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TAX INFORMATION
Bulletin

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Inland Revenue
Te Tari Taake

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YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly 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 a user of that legislation, is highly valued.

A list of the items we are currently inviting submissions on can be found at **www.ird.govt.nz**. On the homepage, click on "Public consultation" in the right-hand navigation. Here you will find drafts we are currently consulting on as well as a list of expired items. You can email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

Public Consultation
Office of the Chief Tax Counsel
Inland Revenue
PO Box 2198
Wellington 6140

You can also subscribe to receive regular email updates when we publish new draft items for comment.

Below is a selection of items we are working on as at the time of publication. If you would like a copy of an item please contact us as soon as possible to ensure your views are taken into account. You can get a copy of the draft from **www.ird.govt.nz/public-consultation/** or call the Team Manager, Technical Services Unit on 04 890 6143.

Ref	Draft type/title	Description/background information
ING0017	Deductibility of company administration costs	This draft interpretation guideline sets out Inland Revenue's position on how taxpayers are to determine their employment status for tax purposes. It analyses the terms "employee" in the Income Tax Act 2007 and "contract of service" in the Goods and Services Tax Act 1985, and discusses the common law tests the courts apply to determine whether a person is engaged under a contract of service (employee) or a contract for services (independent contractor).

IN SUMMARY

Items of interest

Binding rulings

Standard practice statements

New legislation

Legal decisions – case notes

ITEMS OF INTEREST

PROCESS FOR TAX AGENTS TO OBTAIN ELECTRONIC AUTHORITIES TO ACT

Summary

Inland Revenue has introduced an additional process to:

- enable tax agents to obtain authorities to act on behalf of their clients electronically
- provide tax agents with processes to authenticate their clients' identities prior to linking them as a client on Inland Revenue's system via a third-party provider.

For most tax agents there will be no changes to Inland Revenue's current requirements.

Background

The current process is for tax agents to have their clients physically sign a written authority to act on their behalf. The tax agent then holds this written authority on file.

Legislation provides the opportunity for the Commissioner to implement electronic authentication of customers. This new process will provide consistency in how tax agents work with customers.

In June 2009 a prescribed manner for obtaining authorities to act electronically was issued to certain tax agents operating in an "e" environment (see Appendix B). Developments in the "e" environment and the use of third parties for delivering services has led to this additional prescribed manner being issued to all tax agents.

It is important to note that the prescribed manner issued in June 2009 still remains current and acceptable. The additional prescribed manner offers another solution to tax agents operating in the "e" environment.

The traditional hand-signed authority to act process remains acceptable to Inland Revenue.

Electronic "authority to act" – what you must do

Section 81(4)(l) of the Tax Administration Act 1994 allows the Commissioner of Inland Revenue to make available customer information where the customer has "authorised in writing or in such other manner as the Commissioner prescribes in that behalf".

This section allows the Commissioner to provide an electronic "authority to act" from your client. To allow this, specific requirements must be met to establish the identity of your client.

To ensure sufficient authority to act has been obtained, the Commissioner must be satisfied that the customer's identity has been verified.

It is the joint responsibility of tax agents and Inland Revenue to maintain a consistent standard in the way we verify our customers. We have developed a process that provides a level of confidence for taxpayers while maintaining the integrity of the tax system.

Verification of the identity of the client giving the authority

A client's identity may be verified through the use of a third-party provider. Using a current New Zealand driver's licence, the tax agent may use a third-party provider to verify client identity. The third-party provider must be reputable and be authorised to verify at least five points from a current New Zealand driver's licence. They must also be able to confirm that the driver's licence is a valid one and has not been reported stolen/cancelled. The points for verification must include:

- first name
- middle name (if given)
- last name
- driver's licence number
- version number.

Where a client does not hold a current New Zealand driver's licence, a copy of the client's identity document (see Appendix A) must be obtained and held.

For identity to be seen as verified, all five points must match. The third-party provider is required to send the tax agent a confirmation report advising whether verification has been successful. The confirmation report must state accepted/rejected next to each key point and include the: name of the third-party provider; time; and date the verification report was requested and completed.

The confirmation report is to be held on file by the tax agent as verification of client identity in line with standard practice statement GNL-430: *Retention of business records by electronic means (Dec 03)*. Where a confirmation report comes back as unsuccessful, a second attempt may be made. If in the second instance a confirmation report comes back as unsuccessful, the tax agent must then

request a copy of the client's photo ID as outlined in the Appendix.

The tax agent must be able to provide a hard copy of the verification report at the request of the Commissioner.

As the tax agent does not receive an actual copy of the client's photo identification using this process, a bank account match must also be completed. The client must provide the tax agent with a bank account under the name submitted as part of the identity verification. Any final refund for the client may only be refunded into the bank account with the corresponding name (either directly from Inland Revenue or via the agency's trust account). Joint bank accounts are also acceptable, where the joint account name includes that provided during verification process. Details of bank account name and number must be held on file alongside the verification report of client identity.

If a client is not willing to provide a bank account number, any refund must then be issued by cheque. The cheque must be made out to the client's full name as provided by the identity document during the verification process (either directly from Inland Revenue or via the agency's trust account). A copy of the cheque issued must be made and held on file by the online tax agent (this is not required if the refund cheque is issued by Inland Revenue direct to the client).

The process of bank account matching reduces the risk of identity fraud. The perceived benefit of identity fraud through online tax agents is reduced where a bank account match is completed. Substantial effort would be required by an individual to create a bank account for the purpose of obtaining a refund from an online tax agent through the use of identity fraud.

Client must provide sufficient authority

Inland Revenue recognises that some online tax agents adopt a "tick box" approach for obtaining authority to act from the customer. Where this approach is used, the tax agent must make clear as a minimum all the following points for Inland Revenue to be satisfied that sufficient authority to act has been obtained. The authority to act must:

- authorise the tax agent to obtain the customer's information from Inland Revenue
- state the name of the tax agency and/or individual agent's name, plus staff that will be acting on behalf of the customer
- state what tax types the tax agent will be acting on behalf of the customer (the online tax agent may wish to specify "ALL" tax types to ensure full understanding of the client's tax position)
- specify the time for which the authority to act endures and how and when the authority to act can be terminated by either party
- state to the customer that linking allows the tax agent to have full access to information held by Inland Revenue and ability to modify customer details relating to the tax type they are linked for
- state where correspondence for linked tax types will be directed, either to the online tax agent or the client
- state that authority is given for any refund credits to be transferred to the agency's trust account prior to refund to the client (if applicable)
- authorise the online tax agent to prepare, submit and sign tax returns on behalf of the client.

Each point above must have its own "tick box" so the customer is fully aware of the agreement they are entering into when authorising authority to act to the tax agent.

The authority to act points must be agreed to **separately** from the online tax agent's terms and conditions or contract agreement.

A copy of the customer's authority to act must be held on file along with the verification of identity.

Consequences of not obtaining sufficient authority to act

Section 34B(8) of the Tax Administration Act 1994 states:

> The Commissioner may remove a person from the list of tax agents if the Commissioner is satisfied that—
>
> (a) the applicant is not eligible to be a tax agent:
>
> (b) continuing to list the applicant as a tax agent would adversely affect the integrity of the tax system.

The Commissioner may remove a person from the list of tax agents where continuing to list the applicant as a tax agent would adversely affect the integrity of the tax system.

Timeframe

If choosing to operate in an "e" environment, with the use of a third party for client identity verification, full adherence to the specification outlined above is required by 1 February 2012.

If tax agents have any questions regarding these requirements they should in the first instance contact their agent account manager or community compliance officer.

APPENDIX A: ACCEPTABLE FORMS OF ID

There are two separate criteria for authentication purposes. The first is for customers 16 years and over and the second is for persons under 16 years.

Customers 16 years and over

Acceptable proof requires customers, 16 years and over, of tax agents to establish their identity by providing identity documents which must contain a photo of the client as listed below:

- New Zealand driver's licence
- New Zealand passport (please scan/copy the pages showing photo, name and specimen signature)
- overseas passport with New Zealand immigration visa/permit (please scan/copy the pages showing photo, name, any pages showing current work, visitor permits, or residency documentation and a specimen signature) or call Inland Revenue on 0800 227 774 for exempt list
- New Zealand firearms or dealers' licence
- New Zealand 18+ card
- International Drivers' Permit (issued by a member country of the UN Convention on Road Traffic)
- New Zealand certificate of identity (issued by Department of Labour or Department of Internal Affairs).

For a child under 16

Full New Zealand birth certificate issued on or after 1 January 1998. Birth certificates issued after 1 January 1998 carry a unique identification number. If you hold a birth certificate issued before 1 January 1998 and wish to hold a birth certificate with a unique identification number, contact the Department of Internal Affairs.

Plus full proof of the parent or guardian identity by providing one legible scanned copy of an identity document which must contain a photo as listed above.

APPENDIX B: JUNE 2009 ENABLING ELECTRONIC AUTHORITY TO ACT

The following standards have been identified under which the Commissioner of Inland Revenue can prescribe a manner to enable electronic authority to act:

- Establishing the identity of the client giving the authority
- Client must provide sufficient authority
- Tax agent is able to record and store the client's authority
- Inland Revenue has access to information.

Verification of the identity of the client giving the authority

The identity of the person providing the authority to act must be established to a degree of confidence to be reasonably sure that they are entitled to provide that authority, ie, it is their information they are authorising the tax agent to access, or they have the authority to authorise the tax agent to access information regarding a non-individual (eg, a shareholder/director of a company).

They would scan or copy their ID and email or fax/post to agent. The agent would then save the email, IP address, and time logs of the email. This proposed process has itself introduced a new level of risk; the ability to manipulate documents electronically to facilitate identity theft. This risk can be managed with controls and measured to ensure if any increase in identity theft occurs, this can be addressed (see "Back-up controls" below).

The form of ID required will be one legible scanned copy of an identification document that contains a photo. The only acceptable identification documents are listed at Appendix A.

If the PTS customer is a child under 16, the child's parent or guardian is required to provide:

- one legible photocopy of a document which shows the relationship between them and the child such as a full birth certificate, and
- full proof of their own identity as parent or guardian by providing one legible photocopy of an identity document which must contain a photo as listed in Appendix A.

Client must provide sufficient authority

The authority received by the tax agent must be adequate for them to act for the customer with regard to their tax affairs and to receive information held by Inland Revenue (eg, if the tax agent is to link the client for the GST tax type then the client's authority should cover GST). This authority must have the customer's signature (by hand) and can be scanned and emailed or faxed to the agent to facilitate electronic transmission.

Currently Inland Revenue does not provide any guidance through policy as to the content of a client's written authority. There is no proposed change to this position.

Tax agent is able to record and store the client's signed authority to act and ID

A record of the authority and ID provided by the client must be able to be maintained to standards agreeable to Inland Revenue. The standards would follow those required for the electronic storage of business records (as set out in standard practice statement GNL-430).

These standards are as follows.

Auditable

Client authorisations provided electronically must be kept in a manner that allows Inland Revenue to readily review that authority and identification documents of the person who provided them

e-Format

Format of electronic records

Internal controls must be adequate to ensure that all client authorisations provided electronically, including those provided through the Internet, are completely and accurately captured.

Format of electronic records originally in paper form

Paper records transferred to electronic form must be copied completely and accurately in a format identical in all respects to the source-paper document.

Any additional information must not obscure the view of the original record information and must be distinguishable as additions to the original record.

Emails

Emails that communicate a client's authority to act to a tax agent are required to be retained with their origin, destination and time of electronic communication.

Hardware/software

In the event of hardware/software changes:

- facilities for retrieving electronic records that have been stored on the former system must be retained or;
- the electronic records must be converted to a compatible system and both sets of files retained complete with documentation showing the method of transfer and controls in place to ensure the transfer was complete and accurate.

Security

Tax agents should be able to demonstrate that their electronic records systems are secure from both unauthorised access and data alterations.

This usually involves developing and documenting a security program that:

- establishes controls to ensure that only authorised personnel have access to electronic records;
- provides for back-up and recovery of records;
- ensures that personnel are trained to safeguard sensitive or classified electronic records; and
- minimises the risk of unauthorised alteration, addition or erasure.

Back-up

Back-up and recovery procedures must be sufficient to guarantee the availability of electronic records.

Retrievable

The electronic records must be readily accessible and capable of being retrieved on legible hard copy (printouts) or supplied in electronic form (on electronic media and unencrypted in a form able to be read by Inland Revenue staff) if required.

Inland Revenue access to information

Inland Revenue must be able to access the:

1. evidence used to establish the client's identity
2. record of the authority provided by the client.

Assistance to Inland Revenue officers

Adequate viewing and printing facilities should be made available free of charge to Inland Revenue officers. If requested, persons must locate selected records that have been stored and print any items selected, free of charge to Inland Revenue officers.

Persons must be available to explain the operation of their computer system to Inland Revenue officers. This is the case whether the system is owned and operated by the person or out-sourced to a third party.

An electronic facility by which a tax agent obtains a client's authority to act that meets these criteria would reduce the risk that the releasing of that client's information to that tax agent will not breach the provisions of section 81 of the Tax Administration Act 1994.

Back-up controls

AAM sample check ID is stored

As part of the tax agent's extension of time (EOT) agreement, our Agent Account Managers (AAMs) periodically request to view samples of the authorities to act when visiting tax agents to ensure that the requirements set out above are being met. As part of this policy we would introduce the requirement to view the ID provided at the time of the authority, and match these to those types of ID stated in this policy.

AAM sample check stored ID to Inland Revenue-held documents

Also, AAMs would sample-check the details of the PTS customer and in some circumstances the source documents held within Inland Revenue to the ID to ensure reasonable checks have been undertaken to establish the identity.

At the time of linking the customer, ask agents:

a) whether they hold authority to act, and

b) where this is a PTS customer, have they established the identity of the customer.

Validate the correct customer received the refund

Outbound calls could be made to validate the customer (using existing contact centre validation rules) and confirm receipt of refund. A sample check of customers who engage the services of an electronic PTSI or who provided their identity documents electronically could be undertaken at regular intervals to identity occurrences of identity theft.

Monitor for increase in identity theft-related fraud

Assess whether the level of identity fraud in PTSI's have increased and amend this policy where necessary to address any risks that may emerge. Ongoing monitoring should be undertaken for any escalating behaviour that may indicate potential fraud, ie, recent PTS refund then registration of new entity with that PTS customer associated, and or tax types GST/FAM/Tax Credits and subsequent refund applications.

PTS intermediaries

PTSIs would be required to capture all occurrences where reasonable steps have been undertaken to establish the identity and where that identity was not established.

PTSI would be required to capture the email, IP address, and time logs of the authorities.

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 their tax liability based on it.

For full details of how binding rulings work, see *Adjudication & Rulings: A guide to binding rulings (IR 715)* or pages 1–6 of the *TIB* Vol 6, No 12 (May 1995) or pages 1–3 of Vol 7, No 2 (August 1995). You can download these publications free from our website at **www.ird.govt.nz**

PRODUCT RULING BR PRD 11/05: TELECOM CORPORATION OF NEW ZEALAND LIMITED

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

Name of the person who applied for the Ruling

This Ruling has been applied for by Telecom Corporation of New Zealand Limited (Telecom).

Taxation Laws

All legislative references are to the Income Tax Act 2007 ("Act") unless otherwise stated.

This Ruling applies in respect of the Act, in particular ss BD 1, BG 1, part C, ss DA 1, DB 23, DB 49, ED 1 and GA 1, and the Estate and Gift Duties Act 1968, in particular ss 61 and 63.

This Ruling uses the following term defined in the Telecommunications Act 2001: "Demerger Distribution".

This Ruling uses the following term defined in s 2 of the Estate and Gift Duties Act 1968: "dutiable gift".

This Ruling uses the following terms defined in s YA 1: "assessable income", "dividend", "identical share", "original share", "returning share transfer", "share-lending arrangement", "share supplier" and "share user".

The Arrangement to which this Ruling applies

References in this Ruling to:

- "Telecom Group" or "Telecom companies" mean Telecom and its subsidiaries at the relevant time;
- "Chorus Group" or "Chorus companies" mean Chorus Limited (Chorus), the listed parent of the Chorus group of companies to be demerged from the Telecom Group, and its subsidiaries at the relevant time.

The Arrangement is the demerger of Chorus (including the Chorus Group and Chorus companies) from Telecom (including the Telecom Group and Telecom companies) ("Demerger") to bring about the structural separation of the Telecom Group's network infrastructure businesses ("Chorus Businesses") from its other retail-focused businesses to meet the independence requirement of the Ultra-Fast Broadband (UFB) Initiative the Government announced in September 2009. The Demerger will involve the following steps (which are described further in paragraph 19):

- On 1 July 2011 Telecom established the Chorus companies, being Chorus, and Chorus's wholly-owned subsidiary Chorus New Zealand Limited (Chorus New Zealand), with nominal ordinary share capital.
- To enable Chorus New Zealand to purchase the Chorus assets from the Telecom companies, Chorus will, on or around the date on which that purchase is to be completed, issue additional share capital to Telecom, and will borrow under a loan facility from third party banks. Chorus New Zealand will similarly issue additional share capital to Chorus and will also borrow from Chorus under an inter-company loan. (Chorus may also be entitled to receive an amount from a Telecom company in connection with the issue of bonds to be exchanged for bonds currently on issue by a Telecom company, and for agreeing to assume liability under related swap transactions. To that extent, the amount Chorus is required to draw-down under its loan facility will be reduced.)
- Chorus New Zealand will purchase the Chorus assets and liabilities from the Telecom companies for an amount to be determined (but expected to fall within a range of NZ$2 billion to NZ$2.5 billion).
- Telecom will distribute its shares in Chorus to Telecom's existing shareholders, or to a sale agent in the case of ineligible overseas shareholders.

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

Background to the Ultra-Fast Broadband Initiative

Objective of the Ultra-Fast Broadband Initiative

1. The Government announced the UFB Initiative in September 2009. In October 2009, the Government released *New Zealand Government Ultra-Fast Broadband Initiative: Invitation to Participate in Partner Selection Process* (Ministry of Economic Development, October 2009) ("Invitation to Participate") setting out the process and terms and conditions for the selection of government partners in the UFB Initiative. The Invitation to Participate sets out the Government's overall objective for the UFB Initiative (UFB Objective) as follows (footnotes omitted):

> **1.1 Ultra-fast Broadband Initiative**
>
> **(a)** The government's overall objective for the ultra-fast broadband investment initiative **(UFB Initiative)** is:
>
> To accelerate the roll-out of ultra-fast broadband to 75 percent of New Zealanders over ten years, concentrating in the first six years on priority broadband users such as businesses, schools and health services, plus greenfield developments and certain tranches of residential areas **(UFB Objective)**.

2. The Government intends to invest up to NZ$1.5 billion towards achieving the UFB Objective, with the expectation that this will be at least matched by private sector investment.

Structure of investment in the Ultra-Fast Broadband Initiative

3. Crown Fibre Holdings Limited ("Crown Fibre") will manage the Government's investment in the UFB Initiative. Crown Fibre is a wholly-owned Crown investment company incorporated on 29 October 2009. Crown Fibre was responsible for conducting the partner selection process, and will manage the Government's investment in the fibre-optic communications network in the future.

4. One of Crown Fibre's core roles was to select parties with which to co-invest in the UFB Initiative ("Partners"). Telecom was a participant in this partner selection process. On 24 May 2011, the Communications and Information Technology Minister, Steven Joyce, announced that an agreement had been reached with Telecom under which Telecom would build a fibre-optic network in Auckland, the eastern and lower North Island, and most of the South Island.

5. The Government's investment in the UFB Initiative is to be effected through local fibre companies. Local fibre companies will deploy the fibre networks and sell access to products on those networks. In the case of Telecom's proposal, Chorus will in effect be the local fibre company, although the terms of the arrangements between Crown Fibre and Chorus are not identical to the terms envisaged by the Invitation to Participate.

Requirement for independence

6. The *New Zealand Government Ultra-Fast Broadband Initiative: Overview of Initiative* (Ministry of Economic Development, September 2009) outlined the requirements that local fibre companies operate on an independent basis and provides as follows (footnotes omitted):

> 66. The following principles will apply:
>
> ...
>
> - independence – LFCs [local fibre companies] will be prohibited from providing retail services.
>
> 67. In terms of independence, in the event that a prospective LFC partner currently owns a retail operation, the party either:
>
> - must divest itself of the retail operation (or alternatively alter governance arrangements so that it does not control the retail operation); or
> - will not have the right to appoint the majority of directors to the Board of the relevant LFC, and the chair of the LFC Board must be an independent chair agreed to by all shareholders.

7. This condition is repeated as one of the UFB Initiative's "open access requirements" in the Invitation to Participate, which provides as follows:

> **13. Open Access Requirements**
>
> ...
>
> These are the Open Access requirements.
>
> **13.4 Impact of current telecommunications operations**
>
> In the event that a prospective Partner, or a related or associated entity of the Partner, currently (or at any time while a Partner) owns or controls a business which provides any Telecommunications Service other than the Permitted Services, the Partner:
>
> **(a)** must fully divest, or must ensure that the Partner's related or associated entity fully divests, itself of that business; or
>
> **(b)** may not appoint the majority of directors to the Board of the relevant LFC [local fibre company], and the chair of the LFC Board must be an independent chair agreed to by all shareholders.

8. "Permitted Services" are services of the type that will be provided in relation to the fibre optic network infrastructure. Permitted Services (and related terms) are defined in the Invitation to Participate as follows:

> **7. DEFINITIONS AND INTERPRETATION**
>
> **7.1 Definitions**
>
> The terms used in this document shall have the following meanings:
>
> ...
>
> **Layer 1** means layer 1 of the OSI Model, which is normally associated with passive fibre optic network infrastructure;
>
> **Layer 1 Service** means any service which operates at Layer 1;
>
> **Layer 2** means layer 2 of the OSI Model, which is normally associated with active fibre optic network infrastructure;
>
> **Layer 2 Service** means any service which operates at Layer 2;
>
> ...
>
> **OSI Model** means the seven-layer model of network architecture known as the Open Systems Interconnection Model;
>
> ...
>
> **Permitted Services** means the services that may be provided by an LFC [local fibre company], being any Layer 1 Services and, subject to CFH [Crown Fibre] consent, any Layer 2 Service;
>
> ...

Application to the Telecom Group

9. The Telecom Group has a significant operating business unit devoted to the provision of retail telecommunications services to the household and business markets. Because these retail services are not Permitted Services, a member of the Telecom Group would have been prevented from being a Partner unless it was prepared to comply with the requirement not to appoint the majority of the directors of the board of the local fibre company and to accept an independent board chair. Telecom considered that option commercially unacceptable, because it would not have given it the requisite degree of control over the local fibre company. Therefore, Telecom formed the view that the only way it could realistically participate in the UFB Initiative would be to structurally separate.

10. Telecom decided that for its network and wholesale business units (which do provide Permitted Services) to participate as a bidder in the UFB Initiative, it would (subject to its bid being successful and receiving relevant approvals, including shareholder approval) demerge and structurally separate those business units (ie, the Chorus Businesses) from its other business units, which predominantly involve the provision of retail telecommunications services. The entities carrying on the Chorus Businesses following the Demerger (ie, the Chorus companies) will be eligible to participate in the UFB Initiative without breaching the specific requirements imposed by the Government and in a way that does not unduly restrict the Chorus Group's governance arrangements.

