction of merger expenditure. The Commissioner would not regard these two disputes as involving similar issues.

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

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

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

142. Generally, a taxpayer provides information to Inland Revenue voluntarily. However, when this does not occur the Commissioner can seek information from the taxpayer under a statutory provision, for example section 17 or 19. (The Commissioner's practice regarding section 17 is currently set out in S*PS 05/08 Section 17 Notices*.) The requirement for statutory information will specify the period within which the information must be provided.

143. Where the taxpayer does not comply with a formal requirement for information that relates to the dispute (for example, as a tactic to delay the progress of the disputes resolution process), the Commissioner can issue an assessment to the taxpayer without first completing the disputes resolution process.

Exception 5: The taxpayer elects to have the dispute heard by the TRA acting in its small claims jurisdiction (section 89N(1)(c)(vii)).

144. Section 89N(1)(c)(vii) reads:

> (vii) the disputant elects under section 89E to have the dispute heard by a Taxation Review Authority acting in its small claims jurisdiction:

145. A taxpayer can issue a NOPA to the Commissioner under section 89D or 89DA or a NOR rejecting the Commissioner's NOPA issued under section 89B (please see *SPS 08/XX – Disputes resolution process commenced by a taxpayer*.)

146. At the same time, under section 89E(1)(a) the taxpayer can elect in their NOPA or NOR that the TRA acting in its small claims jurisdiction should hear any unresolved dispute arising from the NOPA (whether commenced by the Commissioner or taxpayer), if the amount in dispute is $30,000 or less. In this case, the full disputes resolution process does not have to be followed.

Exception 6: The parties agree in writing that the dispute should be resolved by the court or TRA without completing the dispute resolution process (section 89N(1)(c)(viii)).

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

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

148. Under this exception, where the Commissioner commences the disputes resolution process, the parties can agree in writing that the dispute should be resolved by the court or TRA before either party issues their SOP. This would occur, for example, if the parties could incur excessive compliance and administrative costs in completing the full disputes resolution process relative to the amount in dispute.

149. However, this exception does allow the taxpayer to bring challenge proceedings against the Commissioner at any time. Where this exception applies to disputes that the Commissioner commences (that is, after the parties have made the requisite agreement), section 138B requires that the parties have exchanged a NOPA and NOR before the taxpayer can bring challenge proceedings.

Exception 7: The parties agree in writing to suspend the disputes process pending the outcome of a test case (section 89N(1)(c)(ix)).

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

> (ix) the disputant and the Commissioner agree in writing to suspend proceedings in the dispute pending a decision in a test case referred to in section 89O.

151. Section 89O(2) allows a dispute to be suspended pending the result of a test case. Pursuant to section 89O(3), the parties can agree in writing to suspend the dispute from the date of the agreement until the earliest date that:

> (a) the court's decision is made, or
>
> (b) the test case is otherwise resolved, or
>
> (c) the dispute is otherwise resolved.

152. If the parties agree to suspend the disputes resolution process, any statutory time bar affecting the dispute is stayed. The Commissioner can then make an assessment that is consistent with the test case decision. (However, the taxpayer is not precluded from challenging the Commissioner's assessment under section 89D(1), even if it is consistent with the test case decision.)

153. The Commissioner must issue an amended assessment or perform an action within the time limit specified in section 89O(5).

154. Section 89O(5) reads:

> The Commissioner must make an amended assessment, or perform an action, that is the subject of a suspended dispute by the later of the following:
>
> (a) the day that is 60 days after the last day of the suspension:
>
> (b) the last day of the period that –
>
> (i) begins on the day following the day by which the Commissioner, in the absence of the suspension, would be required under the Inland Revenue Acts to make the amended assessment, or perform the action; and
>
> (ii) contains the same number of days as does the period of the suspension.

155. **When the parties agree in writing to suspend dispute proceedings pending a decision in a test case under section 89O(2) and the commencement of the four-year statutory time bar under section 108 or 108A is imminent, section 89O(5) allows the Commissioner more time to complete the disputes resolution process.**

156. **For example, the Commissioner commences a dispute and on 1 March 2007 agrees with the taxpayer in writing to suspend the disputes proceedings pending the decision in a designated test case. The disputed issue is subject to a statutory time bar that commences after 31 March 2007 and the taxpayer does not agree to delay its application under section 108B(1)(a). A decision is reached in the test case on 31 July 2007.**

157. **The Commissioner must make an amended assessment or perform an action that is the subject of the suspended dispute by 29 September 2007. This date is calculated as follows:**

> (a) **The suspension period commences on the date of the agreement (1 March 2007) and ends on the date of the court's decision in the test case (31 July 2007). This is a period of 153 days.**
>
> (b) **The last date that the Commissioner can make an amended assessment falls on the later of the following two dates:**
>
> (i) **29 September 2007, that is 60 days after the date that the suspension period ends on 31 July 2007 pursuant to section 89O(5)(a), and**

(ii) **31 August 2007, that is 153 days after** the period commences on 1 April 2007 pursuant to section 89O(5)(b).

Exception 8: The Commissioner applies to the High Court for an order to allow more time to complete or dispense with the disputes process.

158. Section 89N(3) reads:

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

159. It is envisaged that this exception will be used only in exceptional circumstances. Certain considerations such as complex issues, issues that involve large amounts of revenue and delays that the taxpayer has caused could be relevant.

160. The Commissioner's application to the High Court under section 89N(3) is subject to statutory time limits. The Commissioner must apply before the four-year statutory time bar falls due.

161. The Commissioner must also issue an amended assessment within the time limit specified in section 89N(5). Section 89N(5) reads:

> **If the Commissioner makes an application under subsection (3), the Commissioner must make an amended assessment by the last day of the period that -**
>
> **(a) begins on the day following the day by which the Commissioner, in the absence of the suspension, would be required under the Inland Revenue Acts to make the amended assessment; and**
>
> **(b) contains the total of -**
>
> **(i) the number of days between the date on which the Commissioner files the application in the High Court and the earliest date on which the application is decided by the High Court or the application or dispute is resolved:**
>
> **(ii) the number of days allowed by an order of a court as a result of the application.**

162. **In situations where the Commissioner makes an application under section 89N(3) and the four-year statutory time bar under section 108 or 108A is imminent, section 89N(5) allows the Commissioner more time to complete the disputes resolution process.**

163. **For example, the Commissioner commences the disputes resolution process. On 1 March 2007 the Commissioner applies to the High Court under section 89N(3) for an order allowing more time to complete the process. The disputed issue is subject to a statutory time bar that commences after 31 March 2007 and the taxpayer does not agree to delay its application under section 108B(1)(a). On 30 June 2007, the High Court makes an order that allows the Commissioner's application and gives the Commissioner thirty further days to complete the disputes resolution process.**

164. **Pursuant to section 89N(5), the Commissioner must make an amended assessment by 30 August 2007. This date is calculated as follows:**

(a) **The Commissioner would have one month to make the amended assessment before the statutory time bar commences. That is, 1 March 2007 to 31 March 2007. The period during which an amended assessment must be made under section 89N(5)(a) commences on 1 April 2007.**

(b) **The period during which the assessment must be made includes 122 days, that is the period between 1 March 2007 and 30 June 2007 (the date of the decision) under section 89N(5)(b)(i) and the 30-day period allowed by the High Court order under section 89N(5)(b)(ii). This is a total of 152 days.**

(c) **The Commissioner must issue an amended assessment to the taxpayer on the date that is 152 days from 1 April 2007. That is, by 30 August 2007.**

165. **During the period from 1 March to 30 August 2007, the parties may continue to attempt to resolve the dispute. This may include exchanging SOPs and going through the adjudication process.**

166. **The above example indicates that the Commissioner has more time to complete the disputes resolution process. The time bar will not commence until 30 August 2007.**

167. Where the Commissioner applies to the High Court under section 89N(3) for an order to truncate the disputes resolution process, the Commissioner must issue an assessment within the period as calculated under section 89N(5). Applying the same facts as in the above example, the Commissioner must issue an assessment to the taxpayer by 30 August 2007.