Regulatory implications of structural separation

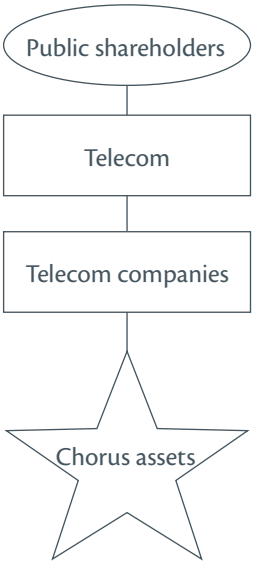
11. The *Discussion Document: Regulatory Implications of Structural Separation* (Ministry of Economic Development, September 2010) sets out the regulatory implications of the structural separation of Telecom as follows:

> **2 Overview**
>
> 14 Structural separation would represent a significant change to the structure of the New Zealand telecommunications industry. Historically, the industry has been dominated by a vertically integrated incumbent operating at all levels of the market, which has given rise to issues regarding the effectiveness of competition. The new split would affect both legacy and next generation access infrastructure.
>
> ...

The Demerger

12. The following diagram summarises the current structure of the Telecom Group.

Current structure of Telecom Group



Overview

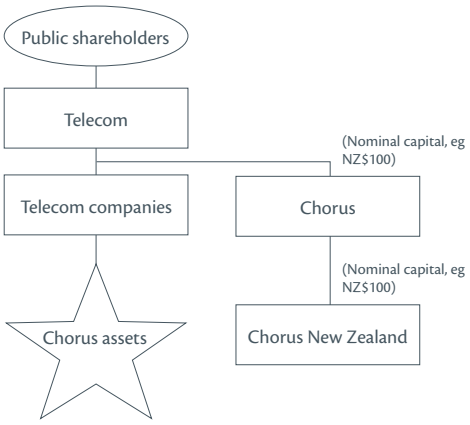
13. Effecting the Demerger requires the following:
    - The establishment of the Chorus companies to separately hold and carry on the Chorus Businesses.
    - The transfer of assets and liabilities of the Chorus Businesses (designated assets and liabilities), by the Telecom companies that hold or are party to those assets and liabilities immediately before the transfer to Chorus New Zealand and the entering into of certain transitional and long-term commercial arrangements between one or more Telecom companies and one or more Chorus companies. (The designated assets and liabilities will be described in the Separation Deed (see paragraph 14) and in a proposal approved by Order in Council made under s 46 of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 ("Broadband Act").)
    - The capitalisation of and provision of interim funding to Chorus and Chorus New Zealand to enable Chorus New Zealand to acquire the assets and liabilities of the Chorus Businesses.
    - The distribution, to each holder of ordinary shares in Telecom, of ordinary shares in Chorus under an arrangement approved by the High Court under part 15 of the Companies Act 1993 ("Companies Act") (subject to the position of ineligible overseas shareholders discussed in paras 22 and 23).
14. The Demerger will be carried out in accordance with:
    - the Broadband Act;
    - a scheme of arrangement approved by the High Court;
    - a separation deed between the relevant companies ("Separation Deed").
15. The Broadband Act amends the Telecommunications Act 2001. The Broadband Act contains measures to reform certain regulatory provisions currently applicable to the Telecom Group to reflect the structural separation of the Telecom Group and the Government's UFB Initiative. The legislation deals with aspects of the Demerger that are affected by existing legislation and provides for certain outcomes different from those that would otherwise result (eg, in respect of public works and resource management matters). The Broadband Act also contains measures providing for the application of the Inland Revenue Acts to the Demerger.
16. The scheme of arrangement approved by the High Court under part 15 of the Companies Act will use a procedure for corporate reorganisations that involves obtaining shareholder approval, and consideration by the High Court of the interests of certain parties. The scheme will describe and give legal effect to the steps by which Chorus shares are to be distributed to Telecom shareholders, and will give legal effect to the Separation Deed.
17. The Separation Deed will provide for the transfer of the designated assets and liabilities to the Chorus Group, the assignment or novation of certain contracts related to the Chorus Businesses to the Chorus Group, and certain transitional arrangements between the Telecom Group and the Chorus Group.
18. Following the Arrangement, Telecom and Chorus will exist and operate as separate entities with separate ownership and management structures. Telecom will remain listed on the New Zealand stock exchange (NZSX) and Australian Securities Exchange and it is intended that Chorus will be listed on both the NZSX and Australian Securities Exchange. Telecom American Depository Shares (ADSs) will continue to be listed on the New York Stock Exchange. Chorus shares or ADSs are not intended to be listed in the United States, but it is expected that Chorus ADSs will trade on an over-the-counter basis in the United States.

Capitalisation of Chorus and Chorus companies and distribution to Telecom shareholders

19. The four steps by which the Demerger will occur are summarised in the text and diagrams that follow (all figures are approximate, and amounts payable may be settled by payment direction in some cases).
20. References to the "Demerger Date" are to the date on which Chorus New Zealand acquires the Chorus Businesses under the Separation Deed and on which the Demerger Distribution is provided to Telecom shareholders. This date is expected to be 30 November 2011 or such other date as is determined by the board of directors of Telecom and notified by Telecom to the NZSX, Australian Securities Exchange and New York Stock Exchange.

Step 1: Telecom establishes the Chorus companies with nominal ordinary share capital.

Step 1: Telecom Demerger



Before Telecom applies for initial court orders

(i) On 1 July 2011, the Chorus companies (being Chorus and Chorus New Zealand) were incorporated with nominal share capital. As at the date of this ruling, Telecom holds all of the shares in Chorus and Chorus in turn holds all of the shares in Chorus New Zealand.

Following receipt of final court orders

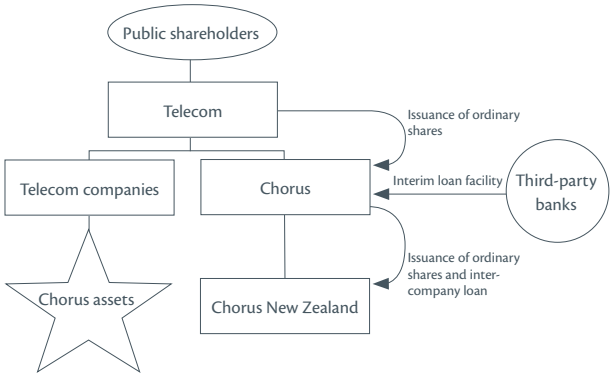
(ii) For a certain period of days before the Demerger Date (expected to be seven business days in the case of trading on the Australian Securities Exchange, and five business days in the case of trading on the NZSX):

- Telecom will trade on an "ex-demerger entitlements" basis;
- Chorus will trade (initially on a deferred settlement basis).

On the Demerger Date

Step 2: Telecom capitalises Chorus and Chorus in turn capitalises Chorus New Zealand in an equal amount. Chorus borrows an amount under an interim loan facility from third-party banks.

Step 2: Telecom Demerger



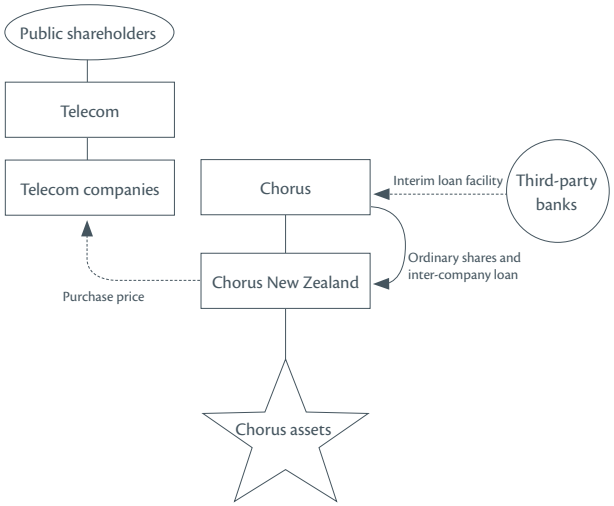
(iv) On the Demerger Date, Telecom will subscribe for such number of Chorus shares as will, together with the existing Chorus shares, enable Telecom to make the pro rata distribution referred to in Step 4 below, in consideration for an aggregate issue price to be determined having regard to each of the purchase price payable by Chorus New Zealand under the Separation Deed and the amount Chorus will have available from borrowings.

(v) Chorus will in turn subscribe for an equivalent number of Chorus New Zealand shares in consideration for an equivalent aggregate issue price.

(vi) Chorus will provide a loan to Chorus New Zealand of an amount sufficient (when considered together with the subscription amount received for the Chorus New Zealand shares) for Chorus New Zealand to pay the purchase price under the Separation Deed. Chorus will obtain the funds for the loan to Chorus New Zealand from sources which include a drawdown under an interim loan facility of an amount expected to fall within a range of NZ$1.5 billion to NZ$2 billion. (Chorus may also be entitled to receive an amount from a Telecom company in connection with the issue of bonds to be exchanged for bonds currently on issue by a Telecom company, and for agreeing to assume liability under related swap transactions. To that extent, the amount Chorus is required to draw-down under its loan facility will be reduced.)

Step 3: Chorus New Zealand purchases the Chorus assets from the Telecom companies.

Step 3: Telecom Demerger

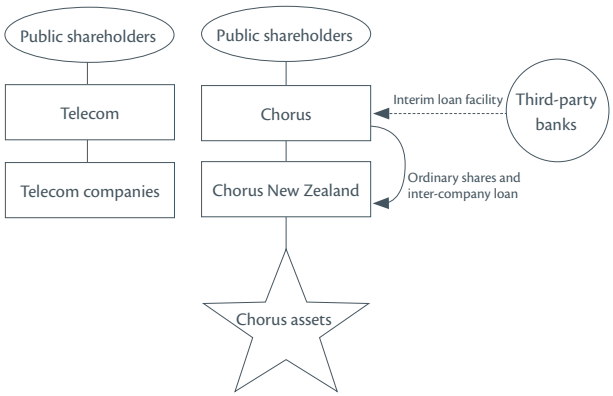


(vii) The designated assets and liabilities will transfer to Chorus New Zealand from the relevant Telecom companies.

(viii) Using the proceeds of the share issues and the funds borrowed under the interim loan facility and received in connection with the bond exchange and assumption of swaps as described in (vi) above, if any (and on-lent by Chorus to Chorus New Zealand), Chorus New Zealand will pay to the relevant Telecom companies an aggregate amount that is to be determined (but expected to fall within a range of NZ$2 billion to NZ$2.5 billion) in consideration for the transfer of the assets and liabilities under the Separation Deed.

Step 4: Telecom distributes its shares in Chorus to Telecom's existing shareholders.

Step 4: Telecom Demerger



(ix) On the Demerger Date, Telecom will make the Demerger Distribution by the following mechanism:

(a) Telecom will make a pro rata distribution (the Demerger Distribution) to Telecom shareholders, conferring on such holders an entitlement to an amount to be ascertained by reference to the volume weighted average price of the Chorus shares as traded on the NZSX over the last five trading days before the Demerger Date (and in accordance with the ratio of Telecom shares to Chorus shares and the approach to rounding described in (b) below).

(b) Each Eligible Shareholder's entitlement to the pro rata distribution amount will be automatically applied to acquire from Telecom the relevant number of Chorus shares to be distributed to that Telecom shareholder. Each Eligible Shareholder will receive a distribution of one Chorus share for every five Telecom shares held, with the number of Chorus shares to be rounded if necessary to the nearest whole number in circumstances where there may otherwise be fractional interests in Chorus shares.

(c) In the case of ineligible overseas shareholders (being a shareholder other than an Eligible Shareholder), the Chorus shares that such holders would otherwise have been entitled to receive as a result of the Demerger Distribution will be transferred to a sale agent, who will then sell them and pay to each ineligible overseas shareholder its share of the net proceeds of sale of those Chorus shares.

(x) Telecom will record the distribution in its accounts (for accounting purposes) partly as a return of capital and partly as a distribution of retained earnings. The amount of the return of capital part will be calculated by:

(a) dividing an amount "A" (being the number of Chorus shares on issue immediately following the Demerger Distribution multiplied by the volume weighted average price of the Chorus shares as traded on the NZSX over the last five trading days before the Demerger Date); by

(b) the sum of amount "A" referred to in subparagraph (a) and an amount "B" (being the number of Telecom shares on issue immediately following the Demerger Distribution multiplied by the volume weighted average price of Telecom shares as traded on the NZSX over the last five trading days before the Demerger Date, on the basis that the Telecom shares trade on an ex-demerger entitlements basis on the NZSX for the whole of this period); and

(c) multiplying the result by the balance of Telecom's share capital account immediately before the distribution.

The part of the distribution that is not a return of capital (as calculated above) will be recorded in Telecom's accounts (for accounting purposes) as a dividend.

21. After the Demerger, the Telecom Group and the Chorus Group will exist and operate as separate corporate groups with separate ownership and management structures. Before the Demerger a transitional governance structure will be established in respect of the Telecom Group and the Chorus Group. The Telecom Group and the Chorus Group will enter into transitional and long-term commercial arrangements involving supplies being made between both groups after the Demerger.

Ineligible overseas shareholders

22. Certain Telecom shareholders will not be eligible to participate in the Demerger Distribution in the same way as other shareholders. Ineligible overseas shareholders are those Telecom shareholders who are not, on the record date for the demerger, Eligible Shareholders. "Eligible Shareholders" are Telecom shareholders whose registered address as at 7:00 pm on the record date is in:
    - New Zealand, Australia, the United States, the United Kingdom Canada, Germany, Hong Kong, Japan, Luxembourg, Norway, the Netherlands, Singapore or Switzerland; or
    - a jurisdiction in which Telecom reasonably believes that it is not prohibited and not unduly onerous or impracticable to distribute Chorus shares to a Telecom shareholder pursuant to the demerger.
23. The shares in Chorus that the ineligible overseas shareholders would otherwise have been entitled to receive as a result of the Demerger Distribution, will be transferred to a sale agent, who will sell them on the NZSX and pay to each ineligible overseas shareholder its share of the net proceeds of sale of those Chorus shares.

Relevant documents

24. The following documents are relevant to the Arrangement:
    - Telecommunications Act 2001, as amended by the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011;
    - draft Scheme Booklet dated 26 August 2011, provided to Inland Revenue on 26 August 2011;
    - draft Separation Arrangement Plan, provided to Inland Revenue on 29 August 2011.

Condition stipulated by the Commissioner

This Ruling is made subject to the following condition:

a) Subpart 2 of Part 2 of the Broadband Act has come into force. This condition will be satisfied:
    (i) if an Order in Council has been made under s 36 of the Broadband Act; and
    (ii) from and including the date on which the Demerger Distribution is made.

How the Taxation Laws apply to the Arrangement

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

- For each holder of a Telecom ordinary share or shares, the Demerger Distribution will not constitute:
    - a dividend under subpart CD of the Act;
    - any other form of assessable income under s BD 1 or part C of the Act; or
    - a dutiable gift under the Estate and Gift Duties Act 1968.
- For the purposes of ss CA 1, CB 1, CB 3, CB 4, CB 5, CH 1, DB 49 and ED 1, a holder of a Telecom ordinary share or shares who receives a share or shares in Chorus as a result of the Demerger Distribution, is treated as having acquired that Chorus share or shares for the same purposes and at the same time as the Telecom shareholder acquired the Telecom share or shares in respect of which that Demerger Distribution was made.
- For the purposes of ss CH 1, DA 1, DB 23, DB 49 and ED 1, a holder of a Telecom ordinary share or shares who receives a share or shares in Chorus as a consequence of the Demerger Distribution shall be treated as having paid an amount given by the following formula, for the acquisition of the Chorus share or shares received and the corresponding Telecom ordinary share or shares (as applicable):

$$\frac{\text{pre-calculation amount paid}}{\text{combined MV}} \times \text{individual MV}$$

Where the:

(i) **pre-calculation amount paid** is the person's expenditure or loss incurred in acquiring the relevant Telecom ordinary share or shares (ignoring the provisions of the Broadband Act);

(ii) **individual MV** is the market capitalisation on the implementation date of the demerger of either Chorus or Telecom, as applicable;

(iii) **combined MV** is the total market capitalisation, on the implementation date of the demerger of the Chorus and Telecom.

For these purposes, "market capitalisation on the implementation date of the demerger" means the number of Chorus shares or Telecom shares (as applicable) on issue immediately following the Demerger Distribution multiplied by the volume weighted average price of Chorus shares or Telecom shares (as applicable) as traded on the NZSX over the first five trading days, starting on the date from which Chorus is listed (provided that an alternative method of calculating market capitalisation has not been prescribed by an Order in Council made under s 46 of the Broadband Act).

- If, on or before the date on which the Demerger Distribution occurs, and ignoring the effect of the Broadband Act, an arrangement is, or would but for the Demerger Distribution, be a returning share transfer under which a Telecom share is an original share, and under the arrangement the share user is required to transfer a Chorus share to the share supplier (a "Telecom Securities Lending Arrangement"):
  (i) that arrangement will continue to be a returning share transfer after the Demerger Distribution; and
  (ii) a Chorus share will be treated as forming part of a Telecom share for the purposes of s ED 1 and the definitions of "identical share" and "original share" in s YA 1.
- For a Telecom Securities Lending Arrangement that meets the definition of "returning share transfer" or "share-lending arrangement" in s YA 1 (taking into account the ruling set out in the fourth bullet point above), the rulings in the second and third bullet points above apply equally to the relevant share supplier under that Telecom Securities Lending Arrangement as if that share supplier were the shareholder referred to in those rulings.
- Sections BG 1 and GA 1 will not apply to vary or negate any of the above ruling bullet points.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 1 July 2011 and ending on 30 June 2014.

This Ruling is signed by me on the 30th day of August 2011.

Dinesh Gupta
Manager (Taxpayer Rulings)

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.

SPS 11/05: DISPUTES RESOLUTION PROCESS COMMENCED BY THE 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 an assessment when the Commissioner commences the disputes resolution process.
2. Unless specified otherwise, all legislative references in this SPS refer to the Tax Administration Act 1994 ("TAA").
3. Where a taxpayer commences the disputes resolution process, the Commissioner's practice is set out in SPS 11/06: *Disputes resolution process commenced by a taxpayer*.
4. The Commissioner regards this SPS as a reference guide for taxpayers and Inland Revenue officers. Where possible, Inland Revenue officers must follow the practices outlined in this SPS.
5. The disputes resolution process is designed to ensure 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.
6. 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 aims to ensure that all the relevant evidence, facts and legal arguments are canvassed before a case proceeds to a court.
7. One of the most significant changes introduced by the Taxation (Tax Administration and Remedial Matters) Act 2011 is the amendment made to the exclusion rule in section 138G of the TAA. The effect of this change is that the Commissioner and the disputant are now only restricted to issues and propositions of law disclosed in their respective Statements of Position, in subsequent challenge proceedings. The Commissioner does not view this change as detracting from the desirability, as far as practicable, for both parties to a dispute to disclose all relevant facts and evidence as early as possible in order to resolve a dispute.
   For the purposes of this SPS, the Commissioner for convenience will refer to the new rule in section 138G as the "issues and propositions of law exclusion rule".
8. In accordance with the objectives of the disputes resolution process, the Commissioner (unless a statutory exception applies under section 89C or 89N(1)(c)) must go through the disputes resolution process before the Commissioner can issue an assessment.

Application

9. This SPS applies from 13 October 2011 and incorporates legislative changes to the disputes process enacted in the Taxation (Tax Administration and Remedial Matters) Act 2011.
10. It replaces SPS 10/04: *Disputes resolution process commenced by the Commissioner of Inland Revenue* dated 8 November 2010.

Background

11. The tax disputes resolution procedures were introduced in accordance with the recommendations of the Richardson Committee in the *Report of the Organisational Review of the Inland Revenue Department* (April 1994) and were designed to reduce the number of disputes by:
    a) promoting full disclosure, and
    b) encouraging the prompt and efficient resolution of tax disputes, and
    c) promoting the early identification of issues, and
    d) improving the accuracy of decisions.
12. The disputes resolution process ensures 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.
13. 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 aims to ensure and encourage as far as practicable, the disclosure of all relevant facts, evidence, issues and propositions of law before a case proceeds to a court or hearing authority.

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

15. 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 the issue of:

    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 other disputable decision (the prescribed form is the *Notice of proposed adjustment (IR 770)*). A NOPA is the formal document which begins the disputes process;

    b) a notice of response ("NOR"): this must be issued by the recipient of a NOPA if they disagree with it (the preferred form is the *Notice of response (IR 771)*);

    c) a disclosure notice and statement of position ("SOP"): the issue of a disclosure notice and SOP by the Commissioner triggers the requirement for the taxpayer to provide a SOP to continue the dispute. Each SOP must provide an outline of the facts, evidence, issues and propositions of law with sufficient details to support the positions taken. Each party must issue a SOP (the preferred form is the *Statement of position (IR 773)*). The SOPs are important documents because they limit the issues and propositions of law that either party can rely on if the case proceeds to court to what is included in the SOP (unless a hearing authority makes an order that allows a party to raise new issues and propositions of law under section 138G(2)).

16. There are also two administrative phases in the disputes process: the conference and adjudication phases. If the dispute has not been already resolved after the NOR phase, the Commissioner's practice will be to hold a conference. A conference can be a formal or informal discussion between the parties to clarify and, if possible, resolve the issues.

17. If the dispute remains unresolved after the conference phase, the Commissioner will prepare a SOP and refer the dispute to adjudication, except in certain circumstances. One of the circumstances where the Commissioner will not refer a dispute to adjudication is where the Commissioner and the taxpayer have agreed in writing not to complete the disputes process (referred to as "opt out", see paragraphs 172 to 195).

18. Adjudication involves an independent review of the dispute by Inland Revenue's Adjudication Unit, which was formed to provide an internal but impartial review of unresolved disputes. Adjudication is the final phase in the disputes process before the taxpayer's assessment is amended (if it is to be amended) following the exchange of the SOPs.

19. Timely progression of disputes through the disputes process may require the use of the Commissioner's information-gathering powers (particularly section 17) before and/or during the disputes process.

20. Inland Revenue has a quality assurance review process known as Core Task Assurance ("CTA") which is designed to ensure that key pieces of work (including NOPAs and SOPs) are subject to an independent review by Legal and Technical Services ("LTS") before being issued. Given the importance of the disputes process to the Commissioner and to taxpayers, Inland Revenue officers are required to get CTA approval of disputes documents prior to issue.

Glossary

21. The following abbreviations are used throughout this SPS:

    - NOPA – Notice of Proposed Adjustment
    - NOR – Notice of Response
    - SOP – Statement of Position
    - Disputes Process – Disputes Resolution Process
    - TRA – Taxation Review Authority.

Summary of key actions and indicative administrative timeframes

22. Set out below is a summary of the key actions and administrative timeframes where the disputes process is commenced by the Commissioner of Inland Revenue.

23. These key actions and timeframes are intended to be administrative guidelines for Inland Revenue officers. Any failure to meet these administrative timeframes will not invalidate subsequent actions of the Commissioner or prevent the case from going through the disputes process.