Application of the exceptions in section 89N

168. The Commissioner's practice is that the parties should endeavour to resolve the dispute before or

via the adjudication process. Where this is not possible and one of the eight exceptions in section 89N applies the Commissioner can amend an assessment without completing the whole disputes resolution process, that is, before the parties accept a NOPA, NOR or SOP that the other has issued, or the Commissioner considers the taxpayer's SOP. This will conclude the disputes resolution process and the dispute will not go through the Adjudication phase.

169. In this circumstance, the taxpayer can challenge the Commissioner's assessment by filing proceedings in the TRA (either acting in its general or small claims jurisdiction) or the High Court within the applicable response period, that is, within two months starting on the date that the notice of assessment is issued (please see paragraph 149 of this SPS).

Taxpayer's response to the Commissioner's NOPA: NOR

170. If a taxpayer disagrees with the Commissioner's proposed adjustment, then, under section 89G(1), they must advise the Commissioner that any or all of the proposed adjustments are rejected by issuing a NOR within the two-month response period. That is, within two months starting on the date that the Commissioner's NOPA is issued. The Commissioner interprets this as requiring Inland Revenue's receipt of the NOR within the response period.

171. For example, if a NOPA is issued on 8 April 2007, the taxpayer must advise the Commissioner that it is rejected by issuing a NOR to the Commissioner for receipt on or before 7 June 2007. However, taxpayers are encouraged to issue their NOR to the Commissioner once they have completed it.

172. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent two weeks before the response period expires to ascertain whether the taxpayer will issue a NOR in response to the Commissioner's NOPA. Such contact may be made by telephone or letter.

173. Section 89G(2) specifies the content requirements of a NOR. The taxpayer must state concisely in the NOR:

    (a) the facts or legal arguments in the Commissioner's NOPA that they consider are wrong, and

    (b) why they consider those facts and arguments are wrong, and

    (c) any facts and legal arguments that they rely upon, and

    (d) how the legal arguments apply to the facts, and

    (e) the quantitative adjustments to any figure proposed in the Commissioner's NOPA that results from the facts and legal arguments that the taxpayer relies upon.

174. In respect of the requirement under section 9G(2)(c) that the taxpayer specifies the facts and legal arguments upon which they are relying, the taxpayer can also refer to legislative provisions, case law and any legal arguments raised in the Commissioner's NOPA. The taxpayer does not have to refer to different legislative provisions, case law and legal arguments.

175. Pursuant to section 89G(2)(e), the requirement for a quantitative adjustment establishes to what extent the taxpayer considers that the Commissioner's adjustment in the NOPA is incorrect. This amount need not be exact, however, every attempt should be made to ensure that it is as accurate as possible. The amount in dispute can be altered, as the dispute progresses irrespective of whether the parties have agreed on the new figure.

Deemed acceptance

176. If the taxpayer does not issue a NOR within the two-month response period and there are no exceptional circumstances as defined in section 89K(3), the taxpayer is deemed to have accepted the adjustment that is proposed in the Commissioner's NOPA. The Commissioner will usually advise the taxpayer that the deemed acceptance has occurred within 2 weeks after the 2-month response period expires.

177. Section 89H(1) reads:

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

178. **Pursuant to section 89I(2), the Commissioner must include or take into account each proposed adjustment that taxpayer accepts or is deemed to accept in a notice of assessment issued to the taxpayer.**

Exceptional circumstances under section 89K

179. Section 89K(3) reads:

> (a) an exceptional circumstance arises if—
>
> (i) an event or circumstance beyond the control of a disputant provides the disputant with a reasonable justification for not rejecting a proposed adjustment, or for not issuing a notice of proposed adjustment or statement of position, within the response period for the notice:

(ii) a disputant is late in issuing a notice of proposed adjustment, notice of response or statement of position but the Commissioner considers that the lateness is minimal, or results from 1 or more statutory holidays falling in the response period:

(b) an act or omission of an agent of a disputant is not an exceptional circumstance unless—

(i) it was caused by an event or circumstance beyond the control of the agent that could not have been anticipated, and its effect could not have been avoided by compliance with accepted standards of business organisation and professional conduct; or

(ii) the agent is late in issuing a notice of proposed adjustment, notice of response or statement of position but the Commissioner considers that the lateness is minimal, or results from 1 or more statutory holidays falling in the response period.

180. **The legislation defines exceptional circumstances very narrowly. The cases regarding "exceptional circumstances," such as *Treasury Technology Holdings Ltd v CIR* (1998) 18 NZTC 13,752, *Milburn NZ Ltd v CIR* (1998) 18 NZTC 14,005, *Fuji Xerox NZ Ltd v C*IR (2001) 17,470 (CA), *Hollis v CIR* (2005) 22 NZTC 19,570 and *Balich v CIR*, unreported High Court, Auckland Registry, CIV 2006-404-4113, 21 February 2007 are also relevant. The case law confirms that the definition of "exceptional circumstances" in sections 89K(3) and 138D should be applied consistently.**

The following guidelines have emerged from the case law:

(a) **a taxpayer's misunderstanding or erroneous calculation of the applicable response period will usually not be regarded as an event or circumstance beyond the taxpayer's control under section 89K(3)(a).**

(b) **an agent's failure to advise their client that they have received a notice of assessment or other relevant document that causes the taxpayer to respond outside the applicable response period will not generally be considered to be an exceptional circumstance under section 89K(3)(b) *(Hollis v CIR)*.**

(c) **an exceptional circumstance can arise if the taxpayer has relied on misleading information regarding the applicable response period given to them by the Commissioner that has caused them to respond outside that response period *(Hollis v CIR*).**

181. The Commissioner will only accept a late NOR on rare occasions. Please see *Tax Information Bulletin* Vol 8, No 3 (August 1996) for some examples of situations that can be an "exceptional circumstance" beyond a taxpayer's control.

182. **The exception for lateness as a result of statutory holidays is self explanatory. The Commissioner can also accept a late NOR if the Commissioner considers that the lateness is minimal, that is, the document was only 1-2 days late.**

183. **For example, the response period ends on Saturday and the taxpayer provides a NOR on the following Tuesday. The Commissioner treats the response period as ending on Monday on the basis of section 35(6) of the Interpretation Act 1999 and accepts that the lateness of the NOR was minimal. That is, the Commissioner has received the NOR within 1-2 days of Monday, the last day of the response period. If the response period ended on Friday and the taxpayer provided the NOR on the following Monday, the Commissioner would also accept that the lateness is minimal.**

184. Besides the degree of lateness, the Commissioner will consider the following factors when exercising the discretion under section 89K(1):

(a) the date on which the NOR was issued, and

(b) the response period within which the NOR should be issued, and

(c) the real event, circumstance or reason why the taxpayer failed to issue the NOR within the response period, and

(d) the taxpayer's compliance history in relation to the tax types under consideration (for example, has the taxpayer paid tax or filed a tax return or NOR late in the past?)

185. For example, a taxpayer issues a NOR to the Commissioner two days after the applicable "response period" has expired. The taxpayer does not provide a legitimate reason for the lateness. The taxpayer also has a history of filing late NORs within the minimal allowable lateness period (that is, up to two days outside the applicable "response period") and has been advised on the calculation of the "response period" on more than one occasion. Although the lateness was minimal on each occasion, the Commissioner would not accept the taxpayer's NOR in this circumstance. This ensures that the section 89K(3)(b)(ii) exception is not treated as an extension of the "response period" in all circumstances.

186. The Commissioner will consider a taxpayer's application made under section 89K after receiving the relevant NOR or SOP. The responsible officer will document the reasons for accepting or rejecting the taxpayer's application and advise the taxpayer of their decision in writing within 15 working days after Inland Revenue receives the application.

187. **The taxpayer must provide reasons to support their claim that exceptional circumstances exist under section 89K(3). Where those reasons are unclear, the Commissioner may require further information and give the taxpayer an opportunity to provide that information before determining whether section 89K applies.**

188. If the Commissioner rejects a taxpayer's application made under section 89K to treat a NOR or SOP as made within the response period, the taxpayer will be deemed to have accepted the proposed adjustment made in the Commissioner's NOPA. (Any decision that the Commissioner makes under section 89K is not a "disputable decision".)

Receipt of a taxpayer's notice of response

189. When Inland Revenue receives a taxpayer's NOR, it will usually be forwarded to the responsible officer within five working days after its receipt. Upon receipt, the responsible officer will ascertain and record the following:

    (a) the date on which the NOR was issued, and

    (b) whether the NOR has been issued within two months starting on the date that the Commissioner's NOPA is issued, and

    (c) the salient features of the NOR including any deficiencies in its content.

190. Where it is practicable, the Commissioner will advise the taxpayer or their tax agent by telephone or in writing within 10 working days that Inland Revenue has received the NOR.

191. The Commissioner will make reasonable efforts to advise the taxpayer or their tax agent within one month after receiving the NOR whether the NOR is being considered or has been accepted, rejected in full or in part.

192. Where the NOR is accepted in full, the Commissioner will usually issue to the taxpayer written confirmation that the NOR has been accepted in full and, if applicable, a notice of assessment within one month after advising that the NOR is accepted.

193. If the Commissioner must investigate further before deciding to accept or reject a NOR, the responsible officer will regularly update the taxpayer or their agent on the progress of the further analysis or enquiry work that is undertaken.

Deficiencies in the content of the notice of response

194. Where Inland Revenue has received a NOR that it considers has deficiencies (that is, the requirements under section 89G(2) are not met), the responsible officer will take reasonable steps to have the taxpayer correct the information in the NOR before the response period expires. The taxpayer will be advised as soon as practicable that the NOR is invalid unless rectified and the additional or correct information must be provided within the response period.

195. The taxpayer will also be advised of when the response period expires and that those deficiencies must be rectified to validate the NOR by then or within the minimal lateness period allowed pursuant to section 89K(3)(a)(ii) (please see paragraph 182) and whether the Commissioner intends to provide any additional information to the taxpayer.

196. Taxpayers are encouraged to issue their NOR immediately after they have completed it because they could have insufficient time to rectify any invalidities or deficiencies if the response period is due to expire.

197. If a taxpayer does not provide the correct information in respect of a deficient NOR before the response period expires, they will be deemed to have accepted the proposed adjustment under section 89H(1), unless one of the exceptional circumstances under section 89K applies. This will conclude the dispute and preclude the taxpayer's right to challenge the adjustments before the High Court or TRA.

Conference

Conduct of a conference

198. Generally, if a dispute remains unresolved after the NOR phase, the conference phase will follow. The Commissioner will usually initiate the conference phase in a timely manner, that is within one month after the taxpayer's NOR is received. If the start of the conference phase is delayed (for example, to allow legal advice to be obtained) the responsible officer will keep the taxpayer informed regarding the progress of the conference. The suggested average time frame for the conference phase is three months. However, this time will vary depending on the facts and complexities of the specific cases.

199. A conference is not statutorily required. Rather, the conference phase is an administrative process that aims to clarify and, if possible, resolve the disputed issues. **However, the conference phase should not be used by either party to the dispute for the purpose of delaying the completion of the disputes resolution process.**

200. The conference should be conducted in a way that is sufficiently flexible and consistent with the taxpayer's wishes and any other relevant factors such as the scope of the investigation. **The Commissioner will establish a time frame to meet with the taxpayer and, sometimes, if necessary, Inland Revenue officers will meet with the taxpayer immediately after considering further information.**

201. A conference can range from a telephone call to several face-to-face meetings. All discussions in the conference must be recorded or otherwise documented (to provide the best record of such discussions and promote the free flow of conversation) and a consensus reached if possible. Recordings can be made on audio or video tape, MP3 and CD recorders and the FTR Gold system. This may include any agreement on facts, common grounds on which the dispute can proceed, a time frame for completing the disputes resolution process and any agreed adjustment.

202. **When a dispute remains unresolved after the conference phase has been completed, Inland Revenue officers will endeavour to issue a disclosure notice together with a SOP pursuant to section 89M(3) without any unnecessary delay.**

203. **The conference phase is not necessarily complete just because the parties have held the final meeting. For example, the parties may need further information or to consider further submissions made at the meetings. This will dictate when the Commissioner issues a disclosure notice. Also, the parties can engage in further discussions during or after the SOP phase to attempt to resolve some or all of the disputed issues.**

Legal and other advisers attending a conference

204. If a dispute is not settled earlier, the parties may want to obtain expert legal or other advice during the conference phase. These advisers can attend any meetings in relation to the dispute. The newly introduced advisers may revisit some items that the parties have previously discussed but not agreed to in writing.

Conference not held or abridged

205. The Commissioner considers that the conference phase is an important part of the disputes resolution process.

206. In some circumstances, the Commissioner will not hold further discussions or a conference, notwithstanding that the Commissioner has not reached an agreement with the taxpayer. However, the disputes resolution process will not be finished, because the disclosure notice and SOP phases will still be undertaken. A dispute that is not resolved in the SOP phase will generally be referred to Adjudication for determination.

207. A conference can be dispensed with or abridged in one or more of the following situations. If:

(a) there are revenue losses incurred as a result of delaying tactics that the taxpayer used to frustrate the collection of tax and the completion of the disputes resolution process, or

(b) the Commissioner is satisfied that the taxpayer or their agent is acting in a frivolous or vexatious manner. For example, where the taxpayer or their agent is setting unreasonable demands about the time, place, or terms of such meeting(s), or conducts themselves unreasonably at any meeting, or

(c) the taxpayer contests the Commissioner's policy and it is agreed to disagree or that a conference would not benefit the parties, or

(d) the taxpayer advises the Commissioner that they want to dispense with the conference, or

(e) the taxpayer is a party to a tax avoidance arrangement that involves the same matters or issues for a number of parties and holding a conference would result in a duplication of those matters or issues.