Paragraph in the SPS	Key actions	Indicative timeframes
	The Commissioner's NOPA	
40	The Commissioner will advise the taxpayer that a NOPA will be issued.	Usually within five working days before the date that the Commissioner issues a NOPA, but this may happen earlier.
45	The Commissioner will confirm whether the taxpayer has received the Commissioner's NOPA (either by telephone or in writing).	Within 10 working days from the date that the Commissioner's NOPA is issued, where practicable.
	Taxpayer's NOR	
100	The taxpayer issues a NOR in response to the Commissioner's NOPA within the applicable response period.	Within two months from the date that the Commissioner's NOPA is issued, unless section 89K applies.
102	The Commissioner will confirm whether the taxpayer will issue a NOR.	Usually two weeks before the response period for the Commissioner's NOPA expires.
127	The Commissioner will forward the taxpayer's NOR to the responsible officer.	Usually within five working days after the taxpayer's NOR is received.
128	The Commissioner will acknowledge the receipt of the taxpayer's NOR.	Usually within 10 working days after the taxpayer's NOR is received.
133	The Commissioner will advise that the taxpayer's NOR is deficient, but the two-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent immediately after they become aware of the deficiency.
117	The Commissioner will consider the application of section 89K, where a taxpayer's NOR has been issued outside the applicable response period.	The Commissioner will advise the taxpayer of the outcome within one month of receipt of the disputant's "late" notice. If the application is rejected, a refusal notice will be issued.
106	The taxpayer is deemed to accept the Commissioner's NOPA, because they failed to issue a NOR within the applicable response period and section 89K does not apply in the case of a late NOR.	At the end of the two-month period starting on the date of issue of the Commissioner's NOPA.
106	The Commissioner will advise the taxpayer in writing that they are deemed to accept the Commissioner's NOPA.	Usually two weeks after the response period to the Commissioner's NOPA has expired.
129	The Commissioner will advise the taxpayer whether their NOR is being considered, has been accepted, or rejected in full or part.	Usually within one month after the taxpayer's NOR is received.
130	If the taxpayer's NOR has been accepted in full, the dispute finishes and Inland Revenue will take appropriate actions (for example, issue an amended assessment).	Usually within one month after the advice of acceptance of the NOR is issued.
	Conference phase	
147	The Commissioner will write to the taxpayer to initiate the conference phase and to offer a facilitated conference.	The Commissioner's offer of a facilitated conference will be made in writing within one month from the date of issue of the taxpayer's NOR. The conference letter marks the start of the conference phase.

Paragraph in the SPS	Key actions	Indicative timeframes
149	The taxpayer will advise Inland Revenue whether they will attend the conference meeting, and whether they will accept the conference facilitation offer.	Usually within two weeks of receipt of the conference facilitation letter. If the taxpayer does not respond within this timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer about the letter.
150	When a taxpayer agrees to attend a conference meeting, Inland Revenue will contact the taxpayer to establish a timeframe, and agree on how the meeting will be conducted.	Usually within two weeks following the taxpayer's agreement to a conference.
154	Conference meeting(s) and further information exchange between Inland Revenue and the taxpayer.	The suggested average timeframe of the conference phase is three months, subject to the facts and complexity of the dispute.
	Opt out	
179	The taxpayer may request to opt out of the disputes resolution process.	Within two weeks from the end of the conference phase.
179	Inland Revenue officer will advise the taxpayer whether the request to opt out has been agreed to.	Usually within two weeks from the date of the taxpayer's request to opt out.
	Disclosure notice and the Commissioner's SOP	
211	The Commissioner will 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.
220	The Commissioner will issue a disclosure notice and the Commissioner's SOP.	Usually within three months from the end of the conference phase or within three months from the date when the Commissioner advises that the taxpayer's opt out request has been declined.
	Taxpayer's SOP	
243	The taxpayer must issue a SOP within the response period for the disclosure notice.	Within two months after the date that the disclosure notice is issued, unless section 89K applies.
246	The Commissioner will confirm whether the taxpayer will issue a SOP.	Usually two weeks before the response period for the Commissioner's disclosure notice expires.
247	The taxpayer's SOP is forwarded to the responsible officer.	Usually within five working days after the taxpayer's SOP is received.
248	The Commissioner will acknowledge the receipt of the taxpayer's SOP.	Usually within 10 working days after the taxpayer's SOP is received.
248	The Commissioner will advise that the taxpayer's SOP is deficient, 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 deficiency.
249	The Commissioner will consider the application of section 89K, where the taxpayer's SOP has been issued outside the applicable response period.	The Commissioner will advise the taxpayer of the outcome within one month of receipt of the disputant's late SOP. If the application is rejected, a refusal notice will be issued.
250	The Commissioner will advise that taxpayer is deemed to accept the Commissioner's SOP, because they failed to issue a SOP within the applicable response period and section 89K does not apply.	Usually two weeks after the response period for the disclosure notice expires.

Paragraph in the SPS	Key actions	Indicative timeframes
	Addendum to the Commissioner's SOP	
251	The Commissioner can provide additional information via an addendum to the Commissioner's SOP under section 89M(8) within the response period for the taxpayer's SOP.	Within two months after the taxpayer's SOP is issued.
254	The Commissioner will advise the taxpayer whether additional information to the Commissioner's SOP will be provided via an addendum under section 89M(8).	Usually within two weeks after the taxpayer's SOP is received, subject to the facts and complexity of the dispute and the available response period.
256	The Commissioner will consider the taxpayer's request to include additional information in their SOP under section 89M(13).	Usually within one month after the date that the Commissioner's addendum is issued.
	Adjudication	
269	The Commissioner will prepare a cover sheet and issue a letter (including a copy of the cover sheet) to the taxpayer to seek their concurrence of the materials to be sent to the adjudicator.	Usually within one month after the date that the Commissioner's addendum (if any) is issued or within one month from the date that the response period for the taxpayer's SOP to expire.
270	The taxpayer must respond to the Commissioner's letter.	Within 10 working days after the date that the Commissioner's letter is issued.
271	The Commissioner will forward materials relevant to the dispute to the Adjudication Unit.	Usually after the taxpayer has concurred on the materials to be sent to the Adjudication Unit or after the 10 working days allowed for the taxpayer's response have elapsed if no response is received.
263	Adjudication of the disputes case.	Usually within three months after the date that the Adjudication Unit receives the dispute files depending on the number of disputes that are before the Adjudication Unit, any allocation delays and the technical, legal and factual complexity of those disputes.

STANDARD PRACTICE AND ANALYSIS

Notice of proposed adjustment (NOPA)

The Commissioner must issue a NOPA before making an assessment

24. 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. For a detailed discussion of these exceptions see Appendix 1.

25. 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 valid under section 114(a).

26. Each exception under section 89C can apply independently or together depending on the circumstances. However, the Commissioner can also choose to issue a NOPA before making an assessment notwithstanding that an exception under section 89C applies.

A disputable decision

27. 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).

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

29. 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.

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

30. The Commissioner can issue an assessment without first issuing a NOPA under section 89C in the circumstances outlined above. Although the Commissioner must always endeavour to apply the exceptions under section 89C correctly, any assessment made in breach of section 89C will still be treated as valid under section 114(a).

31. Where the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can dispute the assessment through the disputes process under section 89D(1). (See SPS 11/06: *Disputes resolution process commenced by a taxpayer* or any replacement SPS.)

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

33. However, section 89I cannot apply if the Commissioner and taxpayer have agreed on an adjustment before entering into the disputes process. The parties can dispute the amended assessment, notwithstanding the previous agreement.

When the Commissioner can issue a NOPA

34. Section 89B specifies when the Commissioner can issue a NOPA.

35. Under section 89B(1) 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.

36. An investigation will have been substantially completed, the facts ascertained, and the proposed adjustment identified and discussed with the taxpayer before a formal NOPA is issued. The Commissioner may actively use his powers to require production of documents in order to ensure that a sustainable position can be taken in the NOPA. The NOPA will also have been quality checked by Legal and Technical Services.

37. 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.

38. However, the Commissioner or taxpayer is not precluded from issuing a NOPA in respect of any amended assessment that the Commissioner has previously issued to reflect the agreed adjustment.

39. 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).

40. Once an investigation has commenced, the intended approach must be discussed with the taxpayer. If the Commissioner decides to issue a NOPA, the responsible officer will endeavour to advise the taxpayer at least five working days before the date that the NOPA is issued. This is to allow the taxpayer time to consider their position and/or seek advice. However, the taxpayer can also be advised earlier.

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

42. 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.

43. If the parties agree upon some and dispute other proposed adjustments for the same tax period and type, the Commissioner cannot issue an assessment that reflects any agreed adjustment already accepted 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) if the Commissioner is not satisfied that the assessment is correct.

44. 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 of section 89N are met. (See paragraphs 98 to 99 for further discussion.)

45. 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

Time bar waivers

46. If it is contemplated that the disputes process cannot be completed before the statutory time bar period for amending an assessment commences, 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 process to be applied.

47. The taxpayer can also give written notice to the Commissioner and waive the time bar for a further six 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.

48. A statutory time bar waiver must be agreed in writing on the prescribed form (*Notice of waiver of time bar (IR 775)*) and delivered to the Commissioner before the relevant four-year period expires.

49. 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. (See paragraph 55.)

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

50. If a NOPA has been issued and the disputes 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. (See the discussion regarding section 89N(3) in paragraphs 28 to 39 of Appendix 1 of this SPS.)

51. 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 matter will be returned to the responsible officer to decide whether to issue an assessment or amended assessment or to accept the taxpayer's position. Section 89N(2)(b) allows the Commissioner to amend an assessment at any time after the Commissioner has considered the taxpayer's SOP in relation to the particular period. (See paragraphs 228 to 230 for further discussion.)

Exceptions under section 89N(1)

52. When a NOPA has been issued, the Commissioner will follow the disputes process unless an exception under section 89N applies. The application of section 89N is discussed in detail in Appendix 1. The Commissioner must obtain and document administrative approval for any departure from the full disputes process.

Limitations on the Commissioner issuing a NOPA

53. Under section 89B(4), the Commissioner cannot issue a NOPA:

    a) if the proposed adjustment is the subject of challenge proceedings, or

    b) after the statutory time bar has expired.

54. 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 RM 2(1) of the Income Tax Act 2007 ("ITA 2007") and 45(1) of the Goods and Services Tax Act 1985.

55. 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)).

56. Furthermore, the Commissioner is not subject to the statutory time bar that arises under section 108 if a taxpayer has a remaining tax credit to which section LA 6(1) of the ITA 2007 applies and the Commissioner seeks to amend an assessment or determination to give effect to section LA 6(3) of the ITA 2007 (section 108(3B)).

57. When considering whether the exception under section 108(2)(b) applies, the Commissioner will disregard omissions of relatively small amounts of income by applying the principle of *de minimis non curat lex* (*Babington v C of IR* [1957] NZLR 861).

58. The Commissioner accepts that the time bar ensures finality in relation to assessments, is a key

protection for most taxpayers and the exclusions from its protection must be only invoked where 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).

59. 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.

60. Any decision to examine a particular period (which would otherwise be time barred) on the basis that section 108(2)(a)–(b) or section 108A(3) may apply, is not, in itself, a disputable decision. Nor is any decision that is made under section 108A, in itself, a disputable decision.

61. Any NOPA where the CIR is proposing an adjustment on the basis that the exception to the time bar in either section 108(2)(a)–(b) or section 108A(3) applies will set out the reasons why the CIR does not consider that the time bar applies.

62. 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 process is completed. The Commissioner will endeavour to undertake the various steps involved in the process within the four-year period.

63. 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.

64. For example, a taxpayer challenges the deductibility of feasibility expenditure in the 2009 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

65. A NOPA is the document that commences the disputes process. It is intended to identify the points of contention and explain the legal or technical aspects of the issuer's position in relation to the proposed adjustment in a formal and understandable manner. This will ensure that information relevant to the dispute is quickly made available to the parties. Section 89F(1) and (2) specifies the content requirements for any NOPA that the Commissioner may issue.

66. Under section 89F(1)(b), the NOPA must be in the prescribed form (*Notice of proposed adjustment (IR 770)*). 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. When preparing a NOPA the Commissioner will endeavour to avoid repeating facts, arguments or using unnecessary detail.

67. Section 89F(2)(b) requires that the NOPA states the key facts and law concisely and in sufficient detail. The Commissioner must ensure that the document is 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. The Commissioner's NOPAs should be concise, accurate, coherent and logically presented. In preparing a NOPA Inland Revenue officers should avoid unnecessarily using legalistic language.

68. 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.

69. The Commissioner has a statutory obligation to inform a taxpayer adequately, but it is recognised that the matters relevant to the dispute will be set out in greater detail at the SOP phase if the dispute is not resolved.

70. 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 process (*CIR v Zentrum Holdings Limited* (2006) 22 NZTC 19,912). However, the parties cannot propose another adjustment involving new grounds and a fresh liability at the SOP phase.

71. The Commissioner must always endeavour to issue a NOPA that has sufficient details, is of a high standard and has been considered by Legal and Technical Services. The Commissioner must endeavour to advise

the taxpayer during the conference phase of any new grounds, information or reduction in quantum that will be introduced in the SOP.

72. If the Commissioner decides to increase the quantum of any proposed adjustment after the NOPA is issued the Commissioner must issue a new NOPA to the taxpayer.

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

74. 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)

75. The Commissioner must consider 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.

76. The Commissioner will also consider whether shortfall penalties and/or other appropriate penalties of lesser percentages 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

77. 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. Even though assessments of shortfall penalties relate to the underlying tax they are not subject to the time bars that arise under section 108 or 108A.

78. Where there is sufficient evidence to suggest that shortfall penalties should be imposed, the relevant Inland Revenue officer must ensure that the shortfall penalties are proposed in the same NOPA as the substantive issues. However, the officer can dispense with this practice if any of the following exceptions apply:

    a) 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) Before entering into the disputes process, a taxpayer has accepted the proposed adjustment in relation to the substantive issues, but not accepted the imposition of the shortfall penalties. In this circumstance, the Commissioner may still issue a NOPA to the taxpayer for the proposed penalties.

    c) 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) Prosecution action is being considered and shortfall penalties also apply because the taxpayer has committed one of the culpable acts (for example, evasion), in most instances the Commissioner must first complete any prosecution action against the taxpayer before the shortfall penalties can be imposed.

79. 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. The Commissioner must issue a new NOPA in respect of any shortfall penalties that are to be imposed after the prosecution.

80. Furthermore, the Commissioner cannot propose shortfall penalties at the SOP phase if they were not previously proposed in a Commissioner's NOPA.

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

Facts

81. 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.

82. 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.

83. Although the Commissioner will make every attempt to be concise in the NOPA, the Commissioner considers that the explanation of the material facts should be relative to the complexity of the issues.

Law

84. Under section 89F(2)(b) 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.

85. 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)

86. 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.

87. The Commissioner must 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 a similar outcome, the NOPA must include all the arguments.

88. The issues and propositions of law exclusion rule under section 138G(1) does not apply to the issues and propositions of law that are raised in the Commissioner's NOPA. That is, the Commissioner is not restricted to raising the same issues 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.

Size and length of Commissioner's NOPAs

General guidelines

89. The length of a Commissioner's NOPA will necessarily vary from case to case. The **maximum length** of a Commissioner's NOPA is administratively capped at 30 pages. The 30-page limit excludes any discussion on shortfall penalties (if included in the same Commissioner's NOPA as the substantive issues), the last page of instructions on "What to do next", and schedules that show complicated calculations and diagrams. The application of the 30-page limit is subject to the following further restrictions:

    a) For disputes involving less than $5,000 of tax (excluding evasion and tax avoidance issues), the Commissioner's NOPA should not exceed five pages.

    b) Where the dispute concerns one issue only (for example, the imposition of shortfall penalties), the Commissioner's NOPA should not exceed 10 pages.

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

91. The Commissioner will strive to keep NOPAs as short as possible, but this will be balanced with the need to achieve the objective of issuing the NOPA (ie, sufficiently communicating to the recipient the proposed adjustments and the reasons for them). Inland Revenue officers are required to get approval before a Commissioner's NOPA can exceed the 30-page limit.

92. Wherever practicable, all adjustments proposed for a particular taxpayer should be included in one NOPA. However, where new issues arise during the disputes process, the Commissioner is not precluded from commencing separate disputes for these new issues. If the parties are still in dispute after the conference phase, the proposed adjustments in multiple NOPAs may, subject to the taxpayer's agreement, be combined into one SOP. Combining multiple issues into one dispute has the benefit of reducing compliance costs and should reduce the time taken in the disputes process.

Timeframes to complete the disputes process

93. If the Commissioner has commenced the disputes process by issuing a NOPA and the dispute remains unresolved, where practicable, the responsible officer must negotiate a timeframe with the taxpayer to ensure that the dispute is progressed in a timely and efficient way.

94. Although not statutorily required, agreeing to a timeframe is a critical administrative requirement that requires both parties to be ready to progress the dispute in a timely manner. The parties should endeavour to meet the agreed timeframe. 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.

95. If the negotiated timeframe cannot be achieved, the responsible officer will enter into a continuing discussion with the taxpayer to either arrange a new timeframe or otherwise keep them advised of when the disclosure notice and SOP will be issued. This is consistent with the purpose of the disputes process which is to promote the prompt and efficient resolution of disputes. Therefore, the failure to negotiate or adhere to an agreed timeframe will not

prevent a case from progressing through the disputes process in a timely manner.

96. In addition to the above administrative practice, the Commissioner is bound by section 89N(2). Under that provision, if a NOPA has been issued and the parties cannot agree on the proposed adjustment, the Commissioner cannot amend an assessment without completing the disputes process unless any of the exceptions in section 89N apply. These exceptions are as follows:

    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 process (section 89N(1)(c)(i)).
    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)).
    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)).
    4. The taxpayer fails to comply with a statutory requirement for information relating to the dispute (section 89N(1)(c)(vi)).
    5. The parties agree in writing that the dispute should be resolved by the court or TRA without completing the disputes process (section 89N(1)(c)(viii)).
    6. The parties agree in writing to suspend the disputes process pending the outcome of a test case (section 89N(1)(c)(ix)).
    7. The Commissioner applies to the High Court for an order to allow more time to complete or dispense with the disputes process (section 89N(3)).

97. These exceptions are explained in further detail in Appendix 2 to this SPS. If any of these exceptions apply the disputes process will end and the dispute will not go through the adjudication phase.

Application of the exceptions in section 89N

98. The Commissioner's practice is that the parties should endeavour to resolve the dispute as early as possible and this should be a focus at all times throughout the stages of the disputes process. If this is not possible and any of the exceptions in section 89N apply, the Commissioner can amend an assessment without completing the whole disputes process, that is, before the parties accept a NOPA, NOR or SOP that the other has issued, or the Commissioner has considered the taxpayer's SOP. This will conclude the disputes process and the dispute will not go through the Adjudication phase.

99. In this circumstance, the taxpayer can challenge the Commissioner's assessment by filing proceedings in the TRA 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.

Notice of response (NOR)

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

100. 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.

101. For example, if a NOPA is issued on 9 April 2010, the taxpayer must advise the Commissioner that it is rejected by issuing a NOR to the Commissioner for receipt on or before 8 June 2010. However, taxpayers are encouraged to issue their NOR to the Commissioner once they have completed it.

102. If a taxpayer has not responded to a NOPA issued by the Commissioner reasonable efforts will be made to contact the taxpayer or their tax agent two weeks before the response period expires to ascertain whether the taxpayer will issue a NOR. Such contact may be made by telephone or letter.

103. 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 that 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.

104. In respect of the requirement under section 89G(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 that are raised in the Commissioner's NOPA. The taxpayer does not have to refer to different legislative provisions, case law and legal arguments.

105. 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

106. Under section 89H(1), if the taxpayer:

a) has not issued a NOR within the two-month response period, and

b) the Commissioner does not accept a late NOR in terms of section 89K,

the taxpayer is deemed to have accepted the adjustment that is proposed in the Commissioner's NOPA and section 89I applies. The Commissioner will usually advise the taxpayer that the deemed acceptance has occurred within two weeks after the two-month response period expires.

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

Section 89K: the circumstances where the Commissioner may accept late rejections, proposed adjustments or statements of position

Exceptional circumstances

108. 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 CIR* (2001) 17,470 (CA), *Hollis v CIR* (2005) 22 NZTC 19,570 and *Balich v CIR* (2007) 23 NZTC 21,230, are also relevant.

109. 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.

110. 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*), and

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*).

111. 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.

112. The exception for lateness arising because of statutory holidays is self-explanatory. The Commissioner can also accept a late NOR where the lateness is minimal, that is, the document was only one to two days late and the other factors relevant to the exercise of the discretion under section 89K(1) are satisfied. (See discussion in paragraph 114.)

113. 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 one to two 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.

114. Besides the degree of lateness, the Commissioner considers that the exercise of the discretion under section 89K(1) requires that the following factors are also taken into account:
    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?).
115. 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.
116. Although the degree of lateness was minimal on each occasion, the Commissioner would not accept that exceptional circumstances exist in this circumstance. This ensures that the exception is not treated as an extension of the response period in all circumstances.
117. The Commissioner will consider a taxpayer's application made under section 89K(1)(b) after receiving the relevant NOR or SOP. Where the application is rejected, the Commissioner is required to issue a "refusal notice" within one month of receipt of the application (which must include the late notice or SOP). The disputant may challenge the Commissioner's refusal notice in the Taxation Review Authority. If the taxpayer's application is accepted that decision will be communicated in writing to the taxpayer within one month of receipt of the application.
118. The taxpayer must provide reasons to support their claim that exceptional circumstances exist under section 89K(3). The taxpayer should address the factors referred to in paragraph 114. If the reasons provided are unclear, further information may be requested, giving the taxpayer an opportunity to provide that information before determining whether section 89K applies.
119. 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.

Demonstrable intention

120. Under section 89K(1)(a)(ii) the Commissioner can also treat a late rejection of the Commissioner's NOPA by a disputant, as being in time where the disputant had a demonstrable intention to enter into or continue the disputes process at the time the disputant failed to act within the applicable response period.
121. The concept of "intention to dispute" reflects the court's consideration of when a dispute should be allowed to continue under the old objection regime in Part 8 of the TAA, in particular, the High Court decision in *Gisborne Mills Ltd v CIR* (1989) 13 TRNZ 405. Robertson J, in *Gisborne Mills*, held that a factor to be taken into account in determining whether the disputant was entitled to continue with their dispute was that they had "consistently asserted that they were entitled to the [tax outcome they were seeking]". This was "in marked distinction to a person who, never having contemplated seeking a benefit under the taxing legislation, endeavours to take advantage of a matter when they become aware of a decision affecting another taxpayer".
122. The officials' issues paper, *Disputes: a review* (July 2010), in relation to an "intention to dispute test", noted:

> The central tenet of any test should be that the taxpayer demonstrates they have, before the deadline, clearly communicated an intention to formally dispute the matter on certain grounds and have not subsequently modified that position.