208. Where it is practicable, the Commissioner will advise the taxpayer or their tax agent of the decision regarding whether or not the conference phase will be dispensed with or abridged in writing within seven days of that decision being made. The reasons for the final decision must be documented.

Disclosure notice

209. The Commissioner must issue a disclosure notice under section 89M(1), unless the Commissioner:

(a) does not have to complete the disputes resolution process because **one of the exceptions** under section 89N(1)(c) applies (please see earlier discussion), or

(b) has already issued to the taxpayer a notice of disputable decision that includes or takes into account the adjustment proposed in the NOPA pursuant to section 89M(2). Section 89M(2) reads:

> (1) Unless subsection (2) applies, and subject to section 89N, the Commissioner must issue a disclosure notice in respect of a notice of proposed adjustment to a disputant at

> the time or after the Commissioner or the taxpayer, as the case may be, issues the notice of proposed adjustment.
>
> (2) The Commissioner may not issue a disclosure notice in respect of a notice of proposed adjustment if the Commissioner has already issued a notice of disputable decision that includes, or takes account of, the adjustment proposed in the notice of proposed adjustment.

210. Pursuant to the definition in section 3(1), a disputable decision is:

> (a) An assessment, or
>
> (b) A decision that the Commissioner makes under a tax law, except for a decision:
>
> (i) to decline to issue a binding ruling, or
>
> (ii) that cannot be the subject of an objection or challenge, or
>
> (iii) that is left to the Commissioner's discretion under sections 89K, 89L, 89M(8), (10) and 89N(3).

211. When issuing a disclosure notice the Commissioner must also provide to the taxpayer the Commissioner's SOP (as discussed below) and include in the disclosure notice a reference to section 138G and the effect of the evidence exclusion rule. Section 89M(3) reads:

> … the Commissioner must, when issuing a disclosure notice, -
>
> (a) Provide the disputant with the Commissioner's statement of position; and
>
> (b) Include in the disclosure notice–
>
> (i) A reference to section 138G; and
>
> (ii) A statement as to the effect of the evidence exclusion rule.

212. The Commissioner will usually advise the taxpayer two weeks before issuing the disclosure notice and SOP that these documents will be issued to them.

Evidence exclusion rule

213. A disclosure notice is the document that triggers the application of the evidence exclusion rule. This rule restricts the evidence that the parties can raise in court challenges to matters disclosed in their SOP. (Please note that the parties can refer to evidence raised by either party.)

214. The Commissioner must explain the effect of the evidence exclusion rule and refer to section 138G in the disclosure notice, because this is one of the guiding principles of the disputes resolution process.

Issue of a disclosure notice

215. The Commissioner can issue a disclosure notice at any time on or after the date that either party issues their NOPA.

216. Usually, the Commissioner will issue a disclosure notice after receiving a NOR, following the conference phase and in accordance with the time line agreed with the taxpayer.

217. **The Commissioner's practice is to issue a disclosure notice within three months after all enquiries are concluded and the conference phase has been completed. However, at times the Commissioner can delay issuing a disclosure notice where, for example, the relevant Inland Revenue officers are still collecting additional information or further investigating the taxpayer. In these circumstances, the relevant officer should use one of the relevant statutory provisions to obtain any information needed to complete the conference or disclosure notice and SOP phases to ensure that the disputes resolution process is conducted in a timely and efficient manner.**

218. Where a disclosure notice is issued earlier (for example, the facts are clear, the taxpayer has agreed on the disputed issues, or a conference is not required) the reasons must be documented and explained to the taxpayer.

219. When deciding whether to issue a disclosure notice before the conference phase has been completed, Inland Revenue officers must be aware that, if the taxpayer discloses new or novel matters in their SOP, they only have two months to reply under section 89M(8) barring a High Court application before the two-month period expires (please see section 89M(10)).

Statement of position

220. Pursuant to section 89M(3), when the Commissioner commences the disputes resolution process, the Commissioner must issue a SOP to the taxpayer together with the disclosure notice.

221. When the disputed issue relates to tax types that are subject to the statutory time bar (for example, income tax, GST, etc) that fall within the current income year, the parties will endeavour to complete the disputes resolution process. The parties can agree to a statutory time bar waiver if they have issued a SOP to each other and there is insufficient time to complete the adjudication process. However, if no such agreement is reached and the Commissioner has fully considered the taxpayer's SOP, the Commissioner can amend and issue the assessment before the statutory time bar falls due.

222. **Section 89N(2)(b) allows the Commissioner to advance to the next stage if the Commissioner has considered the taxpayer's SOP and completed the compulsory elements of the disputes process. The Commissioner can then amend the assessment by exercising the discretion under section 113.**

Contents of a SOP

223. Generally, the contents of a SOP are binding. This is because matters that proceed to court are subject to the "evidence exclusion rule" which limits the parties to the facts, evidence (excluding oral evidence), issues and propositions of law that either party discloses in their SOP unless a court order is made under section 138G(2) allowing new facts and evidence to be raised. However, a mistaken description of facts, evidence, issues or propositions of law and submissions made in the SOP can later be amended if the parties agree to include additional information to the SOPs under section 89M(13).

224. The SOP must be in the prescribed form (section 89M(4)) and must contain sufficient detail to fairly inform the taxpayer of the facts, evidence, issues and propositions of law that the Commissioner wishes to rely on.

225. Section 89M(4) reads:

> The Commissioner's statement of position in the prescribed form must, with sufficient detail to fairly inform the disputant,–
>
> (a) Give an outline of the facts on which the Commissioner intends to rely; and
>
> (b) Give an outline of the evidence on which the Commissioner intends to rely; and
>
> (c) Give an outline of the issues that the Commissioner considers will arise; and
>
> (d) Specify the propositions of law on which the Commissioner intends to rely.

226. The minimum content requirements for a SOP are an outline of the relevant facts, evidence, issues and propositions of law. However, to allow the Adjudication Unit to successfully reach a decision, the SOP must also contain full, complete and detailed submissions. An outline that consists of a frank and complete discussion of the issues, law, arguments and evidence supporting the argument is implicit in the spirit and intent of the disputes resolution process. (In very complex cases a full explanation of the relevant evidence and summary of less relevant evidence will be accepted.)

227. Submissions made in the NOPA phase must be sufficiently concise to enable the parties to progress the dispute without incurring substantial expenses. However, at the SOP phase, if the issues are unresolved and likely to proceed to a court for resolution, then full, complete and detailed submissions should be made. Subject to section 138G(2), **the evidence exclusion rule prevents the court considering arguments and evidence that are not included in:**

> (a) **the SOP, or**
>
> (b) **any additional information that,**
>
> (i) **the Commissioner provides under section 89M(8), that is deemed to be part of the Commissioner's SOP under subsection (9), and**
>
> (ii) **the parties provide pursuant to an agreement under section 89M(13), that is deemed to be part of the provider's SOP under subsection (14).**

228. Section 89M(6B) reads:

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

229. Pursuant to section 89M(6B), only documentary evidence and not potential witnesses must be listed in the SOP. Any witnesses' identities will continue to be protected without undermining the effect of the evidence exclusion rule.