123. To support this general proposition Inland Revenue will consider the following further factors in reaching a view as to whether a taxpayer had a demonstrable intention to dispute:
    - whether the taxpayer has responded to any Inland Revenue correspondence and has consistently asserted their contrary position regarding the substantive issues;
    - whether the taxpayer has complied with other parts of the disputes process and their overall tax obligations (for example, if the late document in question is the taxpayer's SOP, have they filed a timely NOR?);

- whether the taxpayer has corresponded with other relevant parties regarding the dispute, for example, the Minister of Revenue, the Ombudsman or Inland Revenue's Complaints Management Service.

124. In a dispute where the taxpayer or their agent has not filed a SOP because they have miscalculated the response period (and the degree of lateness does not amount to exceptional circumstances), it could be said that having participated in the earlier stages of the disputes process (including complying with timeframes) that, at the end of the response period, the disputant had a genuine intention to continue with the dispute.

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

Disputant may challenge Commissioner's refusal to accept rejection, NOPA or SOP

126. The Commissioner can accept a disputant's late rejection, NOPA or SOP by issuing a notice in favour of the disputant stating that the late rejection, NOPA or SOP will be treated as being given within the applicable response period. On the other hand, where they are not accepted as being on time, the Commissioner must notify the disputant within one month from when the disputant issues a "late" notice or statement of position to the Commissioner, of the Commissioner's decision ("refusal notice"). The disputant may challenge the Commissioner's refusal notice by filing proceedings with the TRA.

Receipt of a taxpayer's NOR

127. When Inland Revenue receives a taxpayer's NOR, it will usually be forwarded to the responsible officer within five working days. 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.

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

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

130. If the NOR is accepted in full, the Commissioner will usually confirm (in writing) that the NOR has been accepted in full and, if applicable, a notice of assessment will be issued within one month.

131. 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 NOR

132. Where Inland Revenue has received a NOR that it considers is deficient (that is, the requirements under section 89G(2) may not be met), where it is possible, the responsible Inland Revenue officer will take reasonable steps to have the taxpayer correct the information in the NOR before the response period expires.

133. The taxpayer will be advised as soon as practicable that the Commissioner considers that the NOR may not meet the requirements of section 89G(2) and why. They will also be advised that any additional or corrected information should be provided within the response period.

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

135. Generally where the deficiencies are not able to be remedied but the NOR advances sufficient argument to allow the dispute to progress, then the Commissioner will continue with the dispute. The Commissioner's argument that the NOR is deficient will be incorporated into the Commissioner's SOP which will also fully argue the substantive issue.

136. However, if the NOR received is highly unsatisfactory the Commissioner is unlikely to continue with the dispute. This will be on the grounds that the NOR does not satisfy the requirements set out in section 89G(2).

137. A NOR is likely to be considered highly unsatisfactory only where the taxpayer's position is materially inconsistent and not capable of coherent explanation, or there is no observable explanation at all of the taxpayer's grounds for dispute. In these situations the taxpayer will be deemed to have accepted the

proposed adjustment under section 89H(1), unless section 89K applies.

138. In considering the adequacy of the taxpayer's NOR, the Commissioner's view will not be based on the strength or weakness of the taxpayer's argument. The Commissioner will only be concerned with whether the NOR meets its statutory requirements.

139. The approach outlined above is consistent with that taken by the Court of Appeal in *CIR v Alam and Begum* (2009) 24 NZTC 23,564.

Conference phase

What is the conference phase of the disputes process?

140. The conference phase of the disputes process allows the taxpayer and Inland Revenue officers directly involved in the dispute to exchange material information relating to the dispute (if this has not already been done prior to the conference phase). More importantly it is an opportunity for the parties to the dispute to try to resolve the differences in their understanding of facts, laws and legal arguments.

141. The word "resolve" in this context is not limited to final resolution of the dispute. Settlement is a possibility but this is not the only objective of the conference phase. The parties may "resolve" part of the dispute by agreeing on some of the facts and clarifying some of the legal arguments, while agreeing to disagree on other matters, which will become the focus in the later phases of the disputes process.

142. Generally, if a dispute remains unresolved after the NOR phase, the conference phase will follow. However, the Commissioner will have fully considered the taxpayer's NOR, including any new records, documents and information mentioned in that document, before determining that the dispute remains unresolved.

143. The conference phase is an administrative process that aims to clarify and, if possible, resolve the dispute. However, the conference phase should not be used by either party for the purpose of delaying the completion of the disputes process. The conference phase can involve more than one meeting between the parties and it 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 meeting.

Legal and other advisers attending a conference

144. If a dispute is not settled earlier, the parties can obtain expert legal or other advice during the conference phase in addition to advice previously obtained. These advisers can attend any meetings in relation to the dispute.

Conference facilitation

145. Conference facilitation is a new feature in the conference phase. A facilitated conference will involve an independent internal facilitator who will promote and encourage structured discussion between Inland Revenue officers and the taxpayer on an informed basis and with the *bona fide* intention of resolving the dispute. The conference facilitator will be a senior Inland Revenue officer who will not have been involved in the dispute or given advice on the dispute prior to the conference phase. The facilitator will have sufficient technical knowledge to understand and lead the conference meeting.

146. The conference facilitator will not be responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end. In particular, it is not the role of the facilitator to undertake settlement of the dispute. If this possibility arises it is the responsibility of the taxpayer and the Inland Revenue officers involved in the dispute.

147. Having a conference facilitated is optional and a conference can be held without a facilitator but, conference facilitation will be offered to all taxpayers as part of the disputes process. The Commissioner's offer of a facilitated conference will be made in writing ("the conference facilitation letter") within one month from the date of issue of the taxpayer's NOR. The conference facilitation letter marks the commencement of the conference phase.

148. The format of the conference meeting need not be limited to a face-to-face meeting. The parties to the dispute may agree to hold a telephone or video conference. (For reasons of simplicity, the SPS refers to "meetings" to include these different conference formats.)

149. The taxpayer is expected to respond within two weeks from the date of the conference facilitation letter. The taxpayer should indicate whether they will attend the conference meeting, whether they will accept the conference facilitation offer, whether there are any special needs or requirements at the meeting and who else will be attending the meeting. If the taxpayer does not respond within this timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer about the conference facilitation letter.

Preparation for the conference meeting

150. When a taxpayer agrees to attend a conference meeting, Inland Revenue will contact the taxpayer within two weeks from the taxpayer's agreement, to establish a timeframe, and agree on how the meeting will be conducted.

151. Prior to the conference meeting, the taxpayer should inform Inland Revenue whether their advisors will attend the conference meeting.

152. The parties to the dispute may agree to exchange information relevant to the dispute before the conference meeting. A copy of that information will be provided to the facilitator. The Inland Revenue officers will provide the taxpayer with a list of information that has been given to the facilitator. The taxpayer may request a copy of any information on that list if it is not already in their possession. It is also crucial for the parties to exchange the information prior to the meeting if the agreed format of the conference is a telephone or video conference.

153. Inland Revenue may decide to concede the dispute after considering the taxpayer's information. The whole disputes process (including the conference phase) would come to an end in these cases.

154. The conference phase will generally be expected to be completed within three months, but this may vary depending on the facts and complexities of the specific case. A longer conference phase may be justified in some disputes if the parties are engaged in meaningful discussions.

155. An agenda will be useful for both parties at the conference meeting. An agreed agenda should divide the conference meeting into two parts. The first part of the meeting should involve an exchange of material information and discussion of contentious facts and issues relating to the dispute. Any procedural matters such as the timeframe for completing the disputes process, the adjudication process, time bar waivers and the possibility of opting out of the disputes process will also be discussed. The second part of the meeting, if applicable, would involve negotiation of possible areas of resolution of the dispute. Any communication made and any materials prepared for the purpose of negotiating a settlement or resolution during this part of the meeting will be treated as being on a "without prejudice" basis.

156. Where there is no agenda the conference facilitator will guide the taxpayer and the Inland Revenue officers to discuss the contentious facts and issues at the conference meeting.

157. Where the option of conference facilitation has been declined, the parties to the dispute should work out the appropriate structure at the conference meeting, bearing in mind that one of the aims of any conference is to reach agreement on some or all the facts and issues and thus, resolve the dispute.

At the conference meeting

Facilitated conference

158. The facilitator will:

a) explain the objectives of the conference phase on the basis of the agreed agenda;

b) remind the parties of any rules relating to the conference (these will generally have been set out in the conference facilitation letter);

c) clarify who the parties are at the conference meeting and the capacities they hold (eg, whether they are the authorised tax advisors; whether they have authority to settle the dispute at the meeting);

d) ask whether the parties agree to record the meeting discussions using audio or video technology (refer to SPS 10/01: *Recording Inland Revenue Interviews* or any replacement SPS);

e) run through the agenda;

f) encourage the parties to present evidence in support of their perceived facts (either at the conference meeting or on a later date if the evidence cannot be provided at the time of the meeting). Where possible, encourage the parties to reach agreement on all the facts of the dispute. If no agreement can be made, encourage the parties to establish the common grounds and address the matters that they agree to disagree. These agreements will be recorded in writing. The agreements will be sent to the taxpayer to verify the correctness and sign by a specified date.

g) promote constructive discussion of only the contentious tax issues and where possible, encourage both parties to explore the issues, resolve or settle the dispute (subject to our internal revenue delegations and guidelines on settlement). If the contentious tax issues cannot be resolved, ask both parties to do one or more of the following:

- At the end of the conference meeting, ask the parties to consider whether the conference phase comes to an end. Consider whether there is need for another meeting, noting that another meeting can be justified if both parties need to exchange further information in support of their tax technical arguments but continuous meetings are discouraged if this is seen as a delaying tactic.
- Where the parties agree to end the conference phase and the facilitator considers that the

objectives of the conference phase have been achieved, the facilitator can clearly signal the end of the conference phase to the parties.

- Agree on the timeframe for completing the disputes process and submitting the dispute to the adjudication process. This includes the timeframe for taxpayers to meet outstanding information requests and Inland Revenue officers' undertaking to provide copies of information relevant to the disputes. The agreed timeframe will also factor in time bar waivers if given by the taxpayer and the time required for any court challenge that relates to documents, which are claimed to be protected by professional legal privilege and tax advice documents, which are claimed to be protected by the non-disclosure rights. Ask the taxpayer whether a time bar waiver will be given if the time bar applicable to the assessment in dispute is imminent.
- Clearly indicate whether the communication made and/or documents prepared for the purpose of negotiating potential settlement or resolution of the dispute will be treated as being on a "without prejudice" basis.
- Ask the taxpayer to consider whether the opt-out process applies and advise the taxpayer of the right to opt out within the required timeframe, so that it is not necessary to complete the disputes process as required under section 89N and that the dispute will be more efficiently resolved by a hearing authority.

h) note that any agreement between the parties will be recorded in writing and signed either at the conference meeting by both parties or on a later date after the taxpayer has verified the correctness of the agreement;

i) note that the Inland Revenue officers directly involved in the dispute will remain as the first point of contact.

Unfacilitated conference

159. In an unfacilitated conference, the parties at the conference should agree on and perform tasks similar to those listed in paragraphs 158(a) to (h) above.

160. At the end of the conference meeting, it is important for the Inland Revenue officers and the taxpayer to discuss whether they consider that the conference phase has come to an end and record any agreement in writing.

After the conference meeting

161. The following is relevant only if the conference phase does not end at the meeting.

Facilitated conference

162. The facilitator will:

a) follow up on the agreed matters including the agreed timeframe and exchange of information (but does not include enforcing the agreement between the taxpayer and the Inland Revenue officers directly involved in the dispute);

b) assess any need to attend a further meeting;

c) suggest to the parties that the conference phase has ended and ask them to reach an agreement on this matter, then clearly notify the parties of the date on which the conference phase has ended.

Unfacilitated conference

163. In a conference that did not have a facilitator, the Inland Revenue officers will perform these tasks. They may suggest to the taxpayer that the conference phase has ended after all the material information relating to the dispute has been exchanged and all the contentious facts and issues have been discussed. The parties will then agree in writing on the date on which the conference phase has ended. If the parties cannot agree on when to end the conference phase, the Investigations Manager will be responsible for making the decision on ending the conference phase after considering all the parties' relevant reasons and concerns.

End of the conference phase

164. It is important for the taxpayer and the Inland Revenue officers to be fully aware of when the conference phase comes to an end. 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 meeting. In most cases, it is expected that the parties involved in the dispute will agree on when the conference phase has ended. Such agreement will be put in writing.

Facilitated conference

165. After a facilitated conference, the facilitator will be responsible for clarifying the agreed end date of the conference phase with the parties.

166. If the facilitator considers that both the taxpayer and Inland Revenue officers have exchanged all the material information relevant to the dispute, have fully discussed the tax technical issues and have not resolved the dispute, the facilitator may suggest to the parties that the conference phase can come to its end.

167. If there is no agreement and the parties' reasons for continuing the conference phase are considered to be insufficient, the conference facilitator can make a decision to end the conference phase and notify the parties of that decision. The following are examples of strong indicators that the conference phase has come to its end:
    a) The taxpayer and/or the tax advisors stop contacting the Inland Revenue officers directly involved in the dispute for a few weeks.
    b) The parties did not exchange information notwithstanding that this had been agreed on at the conference meeting, thus leading to the exercise of the Commissioner's powers (eg section 17 notices).
    c) The parties agree to disagree with each other and express interest in progressing to the SOP phase.
    d) The taxpayer appears to be using delaying tactics at the conference phase when the issue in dispute is subject to an imminent time bar.
168. In rare situations, where conference facilitation is involved and the facilitator is concerned with the parties' decision to end the conference phase before achieving the objectives of the conference meeting, the facilitator may adjourn the meeting and discuss the concerns with the responsible Inland Revenue officers. The facilitator may also contact the taxpayer or the taxpayer's tax advisors to discuss whether the conference phase should come to its end. The facilitator will seek the parties' agreement as to whether or not the conference phase is complete.

Unfacilitated conference

169. Where no conference facilitation is involved, the taxpayer and the Inland Revenue officers will work out when to end the conference phase. They should consider whether the objectives of the conference phase have been achieved before reaching the agreement. If no agreement can be reached, the Investigations Manager will review the conduct of the parties during the conference phase and make a decision on whether the conference phase has come to an end.

After the conference phase

170. When a dispute remains unresolved after the conference phase has been completed, the Commissioner must issue a disclosure notice together with a SOP, unless the Commissioner and the taxpayer have agreed to the taxpayer opting out of the disputes process. The disclosure notice and Commissioner's SOP will generally be issued within three months from the end of the conference phase (see paragraphs 209 to 225 for further discussion on the timeframes for issue of the Commissioner's disclosure notice and SOP).
171. If the taxpayer seeks the Commissioner's agreement to opt out of the disputes process under section 89N(1)(c)(viii), they will be required to sign a declaration that all material information relating to the dispute has been provided to the Commissioner.

Opt out of the disputes process

172. Section 89N(1)(c)(viii) provides that the Commissioner and a taxpayer can agree in writing not to complete the disputes process if they are satisfied that the dispute can be more efficiently resolved at a hearing authority (referred to as "opt out").
173. A taxpayer may request to opt out of the remainder of the disputes process. If they do, a decision on whether or not the Commissioner will enter into an opt-out agreement will be made by a senior Inland Revenue officer. In making a decision on opt out, that person will consult with Legal and Technical Services, the Litigation Management Unit, and the Office of the Chief Tax Counsel. The decision-maker will consider the taxpayer's request with reference to all of the specific criteria listed and will also consider if any other factors exist which mean that the dispute can be resolved more efficiently at a hearing authority.
174. Before agreeing to a taxpayer's request to opt out the Commissioner must be satisfied that the taxpayer has participated meaningfully during the conference phase. In addition, the taxpayer must have signed a declaration that all material information has been provided to the Commissioner.
175. This means that the Commissioner will not agree to opting out unless there has been a conference.
176. In addition to attending the conference, the Commissioner considers that a taxpayer will have participated meaningfully during the conference phase where:
    a) the taxpayer has provided information as requested by Inland Revenue (if it has not already been provided prior to the conference phase); and
    b) the taxpayer has discussed the contentious facts and issues of the dispute with Inland Revenue. This discussion will have involved identifying and clarifying what the dispute turns on, seeking potential resolution of the dispute or reaching agreements to enable the dispute to move forward to the next phase if it remains unresolved.
177. If the taxpayer has participated meaningfully during the conference phase and signed a declaration that

all material information has been provided, the Commissioner will agree to the taxpayer's request to opt out of the disputes process in circumstances where one of the following applies:

a) the total amount of tax in dispute is $75,000 or less except where the dispute is part of a wider dispute;

b) the dispute turns on issues of fact (eg, facts that are to be determined by reference to expert opinions or valuation) only;

c) the dispute concerns facts and issues that are waiting to be resolved by a court; or

d) the dispute concerns facts and issues that are similar to those considered by the Adjudication Unit of the Office of the Chief Tax Counsel ("OCTC") if similar issues have been considered in a dispute in the past.

178. Where the dispute does not fall within the criteria listed above at paragraph 177, the Commissioner may still agree to opt out of the disputes process if it is considered that the dispute can be resolved more efficiently at a hearing authority.

179. The taxpayer may request to opt out of the disputes process within two weeks from the end of the conference phase. The Commissioner will advise the taxpayer in writing within two weeks from the date of the request whether the request to opt out has been agreed to.

180. Where the opt-out request has been agreed to and the dispute remains unresolved after taking into account the information and discussion during the conference phase, the Commissioner will issue an amended assessment.

181. When it is considered that the taxpayer does not meet the criteria for opting out of the disputes process, the taxpayer will be advised of the decision in writing.

a) The $75,000 or less threshold

182. The Commissioner will agree to a taxpayer opting out of the disputes process if the total amount of core tax in dispute is $75,000 or less. The "$75,000 or less" threshold does not apply if the dispute is part of a wider dispute that involves a number of taxpayers. An example of this is a tax avoidance arrangement similar to the "Trinity forestry scheme" in *Accent Management Ltd v CIR* (2007) 23 NZTC 21,323; [2007] NZCA 230.

183. The "$75,000 or less" threshold excludes:

- shortfall penalties, either proposed in the same NOPA as the core tax or proposed in a separate NOPA;
- use-of-money interest that results from the Commissioner's proposed adjustment in the NOPA; and
- late payment penalties imposed on the taxpayer, if applicable.

184. In some disputes, the Commissioner may propose adjustments in respect of more than one tax type or more than one return period/income year. The "$75,000 or less" threshold applies to the net total amount of tax in the **same** dispute. The threshold will take into account the following:

- the proposed adjustments made by the Commissioner in the same NOPA for all return periods and/or income years and tax types;
- any variation of the amount of tax in dispute due to the Commissioner's partial acceptance of the taxpayer's NOR; and
- any variation of the net total amount of tax in dispute as agreed between the participants during the conference phase.

b) The dispute turns on issues of fact only

185. The Commissioner will agree to a taxpayer's request to opt out if the dispute turns on issues of fact or evidence only.

186. The "issues of fact" requirement may apply where the disputed facts are to be determined by reference to expert opinions or valuation.

187. Disputes on tax avoidance issues will not meet the "issues of fact" requirement. In these disputes, case law requires consideration of issues such as whether the arrangement has used a specific provision in a way that cannot have been within Parliament's contemplation when it enacted the provision. This will involve analysing mixed questions of law and fact.

c) The dispute concerns facts and issues that are waiting to be resolved by a court

188. The opt-out process is available if the facts and issues relating to the dispute are similar to those that are waiting to be resolved by a court. The Commissioner will agree to a taxpayer's request to opt out in those cases.

189. A taxpayer may become aware of a current court case that concerns facts and issues that they consider to be similar to their dispute. The Commissioner will consider this position when deciding whether to accept the taxpayer's opt-out request. In considering a taxpayer's request, Inland Revenue will advise the taxpayer of its views as to the similarity, but will not

comment on the merit of the current court case or the plaintiff's tax affairs due to the secrecy provisions of the TAA.

190. In some cases, a taxpayer may not be aware at the time of issuing the NOR or during the conference phase of the existence of similar cases that are subject to court proceedings. The taxpayer may still request to opt out of the disputes process without this knowledge. In considering the request, the decision maker will consult with the Litigation Management Unit to determine whether there are any current court cases that concern facts and issues that are considered to be similar to the taxpayer's dispute.

d) The dispute concerns facts and issues that are similar to those considered by the Adjudication Unit

191. The opt-out process is available if the facts and issues relating to the dispute are similar to those already considered by the Adjudication Unit. A taxpayer may request to opt out of the disputes process because a previous adjudication decision was in favour of the Commissioner and they consider it would be unlikely that the Commissioner's view will change. In considering the taxpayer's request, Inland Revenue will advise the taxpayer of its views as to the similarity, but will need to bear in mind the secrecy provisions of the TAA.

192. In some cases, a taxpayer may not be aware of similar disputes that have been considered by the Adjudication Unit when the taxpayer issues the NOR or participates at a conference meeting. Inland Revenue officers may be aware of such other similar disputes, and may choose to advise the taxpayer that, should the taxpayer request an opt out, Inland Revenue would be very likely to agree. However, Inland Revenue will need to bear in mind the secrecy provisions of the TAA when considering other disputes.

Grounds of assessment where the Commissioner has agreed to opt out

193. In agreeing to the taxpayer's request for opt out the Commissioner will issue an amended assessment and a notice of assessment to the taxpayer. In doing so the Commissioner will have taken into account the information and legal arguments raised in the NOPA, the NOR and during the conference phase. The taxpayer can then challenge the assessment by commencing proceedings in a hearing authority within the applicable response period, ie two months of receipt of the notice of assessment.

194. In making an amended assessment, the Commissioner is not bound by the facts, issues, evidence and propositions of law stated in the NOPA and NOR, and the Commissioner is able to take into account information and arguments raised during the conference phase. The Commissioner's administrative practice is that grounds of assessment which have not previously been referred to in the Commissioner's NOPA and the taxpayers' NOR will not be relied on, if they have not been notified or sufficiently discussed during the conference phase.

195. Where the parties have agreed to opt out the Commissioner will send to the taxpayer at or near the time of issuing the assessment, a letter confirming briefly the grounds of assessment.

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

196. Sometimes it is necessary for Inland Revenue to deal with a large number of taxpayers that are all affected by the same disputed matter. This can arise in situations where:

- the taxpayers are all investors in a particular scheme;
- the taxpayers have entered into similar arrangements and they have the same promoter;
- the taxpayers have entered into similar arrangements and they have the same tax agent;
- there exists a widespread but well-defined common problem involving many unrelated taxpayers (eg, taxpayers moving their private residence into an LAQC, or a number of taxpayers claiming non-deductible expenses such as fines for overloading).

197. Given Inland Revenue's limited resources, and bearing in mind taxpayer compliance costs it may not be appropriate for all the cases to proceed through the full disputes process.

198. The Commissioner's approach to the different situations which arise where a large number of taxpayers are all affected by the same disputed matter is outlined in paragraphs 199 to 208.

Situation 1: The Adjudication Unit has looked at an issue a number of times and consistently taken a view supporting the Commissioner

199. As discussed in detail previously at paragraphs 172 to 192, the Commissioner will agree to the taxpayer's request to opt out of the remaining parts of the disputes process if the facts and issues relating to the dispute are similar to those previously considered by the Adjudication Unit.