230. If the SOP discusses shortfall penalties it must also state any other appropriate penalties of lesser percentages and shortfall penalty reductions (for example, voluntary disclosure or previous behaviour reductions) as alternative arguments. This ensures that the appropriate penalties are assessed in all cases. However, the Commissioner cannot propose shortfall penalties at the SOP phase that were not previously proposed in the Commissioner's NOPA.

Receipt of a taxpayer's SOP in response

231. Where the Commissioner has issued a disclosure notice and SOP, the taxpayer must, subject to section 89M(11), issue a SOP within the two-month response period that starts on the date that the disclosure notice was issued. **Therefore, the Commissioner cannot consider a document that the taxpayer purports to issue as a SOP before the Commissioner has issued the disclosure notice because it will not have been issued within the response period. The taxpayer should resubmit this document after the disclosure notice is issued.**

232. Pursuant to section 89M(11), the taxpayer can apply to the High Court within the response period for more time to reply to the Commissioner's SOP. The taxpayer must show that they had not

previously discussed the disputed issue with the Commissioner and, thus, it is unreasonable to reply to the Commissioner's SOP within the response period.

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

    (a) the date on which the SOP was issued, and

    (b) whether the SOP has been issued within the relevant response period, and

    (c) the SOP's salient features including any deficiencies in its content.

234. Where it is practicable, Inland Revenue will acknowledge the taxpayer's SOP as received within 10 working days of receiving it. However, the Commissioner will advise the taxpayer or their agent of any deficiencies in the SOP's content as soon as practicable. They will be further advised when the response period expires and that those deficiencies must be rectified to validate the SOP by then or within the minimal lateness period allowed pursuant to section 89K(3)(a)(ii) (please see paragraph 182) and whether the Commissioner intends to provide any additional information to the taxpayer.

235. A taxpayer that has issued a SOP outside the applicable response period can apply for consideration of exceptional circumstances under section 89K. The reasons for accepting or rejecting the application will be documented and the responsible officer will make reasonable efforts to advise the taxpayer of the decision in writing within 15 working days after Inland Revenue receives the taxpayer's application.

236. A taxpayer is deemed to have accepted the Commissioner's SOP if they do not respond with their own SOP within two months after the date that the disclosure notice is issued and none of the exceptional circumstances under section 89K apply. Where practicable, the Commissioner will usually advise the taxpayer that deemed acceptance has occurred within two weeks after the date that the response period for the disclosure notice expires.

The Commissioner's response

237. Pursuant to section 89M(8), the Commissioner can, within two months after the taxpayer's SOP is issued, provide to the taxpayer additional information in response to matters that they have raised in their SOP.

238. This applies where the taxpayer raises new or novel information or arguments in their SOP and should be confined to these issues. Any additional information must be provided as far as possible in the same format as the SOP to which it relates. **As mentioned above, the additional information can include documentary evidence but not lists of potential witnesses.**

239. If the Commissioner intends to provide the taxpayer with additional information under section 89M(8), the Commissioner will usually advise the taxpayer or their tax agent of this within two weeks after receiving the taxpayer's SOP. However, the timing of this advice can vary depending on the facts and complexity of the dispute. **The additional information provided under section 89M(8) is deemed to be part of the Commissioner's SOP. Thus, the evidence exclusion rule under section 138G applies to the additional information.**

240. The taxpayer cannot reply to the additional information that the Commissioner provides, unless the parties agree that additional information will be accepted.

Agreement to include additional information

241. The parties can agree to add additional information to their SOP under section 89M(13). Although there is no statutory time limit, the Commissioner's practice is to allow one month (from the date that the Commissioner provides additional information under section 89M(8)) for such an agreement to be reached and information provided. However, before the Commissioner agrees the Commissioner will consider the taxpayer's prior conduct and whether they could have provided the information earlier through the application of due diligence.

242. The Commissioner will also consider the materiality and relevance of the additional information and its capacity to help resolve the dispute. Additional information will not be accepted unless both parties have demonstrated proper cooperation and due diligence in resolving the matters at issue.

243. If a taxpayer's request to add additional information to their SOP is declined, the reasons will usually be communicated to the taxpayer or their tax agent. The reasons will also be documented with detailed reference to the taxpayer's conduct, level of cooperation before the requests and why the information was not provided earlier.

244. Any agreement to add additional information to the SOP will be made subject to the taxpayer agreeing that the Commissioner can include a response to the additional information to the SOPs, if required,

within an agreed time frame. **The additional information that the parties provide will be deemed to be part of the provider's SOP under section 89M(14). Thus, the evidence exclusion rule under section 138G applies to the additional information.**

Preparation for adjudication

245. **The Adjudication Unit is part of Inland Revenue's Office of the Chief Tax Counsel and represents the final step of the disputes resolution process. The Adjudicator's role is to take a fresh look at a tax dispute and the application of law to the facts in an impartial and independent manner and provide a comprehensive and technically accurate decision.**

246. **Generally, the Adjudicator will make such a decision within four months after the case is referred to the Adjudication Unit although this will depend on the complexity of the dispute. (For further information on the time frame for adjudication of disputes please see the article titled "Adjudication Unit – Its role in the dispute resolution process" in the Tax Information Bulletin Vol. 19, No. 10 (November 2007)).**

247. **If the parties have not agreed on all the issues after the conference and disclosure phases have been completed the Commissioner's practice is, generally, to refer the dispute to the Adjudication Unit to consider, irrespective of the issues or amounts of tax involved. However, ultimately this phase will be governed by administrative procedures because there are no explicit statutory requirements.**

248. During the course of a dispute, the Commissioner can issue an amended assessment to the taxpayer, for example, to avoid the application of a time bar or if the taxpayer has reached **an agreement with the Commissioner under section 89N(1)(c)(viii)** that confirms that they do not want the dispute to proceed to the Adjudication Unit. Furthermore, before the dispute is referred to the Adjudication Unit, the taxpayer can request that an amended assessment is issued and then challenge the assessment under section 138B(1).

249. **If the taxpayer has issued challenge proceedings in respect of the disputed assessment but not advised the Commissioner to dispense with the adjudication process, the Commissioner will not refer the dispute to the Adjudication Unit because the Commissioner considers that it is more appropriate for the court or hearing authority to determine the issues relating to the dispute in the challenge proceedings.**

250. **Further to paragraph 249, the Commissioner can elect to not refer a dispute to adjudication in cases where the issue is already under challenge, for example, for a prior income year, and where there is:**

    (a) **a substantial amount of tax at issue, or**

    (b) **an issue of great complexity, or**

    (c) **a need to examine the purposes of the transaction and surrounding circumstances using oral evidence, or**

    (d) **a tax avoidance issue involved that is strongly disputed, or**

    (e) **a likelihood that the dispute will be resolved by the hearing authority and not the disputes resolution process.**

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

252. However, where the dispute is referred to the Adjudication Unit, the Commissioner should not issue an assessment or amended assessment before the adjudication process is completed unless a time bar is imminent. In this circumstance, the responsible officer will prepare a cover sheet that will record all the documents that must be sent to the Adjudication Unit.

253. The cover sheet together with copies of the documents (NOPA, NOR, notice rejecting the NOR, conference notes, both parties' SOP, additional information, material evidence including expert opinions and a schedule of all evidence held) and any recordings of discussions held during the conference will be sent to the Adjudication Unit.

254. The responsible officer will issue a letter together with a copy of the cover sheet to the taxpayer before sending the submissions and evidence to the Adjudication Unit. The cover sheet and letter are usually completed within one month after the date that the Commissioner's reply to the taxpayer's SOP (if any) is issued or the response period for the taxpayer's SOP expires.

255. The purpose of this letter is to seek concurrence on the materials to be sent to the Adjudicator - primarily in regard to documentary evidence that has been disclosed at the SOP phase. This letter will allow no more than 10 working days for a response.

256. Once a consensus is received from the taxpayer, all materials to be sent to the Adjudication Unit will

usually be so forwarded. However, if no response is received from the taxpayer the materials will be forwarded within 10 working days after the date that the letter is issued to the taxpayer advising that the materials will be sent to the Adjudication Unit.

257. Where an investigation has covered a number of issues, the cover sheet will outline those issues that the parties have agreed upon and those issues that are still disputed. The adjudicator will only consider the disputed issues and not those issues that have been agreed upon.

258. The adjudicator usually only considers the information that the parties have submitted. They do not usually seek out further information, although they can consider additional relevant material. However, additional information that is not disclosed in the parties' SOP cannot later be raised as evidence in court because of the evidence exclusion rule in section 138G(1) (discussed above) unless the parties agree to include it as additional information under section 89M.

Adjudication decision

259. Once a conclusion is reached, the Adjudication Unit will advise the taxpayer and responsible officer of the decision. The responsible officer will implement any of the Adjudication Unit's decisions and follow up procedures where required including issuing a notice of assessment to the taxpayer where applicable.

260. Where the Adjudication Unit makes a decision against the Commissioner, the Commissioner is bound by and cannot challenge that decision. The dispute will come to an end.

261. Where the Adjudication Unit makes a decision against the taxpayer, they can challenge the assessment (whether made by the Commissioner or taxpayer) or disputable decision if they are within the applicable response period.

262. Where the Commissioner has commenced the disputes resolution process, the taxpayer, if disagreeing with the Adjudicator's decision and any later notice of assessment or amended assessment that is issued, can file proceedings in the general jurisdiction of the TRA or the High Court if one of the following conditions under section 138B(1) is met:

    (a) the assessment includes an adjustment that the Commissioner has proposed and the taxpayer has rejected within the response period, or

    (b) the assessment is an amended assessment that imposes a fresh or increases an existing liability.

263. A taxpayer can also challenge an assessment that the Commissioner issues before the dispute goes through the Adjudication process (for example, when an exception under section 89N(1)(c) applies).

264. The taxpayer must file proceedings with the TRA or High Court within the two-month response period that starts on the date that the Commissioner issues the notice of assessment or amended assessment.

This Standard Practice Statement is signed on XX XXXX 2008.

Graham Tubb
Group Tax Counsel
Legal and Technical Standards

Disclaimer: This is a draft item only. It may not be relied upon by taxation officers, taxpayers or practitioners. Only finalised items represent an authoritative statement by Inland Revenue of its stance on the particular issues covered.

APPENDIX 1

Disputes resolution process commenced by the Commissioner of Inland Revenue: indicative administrative time frames

Disclaimer: Except for those subject to statutes, the time frames in this Appendix are intended administrative guides for Inland Revenue. Failure to meet these administrative time frames will not invalidate subsequent actions of the Commissioner, or prevent the cases going through the disputes resolution process.

Paragraph in the SPS	Key actions	Time frames
	The Commissioner's NOPA	
79	Advise the taxpayer that a NOPA will be issued.	Usually within 5 working days before the date that the Commissioner's NOPA is issued, but this may happen earlier.
84	Confirm that the taxpayer has received the Commissioner's NOPA (either by telephone or in writing).	Within ten working days from the date that the Commissioner's NOPA is issued, where practicable.
	Taxpayer's NOR	
169	The taxpayer issues a NOR within the applicable response period.	Within two months from the date that the Commissioner's NOPA is issued, unless one of the "exceptional circumstances" under section 89K applies.
170	Confirm whether the taxpayer will issue a NOR.	Usually two weeks before the response period for the Commissioner's NOPA expires.
189	Forward the taxpayer's NOR to the responsible officer.	Usually within one week of receipt of the taxpayer's NOR.
190	Acknowledge the receipt of the taxpayer's NOR.	Usually within two weeks of receipt of the taxpayer's NOR.
196	Advise that the taxpayer's NOR is invalid, but the two-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent as soon as they become aware of the invalidity.
186	Consider the application of "exceptional circumstances" under section 89K, where a taxpayer's NOR has been issued outside the applicable response period.	Usually within three weeks of receipt of the taxpayer's application.
176	The taxpayer is deemed to accept the Commissioner's NOPA, as the taxpayer fails to issue a NOR within the applicable response period and none of the "exceptional circumstances" apply in the case of a late NOR.	Usually two weeks after the response period to the Commissioner's NOPA expires.
191	Advise the taxpayer whether the NOR is being considered, has been accepted, rejected in full or part.	Advise the taxpayer whether the NOR is being considered, has been accepted, rejected in full or part.
192	If the taxpayer's NOR has been accepted in full, the dispute finishes and Inland Revenue will take appropriate actions (for example, issue an assessment).	If the taxpayer's NOR has been accepted in full, the dispute finishes and Inland Revenue will take appropriate actions (for example, issue an assessment).

	Conference phase (if applicable)	
198	Contact the taxpayer to initiate the conference phase.	A conference usually commences within one month from the receipt of the taxpayer's NOR. The suggested average time frame of the conference phase is three months, subject to the facts and complexity of the dispute.
208	The decision not to hold, or abridge any conference must be documented in writing and conveyed by the Commissioner to the taxpayer or agent.	Usually within one week from the Commissioner's decision.
	Disclosure notice and the Commissioner's SOP	
212	Advise the taxpayer that a disclosure notice and the Commissioner's SOP will be issued.	Usually within two weeks before the date that the Commissioner's disclosure notice and SOP are issued.
	Taxpayer's SOP	
231	The taxpayer must issue a SOP within the response period for the disclosure notice.	Within two months from the date that the disclosure notice is issued, unless one of the "exceptional circumstances" under section 89K applies.
233	Confirm whether the taxpayer will issue a SOP.	Usually two weeks before the response period for the Commissioner's disclosure notice expires.
233	Forward the taxpayer's SOP to the responsible officer.	Usually within one week after the taxpayer's SOP is received.
	Acknowledge the receipt of the taxpayer's SOP.	Usually within two weeks after the taxpayer's SOP is received.
234	Advise that the taxpayer's SOP is invalid, but the two-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent as soon as they become aware of the invalidity.
235	Consider the application of "exceptional circumstances" under section 89K, where the taxpayer's SOP has been issued outside the applicable response period.	Usually within three weeks after the taxpayer's application is received.
236	The taxpayer is deemed to accept the Commissioner's SOP, as the taxpayer fails to issue a SOP within the applicable response period and none of the "exceptional circumstances" apply.	Usually two weeks after the response period for the disclosure notice expires.
	Addendum to the Commissioner's SOP	
238	Advise the taxpayer whether the Commissioner will provide additional information via an addendum to the Commissioner's SOP.	Usually within two weeks after the taxpayer's SOP is received, subject to the facts and complexity of the dispute.
237	Provide additional information via addendum to the Commissioner's SOP within the response period for the taxpayer's SOP.	Within two months after the taxpayer's SOP is issued.
241	Consider the taxpayer's request to add additional information to the taxpayer's SOP.	Usually within one month from the date that the Commissioner's addendum is issued.