200. Therefore, in situations where the Adjudication Unit has looked at an issue a number of times and consistently taken a view supporting the

Commissioner agreement between the parties to opt out is an option available to avoid the full disputes process.

201. In these circumstances the Commissioner will indicate to individual taxpayers that the dispute could be suitable for opt out but as this approach to a dispute requires the taxpayer to request opt out, they still have the choice to progress the dispute through the full disputes process.

202. It should be noted that before the Commissioner will agree to a taxpayer's request to opt out the Commissioner must be satisfied that the taxpayer has participated meaningfully during the conference phase. In addition, the taxpayer must have signed a declaration that all material information has been provided to the Commissioner.

Situation 2: There are a number of cases on the same issue under dispute. One case has been referred to the Adjudication Unit, who has still to reach a conclusion on the matter

203. In this situation it may be possible for other affected taxpayers and the Commissioner to merely agree, subject to statutory time bar issues, to place their case "on hold" while the Adjudication Unit undertakes its analysis.

204. However, care will need to be taken to ensure that the time bar will not be breached, and consideration should be given to obtaining a time bar waiver.

205. Again, as this approach requires the taxpayer to agree, the Commissioner can offer it to individual taxpayers but they still have the choice to progress the dispute through the full disputes process.

206. Taxpayers who agree to place their case "on hold" while the Adjudication Unit considers the issues in question in relation to another taxpayer will not be bound by any decision reached by the Adjudication Unit and will be free to continue with their dispute should they wish.

Situation 3: The Adjudication Unit has previously looked at an issue and taken a view supporting the taxpayer

207. It is the Commissioner's policy that a finding for the taxpayer in the initial dispute will usually lead to the other disputes being withdrawn, particularly if the disputes are in respect of the same transaction.

208. However, in some situations further consideration of the issue is required at a national level before the Commissioner will apply the conclusions reached in a particular adjudication report more broadly to other taxpayers. In those cases, Inland Revenue officers may be advised that a specified or contrary approach (to that adopted by the Adjudication Unit) is to be followed pending further consideration of the issue at a national level.

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 process because any of the exceptions under section 89N(1)(c) applies (see earlier discussion), or

b) does not have to complete the disputes process because the High Court has made an order that the dispute resolution process can be truncated pursuant to an application made by the Commissioner under section 89N(3), or

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

210. 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 a statement regarding the effect of the issues and propositions of law exclusion rule pursuant to section 89M(3).

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

212. Where practicable, the Commissioner will contact the taxpayer shortly after the disclosure notice and SOP are issued to ascertain whether the taxpayer has received these documents.

213. If the taxpayer has not received the Commissioner's disclosure notice, for example, due to a postal error or an event or circumstance beyond the taxpayer's control, the Commissioner will issue another disclosure notice to the taxpayer. In this circumstance, the response period within which the taxpayer must respond with their SOP will commence from the date that the Commissioner issued the initial disclosure notice.

214. Where the taxpayer cannot issue a SOP within the applicable response period, they may issue a late SOP with an explanation of why it is late. The Commissioner will consider the late SOP in terms of the discretion under section 89K(1). (See paragraphs 108 to 126 for further discussion.)

Issues and propositions of law exclusion rule

215. A disclosure notice is the document that triggers the application of the issues and propositions of law

exclusion rule. The Commissioner must explain the effect of this rule and refer to section 138G in the disclosure notice. (See paragraph 239 for further discussion.)

Issue of a disclosure notice

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

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

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 any 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. (See section 89M(10).)

220. Where a dispute commenced by the Commissioner remains unresolved after the conference phase, an Inland Revenue officer will usually issue a disclosure notice together with a SOP:

- within **three months** from the end of the conference phase; or
- within **three months** from the date when the Commissioner advises that the taxpayer's opt out request has been declined;

subject to any further time allowed by an appropriate senior manager. (See paragraphs 223 to 225.)

221. The three-month timeframe will exclude any statutory holidays.

222. If the last day of the three-month timeframe falls on a weekend, Inland Revenue must issue the disclosure notice and the SOP by the next working day.

223. While the Commissioner is able to extend the three-month timeframe these extensions should be very rare, because in most disputes, the timeframe is considered to be sufficient for Inland Revenue officers to complete and issue to the taxpayer a disclosure notice and the Commissioner's SOP.

224. The ability for Inland Revenue to extend the three-month timeframe is provided for because it is recognised that even with good planning and the best endeavours of the Inland Revenue officers involved, there might be occasions on which the disclosure notice and the Commissioner's SOP cannot be issued within the three-month timeframe. This might occur when:

a) the facts, issues, and law are complex, and/or

b) the case involves an important issue of precedent and/or the Litigation Management Unit or external advisors are involved in advising on the Commissioner's SOP.

225. If it is considered that an extension of the timeframe is needed:

- approval will first be obtained from an appropriate senior manager;
- the taxpayer will then be advised of the estimated date for issue of the Commissioner's SOP. Where the estimated date cannot be met, Inland Revenue will use its best endeavours to keep the taxpayer informed of the progress made in the completion of the Commissioner's SOP.

Statement of position (SOP)

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

227. When the disputed issue relates to a tax type that is subject to the statutory time bar (for example, income tax, GST) that falls within the current income year, the parties will endeavour to complete the disputes process before the time bar starts. 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.

228. However, if no such agreement is reached, 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 amend the assessment by exercising the discretion under section 113.

229. Whether the Commissioner has adequately considered a SOP will depend on what is a reasonable length of time and level of analysis for that SOP given the circumstances of the case (for example, the length of the SOP and the complexity of the legal issues).

230. Thus a simple dispute could only take a couple of days to consider adequately while a complex dispute could take a few weeks. If the statutory time bar is imminent the Inland Revenue officer will consider the taxpayer's SOP urgently.

Contents of a SOP

231. The "evidence exclusion rule" was replaced by the "issues and propositions of law exclusion rule" as a consequence of the Taxation (Tax Administration and Remedial Matters) Act 2011, for disputes or challenges relating to a disclosure notice issued on of after 29 August 2011. In these disputes, the disputant and the Commissioner are only confined in challenge proceedings to the issues and propositions of laws disclosed in their respective SOPs. In other words, additional facts and evidence not originally disclosed in the disputant's or Commissioner's SOP may be introduced in challenge proceedings.

232. For disclosure notices issued before 29 August 2011, the "evidence exclusion rule" still applies and limits the parties to the facts, evidence (excluding oral evidence), issues and propositions of law that either party discloses in their respective SOPs, unless a court order is made under section 138G(2) allowing new facts and evidence to be raised.

233. However, under either rule, 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 in the SOPs under section 89M(13).

234. Under section 89M(4) the SOP must be in the prescribed form 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.

235. The minimum content requirements for a SOP under section 89M(4) 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.

236. 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 process. (In very complex cases a full explanation of the relevant evidence and summary of less relevant evidence will be accepted.)

237. The disputes process does not require that relevant documents are discovered or full briefs of evidence or exhaustive lists of documents exchanged. Rather, providing an outline of relevant evidence in the SOP will ensure that both parties appreciate the availability of evidence in respect of the factual issues in dispute. The Commissioner should ensure that an outline of any expert evidence on which they intend to rely is included in the SOP.

238. Submissions made in the NOPA phase must be sufficiently concise to enable the parties to progress the dispute without incurring substantial expense. 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.

239. Subject to section 138G(2), the issues and propositions of law exclusion rule prevents the court considering issues and propositions of law that are not included in:

    a) the Commissioner or disputant's 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).

240. Section 89M(6B) reads:

> In subsections 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.

241. 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.

242. 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 have not previously been proposed in the Commissioner's NOPA.

Receipt of a taxpayer's SOP in response

243. 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.

244. 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.

245. 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.

246. The Commissioner will make a reasonable effort to contact the taxpayer or their tax agent two weeks before the response period expires to determine whether the taxpayer will issue a SOP in response to the disclosure notice. Such contact can be made by telephone or in writing.

247. 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.

248. Where it is practicable, Inland Revenue will acknowledge the taxpayer's SOP as received within 10 working days after receiving it. However, the Commissioner will advise the taxpayer or their agent of any deficiencies in the SOP's content as soon as practicable.

249. A taxpayer who has issued a SOP outside the applicable response period can apply for consideration of exceptional circumstances or that the disputant had a demonstrable intention to continue the dispute under section 89K. The responsible officer must notify the taxpayer of the decision in writing within one month of receiving the disputant's "late" SOP (rejection is by way of a "refusal notice").

250. A taxpayer is deemed to have accepted the Commissioner's SOP if they do not reply to it with their own SOP within two months after the date that the disclosure notice is issued and where section 89K does not 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

251. 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.

252. The Commissioner can only provide additional information in response to new or novel information or arguments that the taxpayer has raised in their SOP or agreed to add to their SOP under section 89M(13). The Commissioner cannot add further information simply because it was omitted from the Commissioner's SOP (for example, information that was received under a section 17 notice after the SOP was issued).

253. The additional information must be provided as far as possible in the same format as the SOP to which it relates (that is, in accordance with section 89M(4)). As mentioned above, the additional information can include documentary evidence but not lists of potential witnesses.

254. If the Commissioner intends to provide additional information to the taxpayer under section 89M(8), the Commissioner will usually advise the taxpayer or their tax agent of this within two weeks after the taxpayer's SOP is received. 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. Any new issues or propositions of law forming part of the additional information will be subject to section 138G.

255. The taxpayer cannot reply to the additional information that the Commissioner provides, unless the parties agree that additional information will be accepted under section 89M(13).

Agreement to include additional information

256. Either party can agree to include additional information in their SOP under section 89M(13) at any time during the disputes process including after the dispute has been referred to the Adjudication Unit. 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.

257. However, before agreeing to a request made by the taxpayer under section 89M(13) the Commissioner will consider the taxpayer's prior conduct and whether they could have provided the information earlier through the application of due diligence.

258. The Commissioner will usually also consider the materiality and relevance of the additional information and its capacity to help resolve the dispute and may decide to take it into account in coming to an assessment. In this circumstance, both parties will be

expected to cooperate in resolving the relevance and accuracy of any such material. The Commissioner may wish to apply resources to verification and comment and this will be considered by the adjudicator.

259. If a taxpayer's request to include additional information in their SOP is declined, the reasons must be documented with detailed reference to the taxpayer's conduct, level of cooperation before the request was made and why the information was not provided earlier. The responsible officer will also advise the taxpayer or their tax agent of the reasons why their request was declined.

260. Any agreement to add further 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 timeframe.

261. Any additional information that the parties provide under section 89M(13) will be deemed to form part of the provider's SOP under section 89M(14). Section 138G applies to the additional information.

Preparation for adjudication

262. The Adjudication Unit is part of Inland Revenue's Office of the Chief Tax Counsel and represents the final step of the disputes process. The adjudicator's role is to review unresolved disputes by taking 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 that will ensure the correctness of the assessment.

263. Generally, the adjudicator will make such a decision within three months after the case is referred to the Adjudication Unit (although sometimes a decision can be made in a few weeks). The length of time taken to make a decision will depend on the number of disputes that are before the Adjudication Unit, any allocation delays and the technical, legal and factual complexity of those disputes.[1]

264. The adjudication process is an administrative (rather than a legislative) one. Judicial comments have been made in *C of IR v Zentrum Holdings Limited and Another, Ch'elle Properties (NZ) Limited v CIR* (2004) 21 NZTC 18,618 and *ANZ National Bank Ltd and others v C of IR* (No. 2) (2006) 22 NZTC 19,835 indicating that, as a matter of law, it is not strictly necessary for Inland Revenue officers to send all disputes to the Adjudication Unit for review and Inland Revenue officers are not necessarily bound by the Adjudication Unit's decisions.

265. Notwithstanding the above judicial comments, if the parties have not agreed on all the issues at the end of the conference and disclosure phases or to opting out under section 89N(1)(c)(viii), it is the Commissioner's policy and practice that all disputes are to be sent to the Adjudication Unit for review, irrespective of the complexity or type of issues or amount of tax involved unless any of the following exceptions arise:

    a) the Commissioner has considered the taxpayer's SOP for the purposes of section 89N(2)(b) and referred the dispute to the Adjudication Unit for their preliminary consideration and the Adjudication Unit has determined that it has insufficient time to reach a decision in respect of the dispute before a statutory time bar would prevent an assessment from being increased (see paragraphs 228 to 230 for further discussion), or

    b) any of the legislative exceptions specified in section 89N(1)(c) apply (see Appendix 2 for further discussion) so that the Commissioner can amend an assessment without first completing the disputes process, or

    c) the High Court has made an order that the disputes process can be truncated pursuant to an application made by the Commissioner under section 89N(3) (see Appendix 2 for further discussion).

266. The decision not to refer the case to adjudication must be made by a senior person in Service Delivery (for example, at the time of writing the delegation was with Assurance Manager level or above). In respect of the first exception mentioned in paragraph 265(a) it is necessary that the parties have exchanged a SOP and it is a matter solely for the Adjudication Unit to determine whether it has insufficient time to fully consider the dispute.

267. If the dispute is to be 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.

268. 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 must be sent to the Adjudication Unit.

[1] For further information on the timeframe for adjudication of disputes see the article titled "Adjudication Unit – Its role in the dispute resolution process" that was published in the *Tax Information Bulletin* Vol 19, No 10 (November 2007).

269. If the dispute is to be referred to adjudication, the responsible officer will issue a letter together with a copy of the cover sheet to the taxpayer before sending the submissions, notes and evidence to the 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.

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

271. Once the taxpayer has concurred on the materials to be sent to the Adjudication Unit, those materials will be so forwarded. However, if no response is received from the taxpayer the materials will be forwarded after the 10 working days allowed for the taxpayer's response have elapsed. The adjudicator may also contact the parties after the initial materials have been received to obtain further information.

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

273. Generally, the adjudicator only considers the materials that the parties have submitted. They do not usually seek out or consider further information, unless it is relevant. The adjudicator may consider such additional information notwithstanding that the parties have not agreed that the provider can include this information in their SOP under section 89M(13).

274. However, any additional material which amounts to a legal or factual issue, or a proposition of law, that the parties have not disclosed in their SOP (or agreed to include in their SOP under section 89M(13)) cannot later be raised in court because the issues and propositions of law exclusion rule in section 138G(1) will apply (as discussed in paragraphs 239 to 241).

Adjudication decision

275. 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.

276. 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.

277. 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.

278. If the Commissioner has commenced the disputes 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 any of the following conditions under section 138B(1) are 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.

279. 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).

280. 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.

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

This Standard Practice Statement is signed on 13 October 2011.

Rob Wells
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Legal and Technical Services

APPENDIX 1

Exceptions to the requirement that the Commissioner must issue a NOPA before making an assessment

Exception 1: The assessment corresponds with a tax return

1. Section 89C(a) reads:

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

2. The application of section 89C(a) is limited under the self-assessment rules. Generally, a taxpayer makes an assessment and files a tax return that includes that assessment. If the taxpayer's assessment is supported by the information in the tax return and any underlying source documents that the taxpayer has provided and the Commissioner agrees with the taxpayer's return and assessment there is no need for the Commissioner to invoke the disputes process.
3. In these circumstances, instead of issuing a notice of assessment the Commissioner will issue a statement of account that confirms the taxpayer's assessment. The statutory response period for the purposes of the disputes process will commence from the date that Inland Revenue receives the taxpayer's assessment.
4. 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 their income tax liability in the tax return.

Exception 2: Simple or obvious mistake or oversight

5. 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.

6. 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.
7. The Commissioner will generally treat the following as a simple mistake or oversight:
   a) an arithmetical error;
   b) an error in transposing numbers from one box to another in a tax return;
   c) double counting, such as inadvertently including in the taxpayer's income the same item twice;
   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.
8. A "simple or obvious mistake or oversight" can be determined on a case-by-case basis with no dollar limit. The Commissioner may consider whether this exception applies irrespective of whether the taxpayer has requested that the Commissioner makes an amendment under section 113 or applies the exception under section 89C(b).
9. Where the Commissioner issues an assessment to correct a taxpayer's simple or obvious mistake or oversight, the Commissioner may 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 and not relied on the action or advice of their tax advisor for the purposes of section 141A(2B).

Exception 3: Agreement to amend previous tax position

10. 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.

11. 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.
12. 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, but 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 adjustment.
13. However, if the parties agree on only one adjustment and dispute others in respect of the same assessment, the Commissioner cannot issue an assessment on the basis of the agreed adjustment because the tax position is not necessarily correct.
14. Where a taxpayer proposes an adjustment outside the disputes 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. (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

15. Section 89C(d) reads:

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

16. The same procedures apply for section 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.

17. For example, if the taxpayer has disputed, but now agrees, that they are a "taxpayer" for the purpose of the definition in section YA 1 of the Income Tax Act 2007 and has not provided a tax return, the Commissioner may issue an assessment to the taxpayer under section 89C(d) to reflect this agreement. The Commissioner must also consider whether shortfall penalties are applicable.

18. Another example is where, pursuant to section 6A, the Commissioner settles a tax case and disputes process. In such cases, the Commissioner will usually enter into an individual settlement deed and agreed adjustment in writing with the taxpayer to confirm the settlement.

19. The Commissioner will then give effect to that settlement deed and agreed adjustment by issuing an assessment to the taxpayer under section 89C(d) without first issuing a NOPA.

Exception 5: Material facts and law identical to court proceeding

20. 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.

21. Pursuant to section 89C(db), the Commissioner can issue an assessment to the taxpayer in relation to the other period that is the subject of court proceedings, without first issuing a NOPA. The Commissioner does not have to follow the disputes 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.

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

23. 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 process.

Exception 6: Revenue protection

24. 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.

25. 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.

26. 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).

Exception 7: Fraudulent activity

27. Section 89C(eb) reads:

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

28. Pursuant to section 89C(eb), a taxpayer has been involved in a fraudulent activity if they have engaged or participated in, or been connected with, any fraudulent activity that would have tax consequences for them.

29. If the taxpayer has not been convicted of an offence relating to a fraudulent activity section 89C(eb) can still apply provided that the Commissioner believes on reasonable grounds that the taxpayer has been involved in a fraudulent activity.

30. If Inland Revenue officers apply the exception under section 89C(eb), this should be supported by sufficient evidence of the "reasonable grounds" relied on. The evidence does not have to be absolute proof but, merely sufficient to verify the "reasonable grounds".

Exception 8: Vexatious or frivolous

31. 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.

32. 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.
33. 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

34. Section 89C(g) reads:

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

35. For the purpose of section 89C(g), a direction or determination includes any court or 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 irrespective of whether they were a party to the test case.
36. The Commissioner must retain a copy of the direction or determination to support the application of this exception. In these circumstances, the Commissioner will endeavour to make an assessment including imposing shortfall penalties, within two weeks after receiving the written direction or determination. However, if the direction or determination relates to a test case the Commissioner can issue an assessment within the period specified under section 89O(5).

Exception 10: "Default assessment"

37. Section 89C(h) reads:

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

38. If section 89C(h) applies because the taxpayer has failed to provide a tax return the Commissioner can make an assessment or amended assessment pursuant to section 106(1) (commonly known as a "default assessment").
39. Where a taxpayer seeks to dispute a default assessment through the disputes 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.
40. 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 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.
41. 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.
42. 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 process, they must still provide a tax return.
43. 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.
44. If the Commissioner decides not to exercise the discretion under section 113 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 incorrect.
45. 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

46. Section 89C(i) reads:

> The assessment is made following the failure by a taxpayer to withhold or deduct an amount required to be withheld or deducted by a tax law or to account for an amount withheld or deducted in the manner required by a tax law.

47. This exception is intended to address a taxpayer's failure to withhold, deduct or account to the Commissioner for an amount of tax including PAYE, schedular payments to non-resident contractors and resident withholding tax ("RWT"). The Commissioner must also consider whether shortfall penalties are applicable.

48. The Commissioner may not apply this exception if there is a dispute that involves statutory interpretation (for example, whether a particular item attracts liability for RWT meaning that the taxpayer was required to withhold or deduct RWT) and/or shortfall penalties.

Exception 12: Non-assessed tax return

49. 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.

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

Exception 13: Consequential adjustment

51. 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 ...

52. If transactions affect multiple taxpayers, whether in the same way or in related but opposite ways, the Commissioner can reassess any consequentially affected taxpayers under section 89C(k). This is notwithstanding that the consequentially affected taxpayers have not agreed to the amended assessments.

53. However, those taxpayers subject to the amended assessments may still issue a NOPA to dispute the consequential adjustment within the applicable response period. The Commissioner must also consider whether shortfall penalties are applicable.

54. Section 109(b) deems any assessment that the Commissioner makes to be correct. Therefore, the Commissioner can make any consequential amendment under section 89C(k). However, the Commissioner must be satisfied that there is a direct consequential link between the taxpayers before making any 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 had 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.

Exception 14: Look-through company

55. If an assessment will correct a tax position taken by the taxpayer in relation to a tax position taken by a look-through company in a return of income under section 42B, and the Commissioner and the company have completed the disputes process for that return of income and that tax position, the Commissioner can reassess under section 89C(ka) without first issuing a NOPA.

Exception 15: Income statement

56. Section 89C(l) provides that no NOPA is required if the assessment results from an income statement under Part 3A.

Exception 16: Write-off of outstanding tax for taxpayers with tax losses

57. Under section 177C(5), if the Commissioner writes off outstanding tax for a taxpayer who has a tax loss, the Commissioner must extinguish all or part of the taxpayer's tax loss, by dividing the amount written off by 33% and reducing the tax loss by that amount.

58. Under section 89C(lb) the Commissioner does not have to issue a NOPA prior to issuing an assessment which extinguishes all or part of a tax loss in accordance with section 177C(5).

Exception 17: Tax credits arising from subparts MA–MF and MZ

59. Under section 89C(m) no NOPA is required if an assessment includes a calculation of working for families tax credits (identified in subparts MA to MF and MZ of the Income Tax Act 2007).

APPENDIX 2

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

1. If a NOPA has been issued and the dispute is unresolved, the Commissioner can issue an assessment without completing the disputes 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 process (section 89N(1)(c)(i))

2. 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:

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

4. 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 it is considered that an offence has been committed under section 143H. The offence has the effect of delaying the completion of the disputes process meaning that the Commissioner does not have to complete that process and can amend the taxpayer's assessment under section 113.

5. 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 that it is considered that an offence has been committed under section 143F that has had the effect of delaying the completion of the disputes process. The Commissioner can then exercise the discretion to amend the taxpayer's assessment under section 113 without completing the disputes process.

6. In order to apply this exception, Inland Revenue officers must form an opinion that is honestly and reasonably justifiable on the basis of the evidence available, that the disputant has committed an offence under an Inland Revenue Act. The Inland Revenue officer's decision must be clearly documented and stipulate the grounds and reasoning on which it is based.

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))

7. If the Commissioner has reasonable grounds to believe that the taxpayer or a person associated with them ("associated person") intends to dispose of assets in order to avoid or defer the payment of an outstanding or pending tax liability, the Commissioner can urgently issue an assessment to the taxpayer. Section 89N(1)(c)(ii) and (iii) reads:

   (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 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:

8. In order to issue an assessment on the basis of either of the above exceptions, 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))

9. 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 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:

10. These exceptions apply to any judicial review proceedings that are brought against the Commissioner. In judicial review proceedings, the parties' resources are likely to be directed away from advancing the dispute through the disputes process.

11. For the purpose of section 89N(1)(c)(v), an associated person of a taxpayer may be involved in a similar issue to the taxpayer even if the issue relates to a different revenue type. 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.

12. 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 with 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))

13. 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:

14. 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 sections 17 or 19. (The Commissioner's practice regarding section 17 is currently set out in SPS 05/08: *Section 17 Notices*.) The requirement for statutory information will specify the period within which the information must be provided. This period will allow the taxpayer reasonable and sufficient time to comply.

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

Exception 5: The parties agree in writing that the dispute should be resolved by the court or TRA without completing the disputes process (section 89N(1)(c)(viii))

16. 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:

17. Under this exception, where the Commissioner or taxpayer commences the disputes process, the parties can make such an agreement in writing 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 process relative to the amount in dispute.

18. This exception allows the taxpayer to bring challenge proceedings against the Commissioner. The parties must have exchanged a NOPA and NOR before the taxpayer can bring challenge proceedings under section 138B(1).

19. The circumstances under which the Commissioner will enter into such an agreement are discussed in detail from paragraph 172 to 195. This SPS refers to this exception as opting out of the disputes process or "opt out".

Exception 6: The parties agree in writing to suspend the disputes process pending the outcome of a test case (section 89N(1)(c)(ix))

20. 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.

21. 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.

22. If the parties agree to suspend the disputes 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.)

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

24. 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.

25. If the statutory time bar arising under section 108 or 108A is imminent, section 89O(5) allows the Commissioner more time to complete the disputes process.

26. For example, the Commissioner commences a dispute and on 1 March 2010 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 2010 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 2010.

27. The Commissioner must make an amended assessment or perform an action that is the subject of the suspended dispute by 29 September 2010. This date is calculated as follows:

a) The suspension period commences on the date of the agreement (1 March 2010) and ends on the date of the court's decision in the test case (31 July 2010). 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 2010, that is 60 days after the date that the suspension period ends on 31 July 2010 pursuant to section 89O(5)(a), and

(ii) 31 August 2010, that is 153 days after the period commences on 1 April 2010 pursuant to section 89O(5)(b).

Exception 7: The Commissioner applies to the High Court for an order to allow more time to complete or dispense with the disputes process

28. 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.

29. The Commissioner envisages that this exception will be used if section 89N(1)(c) does not apply and there are exceptional circumstances.

30. Any application made by the Commissioner under section 89N(3) must be based on reasonable grounds. Whether there are reasonable grounds will depend on considerations such as the complexity of the issues in the dispute, whether the taxpayer has caused delays; whether the dispute involves large amounts of revenue or whether there were significant matters in the dispute that were unforeseen by either party and provided a justification for the delay.

31. For example, due to unusual circumstances the Commissioner does not learn about a proposed adjustment until late. Further delays by the taxpayer and the need for the Commissioner to obtain significant legal advice means that the Adjudication Unit cannot consider the dispute before the time bar applies. In these circumstances, the Commissioner may apply to the High Court for an order that allows more time for the disputes process to be completed under section 89N(3). (Note: This is only an example of a possible unforeseen situation and it is anticipated that there will be a wide variety of circumstances under which an application under section 89N(3) will be appropriate.)

32. The Commissioner's application to the High Court under section 89N(3) must be made before the four-year statutory time bar falls due.

33. 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.

34. Section 89N(5) allows the Commissioner more time to complete the disputes process where the statutory time bar under section 108 or 108A is imminent.

35. For example, the Commissioner commences the disputes process. On 1 March 2010 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 2010 and the taxpayer does not agree to delay its application under section 108B(1)(a). On 30 June 2010, the High Court makes an order that allows the Commissioner's application and gives the Commissioner 30 further days to complete the disputes process.

36. Pursuant to section 89N(5), the Commissioner must make an amended assessment by 30 August 2010. 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 2010 to 31 March 2010. The period during which an amended assessment must be made under section 89N(5)(a) commences on 1 April 2010.

b) The period during which the assessment must be made includes 122 days, that is the period between 1 March 2010 and 30 June 2010 (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 2010. That is, by 30 August 2010.

37. During the period from 1 March to 30 August 2010, the parties may continue to attempt to resolve the dispute. This may include exchanging SOPs and going through the adjudication process.

38. The above example indicates that the Commissioner has more time to complete the disputes process. The time bar will not commence until 30 August 2010.

39. Where the Commissioner applies to the High Court under section 89N(3) for an order to truncate the disputes process, an assessment must be issued 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 2010.

SPS 11/06: DISPUTES RESOLUTION PROCESS COMMENCED BY A TAXPAYER

Introduction

1. This Standard Practice Statement ("SPS") discusses a taxpayer's rights and responsibilities in respect of an assessment or other disputable decision when the taxpayer commences the disputes resolution process.
2. Unless specified otherwise, all legislative references in this SPS refer to the Tax Administration Act 1994 ("TAA").
3. Where the Commissioner commences the disputes resolution process, the Commissioner's practice is stated in SPS 11/05: *Disputes resolution process commenced by the Commissioner of Inland Revenue*.
4. The Commissioner regards this SPS as a reference guide for taxpayers and Inland Revenue officers. Where possible, Inland Revenue officers must follow the practices outlined in this SPS.
5. The disputes resolution process is designed to ensure 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.
6. 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 aims to ensure that all the relevant evidence, facts and legal arguments are canvassed before a case goes to a court.
7. One of the most significant changes introduced by the Taxation (Tax Administration and Remedial Matters) Act 2011 is the amendments made to the exclusion rule in section 138G of the TAA. The effect of this change is that the Commissioner and disputant are now only restricted to issues and propositions of law disclosed in their respective Statements of Position, in subsequent challenge proceedings. The Commissioner does not view this change as detracting from the desirability, as far as practicable, for both parties to a dispute to disclose all relevant facts and evidence as early as possible in order to resolve a dispute. For the purposes of this SPS, the Commissioner for convenience will refer to the new rule in section 138G as the "issues and propositions of law exclusion rule".
8. In accordance with the objectives of the disputes resolution process, the Commissioner (unless a statutory exception applies under section 89C or 89N must go through the disputes resolution process before the Commissioner can issue an assessment.

Application

9. This SPS applies from 13 October 2011 and incorporates legislative changes to the disputes process enacted in the Taxation (Tax Administration and Remedial Matters) Act 2011.
10. It replaces SPS 10/05: *Disputes resolution process commenced by a taxpayer* dated 8 November 2010.

Background

11. The tax dispute resolution procedures were introduced in accordance with the recommendations of the Richardson Committee in the *Report of the Organisational Review of the Inland Revenue Department* (April 1994) and were designed to reduce the number of disputes by:
    a) promoting full disclosure, and
    b) encouraging the prompt and efficient resolution of tax disputes, and
    c) promoting the early identification of issues, and
    d) improving the accuracy of decisions.
12. The disputes resolution process ensures that there is full and frank communication between the parties in a structured way within strict time limits for the legislated phases of the process.
13. 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 aims to encourage as far as practicable, the disclosure of all relevant evidence, facts, issues and propositions of law before a case proceeds to a court or hearing authority.
14. 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 the issue of:
    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 other disputable decision (the prescribed form is the *Notice of proposed adjustment (IR 770)*). A NOPA is the formal document which begins the disputes process.
    b) A notice of response ("NOR"): this must be issued by the recipient of a NOPA if they disagree with it (the preferred form is the *Notice of response (IR 771)*).

c) A notice rejecting the Commissioner's NOR: this must be issued by the taxpayer if they disagree with the Commissioner's NOR (there is no prescribed form for a notice rejecting the Commissioner's NOR).

d) A disclosure notice and statement of position ("SOP"): the issue of a disclosure notice by the Commissioner triggers the requirement for the taxpayer to provide a SOP to continue the dispute. Each SOP must provide an outline of the facts, evidence, issues and propositions of law with sufficient details to support the positions taken. Each party must issue a SOP (the preferred form is the *Statement of position (IR 773)*). The SOPs are important documents because they limit the issues and propositions of law that either party can rely on if the case proceeds to court to what is included in the SOPs (unless a hearing authority makes an order that allows a party to raise new issues and propositions of law under section 138G(2)).

15. There are also two administrative phases in the disputes process: the conference and adjudication phases. If the dispute has not been already resolved after the NOR phase, the Commissioner's practice will be to hold a conference. A conference can be a formal or informal discussion between the parties to clarify and, if possible, resolve the issues.

16. If the dispute remains unresolved after the conference phase and the exchange of SOPs, the Commissioner will usually refer the dispute to adjudication, except in limited circumstances. Adjudication involves Inland Revenue independently considering a dispute and is the final phase in the disputes process before the taxpayer's assessment is amended (if it is to be amended) following the exchange of the SOPs.

17. Timely progression of disputes through the disputes process may require the use of the Commissioner's information-gathering powers (particularly section 17) before and/or during the disputes process.

18. Inland Revenue has a quality assurance review process known as Core Task Assurance ("CTA") which is designed to ensure that key pieces of work (including NORs and SOPs) are subject to an independent review by Legal and Technical Services before being issued. Given the importance of the disputes process to the Commissioner and to taxpayers, Inland Revenue officers are required to get CTA approval of disputes documents prior to issue.

Glossary

19. The following abbreviations are used throughout this SPS:

- NOPA – Notice of Proposed Adjustment
- NOR – Notice of Response
- SOP – Statement of Position
- Disputes Process – Disputes Resolution Process
- TRA – Taxation Review Authority.

Summary of key actions and indicative administrative timeframes

20. Set out below is a summary of the key actions and administrative timeframes where a disputes process is commenced by a taxpayer.

21. These key actions and timeframes are intended to be administrative guidelines for Inland Revenue officers. Any failure to meet these administrative timeframes will not invalidate subsequent actions of the Commissioner or prevent the case from going through the disputes process.

Paragraph in the SPS	Key actions	Indicative timeframes
	The taxpayer's NOPA	
39, 48, 60, 71 and 79	A taxpayer's response period for issuing a NOPA in respect of an assessment or other disputable decision.	Within four months from the date that the assessment or other disputable decision is issued.
108	The Commissioner forwards and assigns the taxpayer's NOPA to the responsible officer.	Usually within five working days after the taxpayer's NOPA is received.
110	The Commissioner acknowledges the receipt of the taxpayer's NOPA (either by telephone or in writing).	Usually within 10 working days after the taxpayer's NOPA is received.
111	The Commissioner advises that the taxpayer's NOPA is deficient, but the applicable response period has not expired.	Immediately after the Inland Revenue officer becomes aware of the deficiency.
129	The Commissioner considers the application of section 89K, where a taxpayer's NOPA has been issued outside the applicable response period.	The Commissioner will advise the taxpayer of the outcome within one month of receipt of the disputant's "late" notice. If the application is rejected, a refusal notice will be issued.
	The Commissioner's NOR	
144	The Commissioner advises the taxpayer (either by telephone or in writing) whether the Commissioner intends to issue a NOR.	Usually within 10 working days before the response period for the taxpayer to issue a NOPA expires.
143	The Commissioner has issued and the taxpayer has received a NOR.	Within two months starting on the date that the taxpayer's NOPA is issued.
	The taxpayer's written rejection of the Commissioner's NOR	
164	The Commissioner confirms whether the taxpayer will reject the Commissioner's NOR.	Usually two weeks before the response period for the Commissioner's NOR expires.
165	The taxpayer rejects the Commissioner's NOR in writing.	Within two months after the date that the Commissioner's NOR is issued.
166	Inland Revenue forwards the taxpayer's rejection of the Commissioner's NOR to the responsible officer.	Usually within five working days after receiving the taxpayer's rejection.
166	The Commissioner acknowledges receipt of the taxpayer's rejection of the Commissioner's NOR.	Usually within 10 working days after receiving the taxpayer's rejection.
163	The taxpayer is deemed to accept the Commissioner's NOR, because they have failed to reject it within the applicable response period and none of the reasons in section 89K apply.	At the end of the two-month period starting on the date of issue of the Commissioner's NOR.
167	The Commissioner will advise the taxpayer in writing that they are deemed to accept the Commissioner's NOR.	Within two weeks after the response period for the Commissioner's NOR has ended.

Paragraph in the SPS	Key actions	Indicative timeframes
	Conference phase	
178	The Commissioner will write to the taxpayer to initiate the conference phase and to offer a facilitated conference.	The Commissioner's offer of a facilitated conference will be made in writing within one month after the Commissioner receives the taxpayer's rejection of the Commissioner's NOR. The conference letter marks the start of the conference phase.
180	The taxpayer will advise Inland Revenue whether they will attend the conference meeting, and whether they will accept the conference facilitation offer.	Usually within two weeks of receipt of the conference facilitation letter. If the taxpayer does not respond within this timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer about the letter.
181	When a taxpayer agrees to attend a conference meeting, Inland Revenue will contact the taxpayer to establish a timeframe, and agree on how the meeting will be conducted.	Usually within two weeks following the taxpayer's agreement to a conference.
185	Conference meeting(s) and further information exchange between Inland Revenue and the taxpayer.	The suggested average timeframe of the conference phase is three months, subject to the facts and complexity of the dispute.
	Opt out	
210	The taxpayer may request to opt out of the disputes resolution process.	Within two weeks from the end of the conference phase.
210	Inland Revenue officer will advise the taxpayer whether the request to opt out has been agreed to.	Usually within two weeks from the date of the taxpayer's request to opt out.
	Disclosure notice	
242	The Commissioner advises the taxpayer that a disclosure notice will be issued.	Usually within two weeks before the date that the disclosure notice is issued.
250	The Commissioner issues a disclosure notice to the taxpayer.	Usually within one month of the end of the conference phase.
	Taxpayer's SOP	
253	The taxpayer must issue a SOP within the response period for the disclosure notice.	Within two months after the date that the disclosure notice is issued, unless section 89K applies.
268	The Commissioner confirms whether the taxpayer will issue a SOP.	Usually 10 working days before the response period for the disclosure notice expires.
268	The Commissioner forwards the taxpayer's SOP to the responsible officer.	Usually within five working days after the taxpayer's SOP is received.
269	The Commissioner acknowledges the receipt of the taxpayer's SOP.	Usually within 10 working days after the taxpayer's SOP is received.
269	The Commissioner advises that the taxpayer's SOP is deficient, 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 deficiency.
270	The Commissioner considers whether section 89K applies, where the taxpayer has issued a SOP outside the applicable response period.	The Commissioner will advise the taxpayer of the outcome within one month of receipt of the disputant's "late" SOP. If the application is rejected, a refusal notice will be issued.

Paragraph in the SPS	Key actions	Indicative timeframes
271	The dispute is treated as if it was never commenced, if the taxpayer fails to issue a SOP within the applicable response period and none of the section 89K grounds apply.	Usually 10 working days after the response period for the disclosure notice expires.
	The Commissioner's SOP	
272	The Commissioner issues a SOP in response to the taxpayer's SOP.	Within two months after the date that the taxpayer's SOP is issued, unless an application has been made to the High Court under section 89M(10).
281	The Commissioner considers a taxpayer's request to include additional information in the SOP.	Usually within one month after the date that the Commissioner's SOP is issued.
	Adjudication	
297	The Commissioner prepares a cover sheet and issues a letter (with a copy of the cover sheet) to the taxpayer to seek concurrence on the materials to be sent to the adjudicator.	Usually within one month after the response period for the taxpayer's SOP expires.
298	The taxpayer responds to the Commissioner's letter.	Within 10 working days after the date that the letter is issued.
299	The Commissioner forwards materials relevant to the dispute to the Adjudication Unit.	Usually when the Commissioner receives the taxpayer's response or within 10 working days after the date that the Commissioner's letter is issued.
288	Adjudication of the disputes case.	Usually within three months after the date that the Adjudication Unit receives the disputes files, depending on the number of disputes that are before the Adjudication Unit, any allocation delays and the technical, legal and factual complexity of those disputes.
306	The taxpayer can file challenge proceedings.	Within two months of the adjudication decision.

STANDARD PRACTICE AND ANALYSIS

Assessment

Taxpayer's assessment

22. Section 92(1) reads:

> A taxpayer who is required to furnish a return of income for a tax year must make an assessment of the taxpayer's taxable income and income tax liability and, if applicable for the tax year, the net loss, terminal tax or refund due.

23. Section 92(1) applies to tax on income derived in:

    a) the 2005–06 and later tax years for a taxpayer whose income year matches the tax year, and

    b) the corresponding income year for a taxpayer whose income year is different from the 2005–06 and later tax years.

24. If a taxpayer has to file an income tax return they must make an assessment of their taxable income and income tax liability and, if applicable, the net loss, terminal tax or refund due. The definition of disputable decision in section 3(1) includes an assessment made by a taxpayer.

25. Similar requirements apply to a taxpayer who must file a GST return under the Goods and Services Tax Act 1985 ("the GST Act"). For a GST return period that begins on or after 1 April 2005, the taxpayer must make an assessment of the amount of GST payable. Section 92B(1) reads:

> A taxpayer who is required under the Goods and Services Tax Act 1985 to provide a GST tax return for a GST return period must make an assessment of the amount of GST payable by the taxpayer for the return period.

26. Pursuant to sections 92(2) and 92B(2) the assessment date for an income tax or GST assessment made by a taxpayer is the date that Inland Revenue receives the taxpayer's tax return.

27. When the taxpayer's assessment is received, the Commissioner's practice is to stamp, either

electronically or manually, the tax return with the date of receipt. This date is then entered into Inland Revenue's computerised database and a return acknowledgment form is sent to the taxpayer or agent. This practice ensures that the taxpayer will have a clear record of when their assessment was made.

28. Under section 92B(3) for a GST assessment and section 92(6) for an income tax assessment, a taxpayer cannot make an assessment of the amount of tax payable for a return period in their tax return if the Commissioner has previously made an assessment of the tax that is payable for that return period. This is commonly known as a "default assessment" and involves the Commissioner making a default determination that estimates the taxpayer's tax liability (for example, if they have missed a return filing deadline).

29. For further discussion regarding how a taxpayer can dispute a default assessment see paragraphs 42 to 54.

The Commissioner's assessment

30. Notwithstanding section 92(1) and subject to the statutory time bar in sections 108 and 108A, the Commissioner can sometimes issue a notice of assessment to a taxpayer.

31. The Commissioner cannot make an assessment without first issuing a NOPA to a taxpayer, unless an exception under section 89C to the requirement for issuing a NOPA applies.

32. The exceptions under section 89C are explained in Appendix 1 of SPS 11/05: *Disputes resolution process commenced by the Commissioner of Inland Revenue* or any replacement SPS. The Commissioner must ensure that any assessment is made in accordance with section 89C. However, if, on a rare occasion, an assessment was made in breach of section 89C, it will still be regarded as being valid under section 114(a).

33. If the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can issue a NOPA to the Commissioner under section 89D(1).

Notice of proposed adjustment (NOPA)

Situations where a taxpayer can issue a NOPA to the Commissioner

34. A taxpayer can issue a NOPA to the Commissioner in the following situations:

Situation 1: NOPA in respect of the Commissioner's assessment

35. Section 89D(1) reads:

> If the Commissioner—
>
> (a) issues a notice of assessment to a taxpayer; and
>
> (b) has not previously issued a notice of proposed adjustment to the taxpayer in respect of the assessment, whether or not in breach of section 89C,—
>
> the taxpayer may, subject to subsection (2), issue a notice of proposed adjustment in respect of the assessment.

36. When the Commissioner issues to a taxpayer a notice of assessment that does not relate to a "default assessment" (as discussed in paragraph 28) without first issuing a NOPA, the taxpayer can issue to the Commissioner a NOPA in respect of the assessment. A taxpayer's response to a default assessment is discussed in Situation 2.

37. A taxpayer's NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties. 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 is issuing any assessment or amended assessment (*McIlraith v CIR* (2007) 23 NZTC 21,456).

38. If the Commissioner has issued an assessment the taxpayer can issue a NOPA under section 89D(1) in respect of any of the considerations that were relevant to making the assessment. This could include preliminary decisions which are necessary to make the assessment, for example, a decision made by the Commissioner under section 89C (*MR Forestry (No 1) Trust Ltd v CIR* (2006) 22 NZTC 19,954).

39. The taxpayer must issue the NOPA within the applicable "response period" as defined in section 89AB. Generally, this will be within the four-month period that starts on the date that the Commissioner issues the assessment unless the Commissioner accepts a late NOPA under section 89K(1). However, this response period is subject to the exception discussed in Situation 6.

40. For example, if the Commissioner's notice of assessment is issued on 7 April 2008, under section 89D(1) the taxpayer must issue a NOPA in the prescribed form in respect of the assessment on or before 6 August 2008.

41. The taxpayer's right to issue a NOPA under section 89D(1) is unaffected, even if, in a very rare circumstance, the Commissioner made the assessment in breach of section 89C. The assessment will be deemed to be valid under section 114(a).

Situation 2: NOPA in respect of the Commissioner's default assessment

42. If a taxpayer has not filed a tax return, the Commissioner can make a default assessment under section 106(1) without first issuing a NOPA to the taxpayer.

43. Section 89D(2) reads:

> A taxpayer who has not furnished a return of income for an assessment period may dispute the assessment made by the Commissioner only by furnishing a return of income for the assessment period.

44. A taxpayer that intends to dispute a default assessment through the disputes process must:

    a) pursuant to section 89D(2) provide a tax return for the period to which the default assessment relates notwithstanding that the tax return cannot include the taxpayer's assessment (section 89D(2A)), and

    b) issue a NOPA to the Commissioner in respect of the default assessment within the applicable response period. Generally, this will be within the four-month period that starts on the date that the Commissioner issues the default assessment.

45. Similar rules apply to a NOPA that a taxpayer issues in respect of a GST default assessment.

46. Section 89D(2C) reads:

> A taxpayer who has not provided a GST tax return for a GST return period may not dispute the assessment made by the Commissioner other than by providing a GST return for the GST return period.

47. Where a taxpayer has not filed a GST return, the Commissioner can make a GST default assessment without first issuing a NOPA to the taxpayer.

48. If a taxpayer wants to dispute a GST default assessment through the disputes process, they must:

    a) provide a GST return for the periods to which the GST default assessment relates pursuant to section 89D(2C), notwithstanding that the tax return cannot include the taxpayer's assessment (section 89D(2D)), and

    b) issue a NOPA to the Commissioner in respect of the GST default assessment,

    within the applicable response period. That is, within four months from the date that the default assessment is issued.

49. The legislative requirement to provide a tax return in respect of a default assessment made by the Commissioner when issuing a NOPA is an additional requirement of the disputes process. This ensures that the taxpayer has provided the requisite statutory information before they dispute the assessment.

50. If the Commissioner agrees with taxpayer's tax return and NOPA, the Commissioner will amend the default assessment by exercising the discretion under section 113 subject to the statutory time bar in section 108 or 108A and any other relevant limitations on the exercise of that discretion.