	Adjudication	
254	Prepare a cover sheet and issue a letter (including a copy of the cover sheet) to the taxpayer to seek concurrence of the materials to be sent to the adjudicator.	Usually within 1 month from the date that the Commissioner's addendum (if any) is issued or within 1 month from the date that the response period for the taxpayer's SOP to expire.
255	The taxpayer responds to the Commissioner's letter.	Within two weeks from the date that the Commissioner's letter is issued.
256	Forward materials relevant to the dispute to the Adjudication Unit.	Usually within 12 working days from the date that the Commissioner's letter is issued.
	Adjudication of the disputes case	Usually four months from the date that the Adjudication Unit receives the dispute files, subject to the facts and complexity of the disputes.

LEGAL DECISIONS – CASE NOTES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, Court of Appeal, Privy Council and the Supreme Court.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision. Where possible, we have indicated if an appeal will be forthcoming.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

LIST OF NAMES MUST BE PROVIDED

Case: The Commissioner of Inland Revenue v Blakeley

Decision date: 17 October 2007

Act: Tax Administration Act 1994 ("TAA")

Keywords: section 17 Notice, non-disclosure right, list of names, tax advice document.

Summary

Non-disclosure right did not apply to a list of names and that list must be provided to the Commissioner under section 17 of the TAA.

Facts

In the course of an investigation the Commissioner obtained four tax opinions prepared by a chartered accountant. The Commissioner considered that the arrangements referred to in the opinions were tax avoidance.

In an attempt to identify other taxpayers that had entered into similar arrangements the Commissioner issued a section 17 to the accountant asking him to provide a list of names of persons to whom he had provided advice to in respect of similar arrangements.

The accountant did not comply with the notice, arguing that as the Commissioner already had the advice he would unavoidably be providing the contents of the advice in breach of his clients' non-disclosure right contained in section 20B of the TAA.

Decision

The Commissioner argued that the list of clients' names did not fall within the definition of a "tax advice document" as set out in section 20B(2). On the other hand, the accountant argued that the Commissioner was attempting to obtain the content of tax advice documents by circumventing the statutory non-disclosure right.

The Court held that, in the circumstances of the case, if the list of names were disclosed it would disclose that the clients on the list had received similar advice to that contained in the accountant's opinions. However, that situation had only arisen because the accountant had disclosed to the Commissioner that he had given similar advice to other clients. It would be an odd situation if the enforceability of the section 17 notice could be avoided, by the accountant advising that the same advice had been given to other clients.

Further, that the plain meaning of the words in section 20B requires the identification of a particular book or document in respect of which the non-disclosure right is claimed.

In the result the Court held that the list of names must be produced to the Commissioner and the section 17 Notice could not be resisted.

OVER-MARKET PAYMENTS TO A RELATED PERSON IN THE COURSE OF BUSINESS.

Case: TRA Decision Number 15/2007

Decision date: 8 November 2006

Act: Income Tax Act 1994

Keywords: Avoidance,

Summary

The disputant had entered into an arrangement to pay an above-market income to an administration assistant provided by a related company. As that company had significant carry-forward losses, a significant tax advantage accrued to the disputant. This was held to be so by the Taxation Review Authority ("TRA").

Facts

This case involved challenges to assessments for the 2002 to 2005 income tax years.

Prior to the years in question, the disputant, a real estate agent, directly employed a sub-agent to assist in making property sales on his behalf. He also directly employed

an administration assistant whom he paid $15.00 per hour and worked approximately 20 to 25 hours per week.

The administration assistant provided support to both the disputant and his sub-agent even though the disputant paid for these administrative services. The disputant contends that he had a problem in that he was unable to on charge the sub-agent for the administrative services so a new arrangement was created which would allow him to on charge any future sub-agent for these services.

The disputant entered into a contract with OSL, of which he was the sole director and equal shareholder with his wife, to supply him with management and administrative services. OSL had losses brought forward of $192,844.82 and under the contract; OSL provided an administration assistant to the disputant and charged him $65.00 per hour plus Goods and Services Tax ("GST") for her services. OSL paid the administration assistant $15.00 per hour.

The disputant obtained an inflated income tax deduction for the $65.00 plus GST he paid to OSL but did not suffer the full economic consequences of that. The annual profits of OSL were transferred to the disputant who received them as capital because they were repayments of a shareholder's loan by him to OSL. The disputant was thus able to claim a deduction of $64,659 in each year while the administration assistant was only paid $16,388.

Decision

The Fee Charged

Judge Barber held that payment of $65.00 plus GST per hour was very excessive in marketplace terms, for administrative support in the real estate industry. It was almost four times what needed to be paid, what had previously been paid, and what was in fact paid by OSL to the administration assistant. He also commented that a multiplier rate of 3.869 used by the disputant to arrive at the $65.00 per hour rate was "ridiculously high".

Tax Avoidance

Judge Barber held that the arrangement amounted to tax avoidance. He found the fee of $65.00 per hour for an administration assistant's services to be excessive, un-commercial and integral to an arrangement which decreased the disputant's taxable income by providing him with an inflated deduction, without him suffering the economic consequences of paying the higher administration fee.

From any sensible tax approach, there was little to be gained by the new structure because the multiplier used for the administration assistant's services for the charging out by OSL to the disputant was out of line with commercial sense.

Reconstruction

Judge Barber accepted that there is no requirement on the Commissioner to reconstruct but stated that, whenever reasonably possible, the Commissioner should take the extra step of trying to resolve the disputed issues over tax avoidance by a sensible and agreed reconstruction.

Judge Barber accepted however that this was not an appropriate case for an agreed reconstruction as there was no evidential basis on which to do so. No satisfactory evidence was put to the Authority as to what an appropriate commercial rate or mark-up for a company providing administrative support in the real estate industry would be and Barber J therefore agreed with the Commissioner's approach not to reconstruct.

Shortfall penalty

Judge Barber found for an unacceptable interpretation rather than an abusive tax position because he accepted that the disputant, having been advised by his accountant on the arrangement, honestly thought the structure was valid at law. The shortfall penalty was fixed at 20% with a reduction for previous good behaviour.

TIMING OF DEDUCTION FOR ACCOUNTING SERVICES

Case: TRA Decision Number 14/07

Decision date: 23 November 2007

Act: Income Tax Act 1994, sections BD2, BD4 and DJ5(1)

Keywords: expenditure incurred, definitively committed, legal obligation to make payment, income year

Summary

The taxpayer is allowed a deduction in the income tax year which the expenditure is incurred. Expenditure is incurred when the taxpayer is definitively committed to the expenditure, a legal obligation to make payment in the future has accrued, the expenditure must be more than impending, threatened or expected and theoretical contingencies can be disregarded. The taxpayer did not incur the expenditure (accounting fees for the 2003 financial statements and returns of income) until 2004 and accordingly, could only deduct those fees in 2004 – not 2003 as claimed.

Facts

This case concerns the timing of deductibility of accounting fees.