51. However, if the Commissioner disagrees with the taxpayer's tax return and NOPA the Commissioner cannot amend the default assessment. Instead, the Commissioner must issue a NOR to the taxpayer within the relevant response period to continue the disputes process.

52. The taxpayer cannot commence a dispute or challenge proceedings in a hearing authority by simply filing the tax return to which the default assessment relates. The taxpayer must issue a NOPA with their tax return.

53. If a NOPA is not issued, the Commissioner cannot be compelled to amend the default assessment on receipt of the taxpayer's tax return. However, the Commissioner will amend the assessment under section 113 on the basis of the information provided in the tax return subject to the statutory time bar in section 108 and any other relevant limitations on the exercise of that discretion if this would ensure that the assessment was correct. (See SPS 07/03: *Requests to amend assessments* for further details.) Any amended assessment will be the Commissioner's assessment in this circumstance.

54. The Commissioner can decide not to amend the default assessment by exercising the discretion under section 113 on the basis of the tax return provided.

Situation 3: NOPA in respect of a deemed assessment made under section 80H

55. Section 89D(2B) reads:

> A taxpayer to whom section 80F applies who has not furnished an amended income statement for an assessment period may dispute a deemed assessment under section 80H only by furnishing an amended income statement for the assessment period.

56. Section 89D(2B) applies to a taxpayer who derives income solely from salary, wages, interest and dividends and who will receive an income statement from the Commissioner under section 80D(1).

57. Generally, where the taxpayer considers that the income statement is incorrect, they must advise the Commissioner of the reasons and provide the relevant information to correct the income statement under section 80F(1). This must be done within the statutory time limit. That is, the later of:

a) the taxpayer's terminal tax date for the tax year to which the income statement relates, and

b) two months after the date that the income statement is issued.

58. If the taxpayer does not provide the relevant information within the statutory time limit, they will be treated as having filed a tax return under section 80G(2) and made an assessment under section 80H in respect of that income statement. In this case, the date of the deemed assessment under section 80H will be the date that the statutory time limit under section 80F expires.

59. Pursuant to section 89D(2B), the taxpayer cannot issue to the Commissioner a NOPA in respect of the deemed assessment made under section 80H without first satisfying their statutory obligation to file an amended income statement for the assessment period.

60. If a taxpayer wants to dispute a deemed assessment under section 80H, they must:

a) provide an amended income statement for the assessment period, and

b) issue a NOPA to the Commissioner in respect of the assessment within the applicable response period (that is, four months after the date that the deemed assessment is issued.)

Situation 4: NOPA in respect of a disputable decision that is not an assessment

61. Under section 89D(3) a taxpayer can issue a NOPA in respect of a disputable decision that is not an assessment. Section 89D(3) reads:

> If the Commissioner—
>
> (a) issues a notice of disputable decision that is not a notice of assessment; and
>
> (b) the notice of disputable decision affects the taxpayer, —
>
> the taxpayer, or any other person who has the standing under a tax law to do so on behalf of the taxpayer, may issue a notice of proposed adjustment in respect of the disputable decision.

62. For the purpose of section 89D(3) a person with standing under a tax law to issue a NOPA on behalf of the taxpayer includes a tax advisor and an approved advisor group.

63. Section 3(1) defines a "disputable decision" to include:

> (b) a decision of the Commissioner under a tax law, except for a decision—
>
> (i) to decline to issue a binding ruling under Part 5A; or
>
> (ii) that cannot be the subject of an objection under Part 8; or
>
> (iii) that cannot be challenged under Part 8A; or
>
> (iv) to issue a Commissioner's notice of proposed adjustment under section 89B, a Commissioner's disclosure notice or statement of position under section 89M, or a challenge notice.

64. A "decision of the Commissioner under a tax law" generally refers to a tax law that specifically confers a discretion or power on the Commissioner. Paragraph (b)(iii) excludes from the definition of "disputable decision" any decision that cannot be challenged under Part 8A.

65. For example, if the Commissioner:

a) decides not exercise the discretion under section 113 to amend a taxpayer's income tax assessment, or

b) makes a decision under section 108A(3) regarding the application of the time bar, or

c) does not agree to a time bar waiver under section 108B,

section 138E(1)(e)(iv) (within Part 8A) provides that these decisions cannot be challenged. Therefore, these decisions are not disputable decisions for the purposes of section 89D(3). However, under section 89D(1), the taxpayer can issue a NOPA in respect of the initial assessment if the Commissioner has not previously issued a NOPA in respect of that assessment.

66. A decision made by the Commissioner under section 108(2) (to increase an assessment) is not of itself, and in the absence of an assessment, a disputable decision. Any challenge to the correctness of the decision must be brought in the context of a challenge to the assessment itself (*Vinelight Nominees Ltd & Anor v Commissioner of Inland Revenue (No 2)* (2005) 22 NZTC 19,519).

67. Paragraph (b)(iv) of the definition of "disputable decision" in section 3(1) also excludes a decision to issue a Commissioner's notice of proposed adjustment under section 89B, a Commissioner's disclosure notice or statement of position under section 89M, or a challenge notice.

68. However, a taxpayer may challenge the Commissioner's refusal to accept a late NOPA, NOR of SOP in terms of section 89K(6) in the Taxation Review Authority. The Commissioner's refusal notice is treated for the limited purposes in section 89K(6) as a notice of disputable decision and subject to direct challenge to the Taxation Review Authority, without the need to commence the dispute with a NOPA.

69. The exceptions specified in paragraph (b) of the definition of "disputable decision" ensure that only

substantive issues are disputed as disputable decisions and the procedural components of the disputes process do not, in themselves, give rise to disputes although they may be amenable to judicial review.

70. The following examples illustrate what is a disputable decision:

    a) A taxpayer who is a natural person can dispute the Commissioner's decision made under section YD 1 of the Income Tax Act 2007 ("ITA 2007") that they are a New Zealand resident for taxation purposes.

    b) Under section RD 3(5) of the ITA 2007, the Commissioner can determine whether, and to what extent, a payment is subject to PAYE. This determination cannot be challenged by the taxpayer and, therefore, is excluded from the definition of "disputable decision" under section 3(1)(b)(iii). However, an employer or employee can dispute an assessment of tax deductions on the basis that a section RD 3(5) determination on which it is founded is wrong in fact or law.

71. The taxpayer must issue the NOPA to the Commissioner within the applicable response period. Generally, this will be within the four-month period that starts on the date that the Commissioner issues the notice of disputable decision or notice revoking or varying a disputable decision that is not an assessment unless the Commissioner allows a late NOPA under section 89K(1).

72. It is important to note that issuing a NOPA is not the only way that a taxpayer can raise concerns about a disputable decision that they consider is incorrect. They are quite entitled to engage with Inland Revenue to raise concerns about a disputable decision that has been reached or to provide additional information.

73. However, it is only by issuing a NOPA that a taxpayer can dispute a disputable decision through the disputes process.

Situation 5: NOPA in respect of a taxpayer's assessment

74. Section 89DA(1) reads:

> A taxpayer may issue a notice of proposed adjustment in respect of an assessment made by the taxpayer for a tax year or a GST return period if the Commissioner has not previously issued a notice of proposed adjustment to the taxpayer in respect of the assessment.

75. If a taxpayer needs to file an income tax return they must also make an assessment of their taxable income and income tax liability under section 92(1) unless the Commissioner has previously made an assessment for that tax year (section 92(6)).

76. Section 89DA(1) also applies to a taxpayer's GST assessment for a return period. A taxpayer who has to file a GST return must also make an assessment of the amount of GST payable for the return period under section 92B(1).

77. The date on which a taxpayer's assessment of income tax is made is the date on which the taxpayer's return of income is received at an office of Inland Revenue (section 92(2)). A taxpayer's assessment of the amount of GST payable is made on the date on which the taxpayer's GST tax return is received at an office of Inland Revenue (section 92B(2)).

78. Pursuant to section 89DA(1), a taxpayer can issue to the Commissioner a NOPA in respect of their own tax assessment.

79. The taxpayer's NOPA must be issued within the applicable response period as defined in section 89AB. Generally, this will be within the four-month period that starts on the date that the Commissioner receives the taxpayer's assessment unless the Commissioner allows a late NOPA under section 89K(1).

80. The date that the Commissioner receives the taxpayer's assessment will be determined under section 14B. For example, under section 14B(8), the Commissioner will receive a NOPA that the taxpayer sends by post on the date that it would have been delivered in the ordinary course of post.

Situation 6: NOPA that relates solely to a research and development tax credit

81. Under section 89DA(3), a taxpayer can also issue a NOPA that relates solely to a research and development expenditure tax credit arising from a notice of assessment that they have previously issued for the 2008–09 tax year.

82. The NOPA must be issued within the period that starts on the date on which the Commissioner receives the taxpayer's assessment and ends two years after the latest date on which a taxpayer can provide a return of income for the 2008–09 tax year. This response period is an exception to the general response period that applies for disputing taxpayer assessments.

83. As the research and development expenditure tax credit has been repealed from the 2009–10 tax year onwards this response period has limited application and it is not intended to discuss it further in this SPS.

Contents of a taxpayer's NOPA

84. A NOPA is the document that commences the disputes process. It is intended to identify the true points of contention and explain the legal or technical aspects of the issuer's position in relation to the

proposed adjustment in a formal and understandable manner. This will ensure that information relevant to the dispute is quickly made available to the parties. Section 89F(1) and (3) specifies the content requirements for any NOPA that a taxpayer may issue.

85. 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.
>
> ...
>
> (3) A notice of proposed adjustment issued by a disputant must—
>
> (a) identify the adjustment or adjustments proposed to be made to the assessment; and
>
> (b) provide a statement of the facts and the law in sufficient detail to inform the Commissioner of the grounds for the disputant's proposed adjustment or adjustments; and
>
> (c) state how the law applies to the facts; and
>
> (d) include copies of the documents of which the disputant is aware at the time that the notice is issued that are significantly relevant to the issues arising between the Commissioner and the disputant.

86. The prescribed form for a NOPA as required under section 89F(1)(b) is the *Notice of proposed adjustment (IR 770)* form that can be found on Inland Revenue's website: **www.ird.govt.nz** A handwritten NOPA in this form is acceptable. Additional information can also be attached to the prescribed form.

87. If the Commissioner receives a NOPA that is not in the prescribed form or has insufficient detail under section 89F(1)(a) the Commissioner's practice will be to advise the taxpayer that the NOPA must be in the prescribed form or include sufficient information. If this occurs on the last day of the response period the Commissioner will consider any resubmitted NOPA under section 89K(1) (see paragraph 119).

88. If the taxpayer's NOPA does not satisfy the content requirements under section 89F(1)(a) and (3) the Commissioner can reject the NOPA and not issue a NOR (see paragraphs 111 to 118).

89. When issuing a NOPA, the taxpayer must state the facts and law in sufficient detail, state how the law applies to the facts, and include copies of the documents that are significantly relevant to the dispute and known to the taxpayer when they issue the NOPA.

90. The Commissioner cannot treat a tax return provided by the taxpayer as a NOPA because it will not satisfy the requirements in section 89F(1) and (3).

91. Section 89F(3)(b) requires that the taxpayer's NOPA states the key facts and law concisely and in sufficient detail. The term "sufficient detail" means that the document must contain adequate analysis of the law and facts that are relevant to the dispute. This means sufficient discussion of the law to enable the Commissioner to clearly understand the proposed adjustment.

92. The Commissioner considers that it is necessary that the taxpayer provides "a statement of the facts and law in sufficient detail" to ensure that they have fully considered issues before they raise them in their NOPA and to reduce further administrative and compliance costs.

Identify the proposed adjustment – section 89F(3)(a)

93. The taxpayer must identify the proposed adjustment in their NOPA. This includes for each proposed adjustment:

a) the amount or impact of the adjustment, and

b) the tax year or period to which the proposed adjustment relates.

94. The proposed adjustment should be set out as specifically as possible. For example:

- "increase the 2007 repairs and maintenance expenditure by $3,000";
- "increase the GST input tax deduction by $4,000 in the August 2007 return period".

Provide a statement of the facts and law in sufficient detail – section 89F(3)(b)

Facts

95. To provide a brief and accurate statement of facts, the taxpayer must focus on the material factual matters relevant to the legal issues. The taxpayer must include the facts necessary for proving all the arguments raised in support of each adjustment, including any facts that are inconsistent with any argument that the Commissioner has previously raised.

96. The taxpayer should endeavour to disclose all the relevant material facts clearly and with adequate amounts of detail relative to the complexity of the issues. The taxpayer is best suited to do this because they are usually very familiar with the background and facts that relate to the dispute. Disclosing the background and facts at the NOPA phase helps to resolve the dispute at an earlier stage. However, the taxpayer should not overstate the facts with irrelevant detail or repetition.

97. In complex cases, the Commissioner expects the taxpayer to explain the relevant facts clearly and methodically. The taxpayer should also assist the Commissioner to understand the background and facts of the dispute, so as to facilitate a speedy resolution of the case. The taxpayer should explain the facts and law in sufficient detail to inform the Commissioner of the grounds for the adjustment. It is unhelpful and can cause delays if the Commissioner has to second guess the factual bases of the taxpayer's case.

98. For example, in a dispute that involves a complex financial arrangement, the taxpayer should explain each element of it. This includes explaining the background to the financial arrangement, identifying the parties involved, highlighting the relevant clauses in an agreement, etc.

Law

99. Each proposed adjustment should stipulate the relevant section or sections that the taxpayer relies on and including, if a section has multiple independent parts, the applicable subsection(s).

100. It is important that the taxpayer includes an adequate amount of analysis of the applicable legal principles or tests in their NOPA. If possible these should be supported by case authorities with full citations. For example, in a dispute that involves the tax treatment of a trade-tie payment, the taxpayer must apply the legal principles from a leading case such as *Birkdale Service Station v CIR* (2000) 19 NZTC 15,981. However, it is not necessary to laboriously describe large numbers of precedent cases on the same issue or include extracts from each.

How the law applies to the facts – section 89F(3)(c)

101. The taxpayer must apply the legal arguments to the facts. This ensures that the proposed adjustment is not a statement that appears out of context in relation to the rest of the document. The Commissioner considers that the application of the law to the facts should logically support the proposed adjustment and be stated clearly and in detail.

102. The taxpayer should present the materials and arguments on which they intend to rely or on which reliance will be placed. That is, if more than one argument supports the same or a similar outcome, all arguments should be made and supported by evidence. For each proposition of law, it is recommended that the NOPA makes a clear link to an outline of supporting facts.

Include copies of the relevant documents that support the adjustment – section 89F(3)(d)

103. The taxpayer must provide full copies of the documents that they know are significantly relevant to the dispute and in existence when they issue the NOPA. This ensures that the Commissioner has all the relevant information necessary to respond to the NOPA.

104. For example:

a) A taxpayer proposes an adjustment to GST input tax credits in their NOPA. The taxpayer must provide copies of the relevant tax invoices as documentary evidence in their NOPA.

b) A taxpayer's dispute involves a sale of land transaction. The taxpayer must provide a copy of the sale and purchase agreement and other relevant correspondence between the vendor and the purchaser as documentary evidence in their NOPA.

105. In some cases, new documentary evidence can emerge, as the dispute progresses. For example, the documentation is quite old and may have been misplaced. The taxpayer may be unaware of these documents when the NOPA was issued. The parties should then exchange this new evidence when it becomes known or available.

106. Where a taxpayer is aware of a particular document that is significantly relevant to their dispute, but cannot obtain a copy of it, the taxpayer should include the following matters in their NOPA:

a) the nature of the document and its relevance to the dispute, and

b) the reasonable steps that the taxpayer has taken to obtain a copy of the document, and

c) the expected date that the document will be made available to the Commissioner.

107. However, this practice should not be treated as dispensing with the requirements under section 89F(3)(d). The Commissioner still expects the taxpayer will send copies of the relevant documents mentioned in their NOPA as soon as they become available.

Receipt of a taxpayer's NOPA

108. Inland Revenue will usually assign a taxpayer's NOPA to the responsible officer within five working days after it is received.

109. After receiving the NOPA, the responsible officer will determine and record the following:

a) the date on which the NOPA was issued, whether the NOPA has been issued within the applicable

response period and the date by which the Commissioner's response must be issued, and

b) the NOPA's salient features including any deficiencies in its content.

110. Where practicable, Inland Revenue will advise the taxpayer or their tax agent that it has received the NOPA by telephone or in writing within 10 working days.

Deficiencies in the contents of a NOPA

111. Where Inland Revenue has received a NOPA that it considers deficient (that is, the requirements under section 89F(1)(a) and (3) may not be met), the responsible Inland Revenue officer will take reasonable steps to have the taxpayer correct the information in the NOPA before the response period expires.

112. The taxpayer will be advised as soon as practicable that the Commissioner considers that the NOPA may not meet the requirements of section 89F(1)(a) and (3) and why. They will also be advised that any additional or corrected information should be provided within the response period.

113. Taxpayers are encouraged to issue their NOPA immediately after they have completed it because they could have insufficient time to rectify any deficiencies if the response period is due to expire.

114. Generally where the deficiencies are not able to be remedied but the NOPA advances sufficient argument to allow the dispute to progress, then the Commissioner will continue with the dispute. The argument that the NOPA is deficient will be incorporated into the Commissioner's SOP and the Commissioner will also fully argue the substantive issue.

115. However, if the NOPA received is highly unsatisfactory the Commissioner is unlikely to continue with the dispute. This will be on the grounds that the NOPA does not satisfy the requirements set out in section 89F(1)(a) and (3).

116. A NOPA is likely to be considered highly unsatisfactory only where the taxpayer's position is materially inconsistent and not capable of coherent explanation, or there is no observable explanation at all of the taxpayer's grounds for dispute. In these situations the dispute will be treated as if it has never commenced (unless the taxpayer resubmits a late NOPA and the Commissioner accepts it under one of the exceptional circumstances under section 89K).

117. In considering the adequacy of the taxpayer's NOPA, the Commissioner's view will not be based on the strength or weakness of the taxpayer's argument. The Commissioner will only be concerned with whether the NOPA meets its statutory requirements.

118. The approach outlined above is consistent with that taken by the Court of Appeal in *CIR v Alam and Begum* (2009) 24 NZTC 23,564.

NOPA that a taxpayer has issued outside the applicable response period

119. The Commissioner cannot accept a NOPA that a taxpayer issues under section 89D or 89DA outside the applicable response period, unless an exceptional circumstance arises or the disputant can prove a demonstrable intention to enter into or continue the disputes process under section 89K of the TAA.

Exceptional circumstances under section 89K

120. The legislation defines exceptional circumstances very narrowly. The cases on "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 CIR* (2001) 17,470 (CA), *Hollis v CIR* (2005) 22 NZTC 19,570, and *Balich v CIR* (2007) 23 NZTC 21,230 are also relevant. The case law confirms that the Commissioner should apply the definition of "exceptional circumstances" in sections 89K(3) and 138D consistently.

121. 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 documents 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*); and

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

122. See *Tax Information Bulletin* Vol 8, No 3 (August 1996) for some examples of situations that can be considered "exceptional circumstances" beyond a taxpayer's control.

123. Section 89K(3) reads:

> For the purpose of subsection (1),—
>
> (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.

124. The statutory holiday exception is self-explanatory. The Commissioner can also accept a late NOPA where the Commissioner considers that the lateness is minimal, that is, the document was only one to two days late.

125. For example, the response period ends on a Saturday and the taxpayer provides a NOPA 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 NOPA was minimal. That is, the Commissioner received the NOPA within one to two 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.

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

a) the date on which the NOPA was issued, and

b) the response period within which the NOPA should be issued, and

c) the real event, circumstance or reason why the taxpayer did not issue the NOPA within the applicable response period, and

d) the taxpayer's compliance history in relation to the tax types under consideration (for example, the taxpayer may have a history of paying tax late or filing late tax returns or NOPAs in the past).

127. For example, a taxpayer issues a NOPA to the Commissioner two days after the applicable response period has expired. The taxpayer does not provide a legitimate reason for the lateness. The taxpayer also has a history of filing late NOPAs 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 each time.

128. Although the degree of lateness was minimal each time, the Commissioner would not accept the taxpayer's NOPA 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.

129. The Commissioner will consider a taxpayer's application made under section 89K(1)(b) after receiving the relevant NOPA. Where the application is rejected, the Commissioner is required to issue a "refusal notice" within one month of receipt of the application (which must include the late NOPA). The disputant may challenge the Commissioner's refusal notice by taking proceedings directly to the TRA. Where the taxpayer's application is accepted, the Commissioner will advise the taxpayer of the Commissioner's decision in writing within one month after Inland Revenue receives the application.

130. If the Commissioner rejects a taxpayer's application made under section 89K(1), the Commissioner can still consider the validity of the taxpayer's tax position in terms of the practice for applying the discretion under section 113. See SPS 07/03: *Requests to amend assessments* for details of this practice.

Demonstrable intention

131. Under section 89K(1)(a)(ii) the Commissioner can also treat a late NOPA, as being on time where the Commissioner considers that the disputant had a demonstrable intention to enter into or continue the disputes process at the time the disputant failed to act within the applicable response period.

132. The concept of "intention to dispute" reflects the court's consideration of when a dispute should be allowed to continue under the old objection regime in Part 8 of the TAA, in particular, the High Court decision in *Gisborne Mills Ltd v CIR* (1989) 13 TRNZ 405. Robertson J, in *Gisborne Mills*, held that a factor to be taken into account in determining whether the

disputant was entitled to continue with their dispute was that they had "consistently asserted that they were entitled to the [tax outcome they were seeking]". This was "in marked distinction to a person who, never having contemplated seeking a benefit under the taxing legislation, endeavours to take advantage of a matter when they become aware of a decision affecting another taxpayer".

133. The officials' issues paper, *Disputes: a review* (July 2010), in relation to an "intention to dispute test", noted:

> The central tenet of any test should be that the taxpayer demonstrates they have, before the deadline, clearly communicated an intention to formally dispute the matter on certain grounds and have not subsequently modified that position.

134. To support this general proposition Inland Revenue will consider the following further factors in reaching a view as to whether a taxpayer had a demonstrable intention to dispute:

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

135. In a dispute where the taxpayer or their agent has not filed an SOP because they have miscalculated the response period (and the degree of lateness does not amount to exceptional circumstances), it could be said that having participated in the earlier stages of the disputes process (including complying with timeframes) that, at the end of the response period, the disputant had a genuine intention to continue with the dispute.

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

Disputant may challenge Commissioner's refusal to accept a late NOPA

137. The Commissioner can accept a disputant's late NOPA (and a late rejection of the Commissioner's NOPA or late SOP) by issuing a notice in favour of the disputant stating that the late notice will be treated as being given within the applicable response period. On the other hand, where they are not accepted as being on time, the Commissioner must notify the disputant within one month from when the disputant issues a "late" notice or SOP to the Commissioner, of the Commissioner's decision ("refusal notice"). The disputant may challenge the Commissioner's refusal notice by filing proceedings with the TRA.

Timeframes to complete the disputes process

138. If a taxpayer has issued a NOPA to the Commissioner and the dispute remains unresolved, when practicable, the parties should negotiate a timeframe to ensure that the dispute is progressed in a timely and efficient way.