The Disputant is a limited liability company. It entered into an agreement with its chartered accountants on 6 March 2000 which confirmed "the terms of our continuing appointment to provide accounting services; the nature of those services". In relation to the annual

financial statements, the accountants would "bill as the work is performed. These progress billings will be shown in the final bill which will detail the total cost for those statements".

On 31 March 2003 the Disputant accrued $2,285.00 as "being estimate of 2003 fees" and subsequently claimed a deduction in it's 2003 income tax return. The accounting services for the $2,285 were, however, performed and invoiced in the 2004 income tax year.

Decision

The Taxation Review Authority ("TRA") confirmed that it is settled law that expenditure can only be deducted if it can be brought within the terms of the Tax Acts and, referring to both the Privy Council and Court of Appeal in *Mitsubishi Motors Ltd v The Commissioner of Inland Revenue*, accounting principles and good commercial practice cannot be substituted for the statutory test of deductibility.

A deduction must be allocated to the income year in which it is incurred. The principles of "incurred" are also settled law and the principles can be summarised as:

- Expenditure is incurred in an income year even if there is no actual disbursement.
- Expenditure is incurred if the taxpayer has "definitively committed" itself to that expenditure.
- It is not sufficient that the expenditure be merely "impending, threatened or expected".
- There must be an "existing obligation" and whether, in light of all the surrounding circumstances, a legal obligation to make a payment in the future has said to have accrued.

Where the expenditure arises under a written agreement, whether or not it constitutes an existing obligation is a question of the construction of the deed or agreement.

On the facts of this case, the Disputant may have had statutory obligations to prepare financial accounts and returns of income but it did not have a statutory obligation to pay its accountants to prepare those financial statements and returns of income. The contractual relationship was only that, if the accountants performed work, they would bill the Disputant as the work was performed. As at 31 March 2003, the Disputant was not contractually bound to have the accountants prepare the financial statements and returns of income. On 1 April 2003 the Disputant could have ceased using the accountants and used other means (itself or other agents) to prepare the financial statements and returns of income. This is reinforced because, if contractually bound, the Disputant would be liable here for an unquantified rate of payment.

As the legal obligation to make payment only arose upon work being completed and invoiced for, the Disputant was not definitively committed to the expenditure at 31 March 2003. Accordingly, it had not incurred the expenditure in the 2003 income tax year and was not entitled to the deduction in that year.

The TRA noted that it seems basic that if a taxpayer seeks to deduct accountancy fees in a particular year, then as a general rule that service needs to have been provided in that particular year. Any accounting practice to deduct fees in an earlier year for work done some months later is, as a matter of law, a wrong practice. The TRA left open the possibility that there may be merit in the argument that a pre-commitment on a commercial basis for accounting services to be provided after the end of revenue year in question creates a debt incurred in the earlier year

APPEAL AGAINST DISMISSAL OF STRIKE-OUT APPLICATION

Case:	The Commissioner of Inland Revenue v J A Reid & Ors
Decision date:	13 December 2007
Act:	High Court Rule 186
Keywords:	Misfeasance in public office; strike-out application; vicarious liability; public office; malicious prosecution

Summary

The plaintiff alleged misfeasance in public office against the Commissioner in relation to the tax investigation and SFO referral of the plaintiff's investment scheme. The Commissioner's application to strike out the proceedings was denied by the High Court. He appealed to the Court of Appeal.

Facts

This decision relates to an application by the Commissioner to strike out the Plaintiffs' proceedings.

The proceedings in question relate to the Digi-Tech and NZIL investments promoted by the Plaintiffs in the mid-1990s. The Commissioner investigated the transactions and made a referral to the Serious Fraud Office, which then prosecuted the Plaintiffs on two counts of conspiracy to defraud the public and the Commissioner. The case was heard in 2004 and the Plaintiffs were acquitted. The Plaintiffs have filed proceedings against the Commissioner claiming damages for the tort of misfeasance in a public office.

The Plaintiffs (in the substantive proceeding) filed a claim in the High Court alleging that the Commissioner and his employees exercised their power with an improper motive and with intent to injure the plaintiffs.

The Commissioner applied for an order striking out the proceeding on the grounds that the statement of claim disclosed no reasonable cause of action, and was an abuse of process. The High Court found against the Commissioner as it was not convinced that the plaintiffs claim could not possibly succeed. The Commissioner appealed that decision to the Court of Appeal.

Decision

In considering the criminal proceedings first and whether the claim should be struck out as an improper attempt to re-litigate matters already resolved, the Court saw no reason to depart from the strike-out principle that the proceedings must be determined on the basis the of the facts as pleaded in the statement of claim.

In terms of the argument by the Commissioner that the claim was an attempt to bypass a claim of malicious prosecution, the Court considered these were matters which should be addressed at a substantive hearing.

The Court considered that for an application for strike-out to succeed, it needed to be shown that the cause of action on the facts as pleaded, were so untenable that it could not possibly succeed. Therefore, the Commissioner needed to show one or more of the elements of the tort of misfeasance was absent. The Court found there was no question that the Commissioner held public office but conceded the majority of the allegations focused on employees and contractors. However, the Court accepted for the purpose of strike-out the submission by the respondents that the relevant acts were those that caused the injury and that all those acts were exercises of power conferred on the Commissioner. The fact he may have been assisted by employees or agents did not alter that position.

In relation to the element of intention the Court again accepted for strike-out purposes that the Commissioner acted with the motive alleged in the statement of claim. They conceded that whether it in fact was present would be a matter for trial.

On the basis of the allegations pleaded, the Court of Appeal could not say the claim of misfeasance could not possibly succeed, or that it was an abuse of process. They agreed with the High Court that whether the actions were illegitimate and with improper motive were questions that could only be determined at trial.

The Court did however; acknowledge that the claim could face difficulties in establishing the required intention on the part of the Commissioner and his employees and any proximate cause of damage to the respondents.

REGULAR FEATURES

DUE DATES REMINDER

February 2008

7 End-of-year income tax

2007 end-of-year income tax due for people and organisations with a March balance date and don't have an agent

20 Employer deductions

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

28 GST return and payment due

March 2008

7 Provisional tax instalments due for people and organisations with a March balance date

20 Employer deductions

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

28 GST return and payment due

These dates are taken from Inland Revenue's *Smart business tax due date calendar 2007–2008*. This calendar reflects the due dates for small employers only—less than $100,000 PAYE and SSCWT deductions per annum.

YOUR CHANCE TO COMMENT ON DRAFT TAXATION ITEMS BEFORE THEY ARE FINALISED

This page shows the draft binding rulings, interpretation statements, standard practice statements and other items that we now have available for your review. You can get a copy and give us your comments in these ways.

By internet: Visit **www.ird.govt.nz**
On the homepage, click on "Public consultation" in the right-hand navigation bar. Here you will find links to drafts presently available for comment. You can send in your comments by the internet.

By post: Tick the drafts you want below, fill in your name and address, and return this page to the address below. We'll send you the drafts by return post. Please send any comments in writing, to the address below. We don't have facilities to deal with your comments by phone or at our other offices.

Name _____

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Draft question we've been asked	***Comment deadline***
☐ QB0039: Self-assessment	29 February 2008
☐ DDP0009: Depreciation determination	29 February 2008

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