139. Agreeing to a timeframe is not statutorily required but, rather, is a critical administrative requirement that requires both parties to be ready to progress matters. The parties should endeavour to meet the agreed timeframe. If there are delays in the progress of the dispute the responsible officer must manage the delay including any relationship with internal advisers and liaise with the taxpayer.

140. If the negotiated timeframe cannot be achieved, the Commissioner must enter into continuing discussions with the taxpayer, either to arrange a new timeframe, or otherwise keep them advised of when the disclosure notice will be issued. Therefore, the failure to negotiate or adhere to an agreed timeframe will not prevent the case from progressing through the disputes process in a timely manner.

141. In addition to the above administrative practice, the Commissioner is bound by section 89P. Section 89P provides that where the taxpayer initiated NOPA is issued after 29 August 2011, being the date of enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011, then the Commissioner must issue a challenge notice to a disputant within four years of the issue of the disputant's NOPA. Section 89H(3) provides that where the Commissioner fails to meet the four-year timeframe for issuing a challenge notice, then the Commissioner is deemed to have accepted the adjustments proposed in the disputant's NOPA.

142. Under section 89P(3) the Commissioner cannot issue the challenge notice without completing the

disputes process (that is, issue a SOP), unless any of the exceptions in section 89N apply. These exceptions are explained in Appendix 2 of SPS 11/05: *Disputes resolution process commenced by the Commissioner of Inland Revenue* or any replacement SPS.

Notice of response (NOR)

The Commissioner's response to a taxpayer's NOPA: NOR

143. If the Commissioner disagrees with the taxpayer's proposed adjustment, then, under section 89G(1) the Commissioner must advise the taxpayer that any or all of their proposed adjustments are rejected by issuing a NOR within the applicable response period. That is, within two months starting on the date that the taxpayer's NOPA is issued. The Commissioner interprets this to mean that the taxpayer must receive the NOR within this period. For example, if a taxpayer issues a NOPA on 9 April 2010, the Commissioner must advise the taxpayer of its rejection by issuing to them a NOR and they must receive that NOR on or before 8 June 2010.

144. Where practicable, the Commissioner will make reasonable efforts to contact the taxpayer or their tax agent within 10 working days before the response period expires to advise whether the Commissioner intends to issue a NOR to them in response to their NOPA. Such contact may be made by telephone or letter.

145. The Commissioner must issue the NOR to the taxpayer (section 14(3)(a)) or a representative authorised to act on their behalf (section 14(3)(b)). In respect of the latter, it is a question of fact whether the recipient is authorised to receive the NOR on the taxpayer's behalf. The taxpayer must ensure that their NOPA stipulates the name of the person or agent that they have nominated to receive any NOR issued by the Commissioner (*CIR v Thompson* (2007) 23 NZTC 21,375).

146. If a tax agent sends a NOPA to the Commissioner although the tax agent would appear to have authority to receive the Commissioner's NOR, the Commissioner's practice will be to contact the tax agent to confirm whether the agent can accept service of the NOR.

147. Section 89G(2) specifies the content requirements for a NOR. The Commissioner must state concisely in the NOR:

    a) the facts or legal arguments in the taxpayer's NOPA that the Commissioner considers are wrong; and

    b) why the Commissioner considers that those facts and arguments are wrong; and

    c) any facts and legal arguments that the Commissioner relies upon; and

    d) how the legal arguments apply to the facts; and

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

148. Under section 89G(2)(e), the requirement for a quantitative adjustment establishes the extent to which the Commissioner considers that the adjustment in the taxpayer's NOPA is incorrect. This amount need not be exact, although, every attempt should be made to ensure that it is as accurate as possible. The amount in dispute can be varied, as the dispute progresses. For example, if the parties agree on new figures at the conference phase.

149. The Commissioner considers that Inland Revenue has a statutory obligation to inform the taxpayer adequately. Therefore, any NOR that the Commissioner issues to reject the adjustment proposed in the taxpayer's NOPA must be relatively brief but sufficiently detailed to explain all the relevant facts, quantitative adjustments, issues and law.

Deemed acceptance

150. Section 89H(2) reads:

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

151. If the Commissioner issues a NOR outside the two-month response period, the Commissioner is deemed to have accepted the adjustment proposed in the taxpayer's NOPA under section 89H(2). This will finish the dispute and the Commissioner must issue an assessment or amended assessment to the taxpayer pursuant to section 89J(1) (see the discussion in paragraphs 157 to 162).

152. However, the Commissioner is not precluded from later exercising the discretion under section 113 and issuing to the taxpayer an amended assessment that reflects another adjustment for a different issue to that previously accepted under section 89H(2) for the same tax period.

153. As discussed above, section 89H(3) provides that where the Commissioner fails to meet the 4 year timeframe for issuing a challenge notice, then the Commissioner is deemed to have accepted the

adjustments proposed in the disputant's NOPA. The Commissioner must assess the disputant incorporating the adjustments which have been deemed to be accepted: section 89J.

Exception to deemed acceptance

154. Notwithstanding section 89H(2), the Commissioner can apply to the High Court for an order that a NOR can be issued outside the two-month response period under section 89L(1). Section 89L only applies if an exceptional circumstance has occurred or prevented the Commissioner from issuing a NOR to the taxpayer within the response period. The Commissioner will endeavour to apply the requirement for exceptional circumstances in section 89L(1)(a) consistently with the similar requirement in section 89K(1)(a) (see discussion in paragraphs 120 to 130).

155. Under section 89L(3), an "exceptional circumstance":

> Is an event or circumstance beyond the control of the Commissioner or an officer of the Department that provides the Commissioner with a reasonable justification for not rejecting an adjustment proposed by a disputant within the response period; and

156. For example:

a) A flood damaged an Inland Revenue office during the applicable response period for a taxpayer's NOPA. The taxpayer's NOPA was lost in the flood. The Inland Revenue officer could not obtain another copy of the NOPA within the applicable response period. The absence of information has prevented the Commissioner from forming a view on the subject matter in dispute. The Commissioner can apply for a High Court order under section 89L for further time to issue a NOR.

b) The Inland Revenue officer to whom a taxpayer's NOPA was assigned is absent on annual leave for the remainder of the response period. The Inland Revenue officer does not arrange for another officer to prepare and issue a NOR to the taxpayer within the response period. The Commissioner is deemed to accept the NOPA under section 89H(2). In this circumstance, the Commissioner does not consider that an exceptional circumstance prevented the Inland Revenue officer from rejecting the adjustment within the response period for the purpose of section 89L(1)(a).

157. The exceptions for deemed acceptance have been extended and amended in respect of disputes where the taxpayer initiated NOPA is issued after 29 August 2011, being the date of enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011. The Commissioner can apply to the High Court for an order allowing the Commissioner to issue a challenge notice past the 4 year limitation period, where there has been an exceptional circumstance as defined in section 89L(3). The Court application must be made within the 4 year period.

Implication of section 89J

158. Under section 89J(1), if the Commissioner accepts or is deemed to accept any adjustment that is proposed in a taxpayer's NOPA, the Commissioner must include or take account of the adjustment in:

a) a notice of assessment; and

b) any further notice of assessment or amended assessment

that is issued to the taxpayer unless the Commissioner has applied to the High Court for an order that a notice can be issued rejecting the proposed adjustment under section 89L(1) and (1B).

159. In this circumstance, the Commissioner's practice will be not to later issue a NOPA that purports to reverse any proposed adjustment previously accepted under section 89H(2) because section 89J(1) prevents the Commissioner from issuing to the taxpayer a further amended assessment that does not include or take into account the previously accepted adjustment.

160. However, pursuant to section 89J(2) the Commissioner does not have to issue a notice of assessment or amended assessment that includes or takes into account an adjustment that the Commissioner has, or is deemed to have accepted, if the Commissioner considers that, in relation to the adjustment, the taxpayer:

a) was fraudulent; or

b) wilfully misled the Commissioner.

161. If the Commissioner considers that section 89J(2) applies following deemed acceptance under section 89H(2) the Commissioner cannot resume the earlier disputes process but can later issue a NOPA in respect of any of the adjustments proposed in the earlier disputes process.

162. Any opinion that the Commissioner forms under section 89J(2) must be honestly held, based on a correct understanding of the relevant grounds and reasonably justifiable on the basis of the facts and law available. An opinion formed by the Commissioner under section 89J(2) is a disputable decision for the purposes of section 89D(3).

Rejection of the Commissioner's NOR

163. If the Commissioner has issued a NOR under section 89G(1) that rejects the adjustment proposed in

the taxpayer's NOPA, the taxpayer must reject the Commissioner's NOR within the applicable response period. That is, within two months starting on the date that the Commissioner issues the NOR. Otherwise, the taxpayer is deemed to have accepted the Commissioner's NOR under section 89H(3) and the dispute will finish.

164. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent two weeks before the response period for the Commissioner's NOR expires to determine whether the taxpayer will reject the Commissioner's NOR in writing. Such contact can be made by telephone or in writing.

165. The taxpayer must reject the Commissioner's NOR in writing. The written rejection must be issued within the response period and can be in any form. The taxpayer does not have to expressly reject each of the rejections of proposed adjustments that are included in the Commissioner's NOR. The taxpayer's written rejection must simply make it clear that the taxpayer rejects the Commissioner's NOR.

166. Where practicable, the taxpayer's written rejection will be referred to the responsible officer within five working days after Inland Revenue has received it and acknowledged as received within 10 working days.

167. If deemed acceptance occurs (that is, the taxpayer has not rejected the Commissioner's NOR in writing), the Commissioner will make reasonable efforts to advise the taxpayer of this within two weeks after the response period to the Commissioner's NOR has expired.

168. Under section 138B(3) a taxpayer can file challenge proceedings upon receipt of the Commissioner's NOR. The Commissioner's practice is to treat a notice of proceedings and statement of claim that the taxpayer serves on the Commissioner within the response period commencing challenge proceedings as also being a request for the Commissioner's agreement to opt out of the disputes process under section 89N(1)(c)(viii). The Commissioner will agree to the taxpayer opting out in these circumstances as it is considered that once a challenge is filed the dispute will be resolved more efficiently at a hearing authority.

169. For taxpayer-initiated NOPAs issued after 29 August 2011, being the date of enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011, a new section 138B(3) applies. The new section 138B(3) provides that a disputant may challenge a self-assessment, where the disputant has issued a NOPA which has been rejected by the Commissioner, but only after the Commissioner has issued a challenge notice. As a challenge notice cannot be issued by the Commissioner until the Commissioner issues a SOP (unless one of the exceptions in section 89N(1)(c)(viii) applies), a taxpayer is no longer permitted to unilaterally opt out of the disputes process.

170. Section 89P(4) requires that a challenge notice must state that the Commissioner will not be issuing an amended assessment that includes or takes into account an adjustment proposed by the disputant, and that a challenge may proceed. The Commissioner must issue a challenge notice within 4 years of the disputant issuing a NOPA to the Commissioner: section 89P(1).

Conference phase

What is the conference phase of the disputes process?

171. The conference phase of the disputes process allows the taxpayer and Inland Revenue officers directly involved in the dispute to exchange material information relating to the dispute (if this has not already been done prior to the conference phase). More importantly it is an opportunity for the parties to the dispute to try to resolve the differences in their understanding of facts, laws and legal arguments.

172. The word "resolve" in this context is not limited to final resolution of the dispute. Settlement is a possibility but this is not the only objective of the conference phase. The parties may "resolve" part of the dispute by agreeing on some of the facts and clarifying some of the legal arguments, while agreeing to disagree on other matters, which will become the focus in the later phases of the disputes process.

173. Generally, if a dispute remains unresolved after the NOR phase, the conference phase will follow.

174. The conference phase is an administrative process that aims to clarify and, if possible, resolve the dispute. However, the conference phase should not be used by either party for the purpose of delaying the completion of the disputes process. The conference phase can involve more than one meeting between the parties and it 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 meeting.

Legal and other advisers attending a conference

175. If a dispute is not settled earlier, the parties can obtain expert legal or other advice during the conference phase in addition to advice previously obtained. These advisers can attend any meetings in relation to the dispute.

Conference facilitation

176. Conference facilitation is a new feature in the conference phase. A facilitated conference will involve an independent internal facilitator who will promote and encourage structured discussion between Inland Revenue officers and the taxpayer on an informed basis and with the *bona fide* intention of resolving the dispute. The conference facilitator will be a senior Inland Revenue officer who will not have been involved in the dispute or given advice on the dispute prior to the conference phase. The facilitator will have sufficient technical knowledge to understand and lead the conference meeting.

177. The conference facilitator will not be responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end. In particular, it is not the role of the facilitator to undertake settlement of the dispute. If this possibility arises it is the responsibility of the taxpayer and the Inland Revenue officers involved in the dispute.

178. Having a conference facilitated is optional and a conference can be held without a facilitator but, conference facilitation will be offered to all taxpayers as part of the disputes process. The Commissioner's offer of a facilitated conference will be made in writing ("the conference facilitation letter") within one month from the date of issue of the taxpayer's rejection of the Commissioner's NOR. The conference facilitation letter marks the commencement of the conference phase.

179. The format of the conference meeting need not be limited to a face-to-face meeting. The parties to the dispute may agree to hold a telephone or video conference. (For reasons of simplicity, the SPS refers to "meetings" to include these different conference formats.)

180. The taxpayer is expected to respond within two weeks from the date of the conference facilitation letter. The taxpayer should indicate whether they will attend the conference meeting, whether they will accept the conference facilitation offer, whether there are any special needs or requirements at the meeting and who else will be attending the meeting. If the taxpayer does not respond within this timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer about the conference facilitation letter.

Preparation for the conference meeting

181. When a taxpayer agrees to attend a conference meeting, Inland Revenue will contact the taxpayer within two weeks from the taxpayer's agreement to establish a timeframe and agree on how the meeting will be conducted.

182. Prior to the conference meeting, the taxpayer should inform Inland Revenue whether their advisors will attend the conference meeting.

183. The parties to the dispute may agree to exchange information relevant to the dispute before the conference meeting. A copy of that information will be provided to the facilitator. The Inland Revenue officers will provide the taxpayer a list of information that has been given to the facilitator. The taxpayer may request a copy of any information on that list if it is not already in their possession. It is also crucial for the parties to exchange the information prior to the meeting if the agreed format of the conference is a telephone or video conference.

184. Inland Revenue may decide to concede the dispute after considering the taxpayer's information. The whole disputes process (including the conference phase) would come to an end in these cases.

185. The conference phase will generally be expected to be completed within three months, but this may vary depending on the facts and complexities of the specific case. A longer conference phase may be justified in some disputes if the parties are engaged in meaningful discussions.

186. An agenda will be useful for both parties at the conference meeting. An agreed agenda should divide the conference meeting into two parts. The first part of the meeting should involve an exchange of material information and discussion of contentious facts and issues relating to the dispute. Any procedural matters such as the timeframe for completing the disputes process, the adjudication process, time bar waivers and the possibility of opting out of the disputes process will also be discussed. The second part of the meeting, if applicable, would involve negotiation of possible areas of resolution of the dispute. Any communication made and any materials prepared for the purpose of negotiating a settlement or resolution during this part of the meeting will be treated as being on a "without prejudice" basis.

187. Where there is no agenda the conference facilitator will guide the taxpayer and the Inland Revenue officers to discuss the contentious facts and issues at the conference meeting.

188. Where the option of conference facilitation has been declined, the parties to the dispute should work out the appropriate structure at the conference meeting, bearing in mind that one of the aims of any conference

is to reach agreement on some or all the facts and issues and thus, resolve the dispute.

At the conference meeting

Facilitated conference

189. The facilitator will:

a) explain the objectives of the conference phase on the basis of the agreed agenda;

b) remind the parties of any rules relating to the conference (these will generally have been set out in the conference facilitation letter);

c) clarify who the parties are at the conference meeting and the capacities they hold (eg, whether they are the authorised tax advisors; whether they have authority to settle the dispute at the meeting);

d) ask whether the parties agree to record the meeting discussions using audio or video technology (refer to SPS 10/01: *Recording Inland Revenue Interviews* or any replacement SPS);

e) run through the agenda;

f) encourage the parties to present evidence in support of their perceived facts (either at the conference meeting or on a later date if the evidence cannot be provided at the time of the meeting). Where possible, encourage the parties to reach agreement on all the facts of the dispute. If no agreement can be made, encourage the parties to establish the common grounds and address the matters that they agree to disagree. These agreements will be recorded in writing. The agreements will be sent to the taxpayer to verify the correctness and sign by a specified date;

g) promote constructive discussion of only the contentious tax issues and where possible, encourage both parties to explore the issues, resolve or settle the dispute (subject to our internal revenue delegations and guidelines on settlement). If the contentious tax issues cannot be resolved, ask both parties to do one or more of the following:

- At the end of the conference meeting, ask the parties to consider whether the conference phase comes to an end. Consider whether there is need for another meeting, noting that another meeting can be justified if both parties need to exchange further information in support of their tax technical arguments but continuous meetings are discouraged if this is seen as a delaying tactic.
- Where the parties agree to end the conference phase and the facilitator considers that the objectives of the conference phase have been achieved, the facilitator can clearly signal the end of the conference phase to the parties.
- Agree on the timeframe for completing the disputes process and submitting the dispute to the adjudication process. This includes the timeframe for taxpayers to meet outstanding information requests and Inland Revenue officers' undertaking to provide copies of information relevant to the disputes. The agreed timeframe will also factor in time bar waivers if given by the taxpayer and the time required for any court challenge that relates to documents, which are claimed to be protected by professional legal privilege and tax advice documents, which are claimed to be protected by the non-disclosure rights. Ask the taxpayer whether a time bar waiver will be given if the time bar applicable to the assessment in dispute is imminent.
- Clearly indicate whether the communication made and/or documents prepared for the purpose of negotiating potential settlement or resolution of the dispute will be treated as being on a "without prejudice" basis.
- Ask the taxpayer to consider whether the opt-out process applies and advise the taxpayer of the right to opt out within the required timeframe, so that it is not necessary to complete the disputes process as required under section 89N and that the dispute will be more efficiently resolved by a hearing authority.

h) note that any agreement between the parties will be recorded in writing and signed either at the conference meeting by both parties or on a later date after the taxpayer has verified the correctness of the agreement;

i) note that the Inland Revenue officers directly involved in the dispute will remain as the first point of contact.

Unfacilitated conference

190. In an unfacilitated conference, the parties at the conference should agree on and perform tasks similar to those listed in paragraphs 189(a) to (h) above.

191. At the end of the conference meeting, it is important for the Inland Revenue officers and the taxpayer to discuss whether they consider that the conference phase has come to an end and record any agreement in writing.

After the conference meeting

192. The following is relevant only if the conference phase does not end at the meeting.

Facilitated conference

193. The facilitator will:

a) follow up on the agreed matters including the agreed timeframe and exchange of information (but does not include enforcing the agreement between the taxpayer and the Inland Revenue officers directly involved in the dispute);

b) assess any need to attend a further meeting;

c) suggest to the parties that the conference phase has ended and ask them to reach an agreement on this matter, then clearly notify the parties of the date on which the conference phase has ended.

Unfacilitated conference

194. In a conference that did not have a facilitator, the Inland Revenue officers will perform these tasks. They may suggest to the taxpayer that the conference phase has ended after all the material information relating to the dispute has been exchanged and all the contentious facts and issues have been discussed. The parties will then agree in writing on the date on which the conference phase has ended. If the parties cannot agree on when to end the conference phase, the Investigations Manager will be responsible for making the decision on ending the conference phase after considering all the parties' relevant reasons and concerns.

End of the conference phase

195. It is important for the taxpayer and the Inland Revenue officers to be fully aware of when the conference phase comes to an end. 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 meeting. In most cases, it is expected that the parties involved in the dispute will agree on when the conference phase has ended. Such agreement will be put in writing.

Facilitated conference

196. After a facilitated conference the facilitator will be responsible for clarifying the agreed end date of the conference phase with the parties.

197. If the facilitator considers that both the taxpayer and Inland Revenue officers have exchanged all the material information relevant to the dispute, have fully discussed the tax technical issues and have not resolved the dispute, the facilitator may suggest to the parties that the conference phase can come to its end.

198. If there is no agreement and the parties' reasons for continuing the conference phase are considered to be insufficient, the conference facilitator can make a decision to end the conference phase and notify the parties of that decision. The following are examples of strong indicators that the conference phase has come to its end:

a) The taxpayer and/or the tax advisors stop contacting the Inland Revenue officers directly involved in the dispute for a few weeks.

b) The parties did not exchange information notwithstanding that this has been agreed on at the conference meeting, thus leading to the exercise of the Commissioner's powers (eg section 17 notices).

c) The parties agree to disagree with each other and express interest in progressing to the SOP phase.

d) The taxpayer appears to be using delaying tactics at the conference phase when the issue in dispute is subject to an imminent time bar.

199. In rare situations, where conference facilitation is involved and the facilitator is concerned with the parties' decision to end the conference phase before achieving the objectives of the conference meeting, the facilitator may adjourn the meeting and discuss the concerns with the responsible Inland Revenue officers. The facilitator may also contact the taxpayer or the taxpayer's tax advisors to discuss whether the conference phase should come to its end. The facilitator will seek the parties' agreement as to whether or not the conference phase is complete.

Unfacilitated conference

200. Where no conference facilitation is involved, the taxpayer and the Inland Revenue officers will work out when to end the conference phase. They should consider whether the objectives of the conference phase have been achieved before reaching the agreement. If no agreement can be reached, the Investigations Manager will review the conduct of the parties during the conference phase and make a decision on whether the conference phase has come to an end.

201. When a dispute remains unresolved after the conference phase has been completed, the Commissioner must issue a disclosure notice under section 89M(1).

202. If the taxpayer seeks the Commissioner's agreement to opt out of the disputes process under section 89N(1)(c)(viii), they will be required to sign a declaration that all material information relating to the dispute has been provided to the Commissioner.

Opt out of the disputes process

203. Section 89N(1)(c)(viii) provides that the Commissioner and a taxpayer can agree in writing not to complete the disputes process if they are satisfied that the dispute can be more efficiently resolved at a hearing authority (referred to as "opt out").

204. A taxpayer may request to opt out of the remainder of the disputes process. If they do, a decision on whether or not the Commissioner will enter into an opt-out agreement will be made by a senior Inland Revenue officer. In making a decision on opt out, that person will consult with Legal and Technical Services, the Litigation Management Unit, and the Office of the Chief Tax Counsel. The decision-maker will consider the taxpayer's request with reference to all of the specific criteria listed and will also consider if any other factors exist which mean that the dispute can be resolved more efficiently at a hearing authority.

205. Before agreeing to a taxpayer's request to opt out the Commissioner must be satisfied that the taxpayer has participated meaningfully during the conference phase. In addition, the taxpayer must have signed a declaration that all material information has been provided to the Commissioner.

206. This means that the Commissioner will not agree to opting out unless there has been a conference.

207. In addition to attending the conference, the Commissioner considers that a taxpayer will have participated meaningfully during the conference phase where:

    a) the taxpayer has provided information as requested by Inland Revenue (if it has not already been provided prior to the conference phase); and

    b) the taxpayer has discussed the contentious facts and issues of the dispute with Inland Revenue. This discussion will have involved identifying and clarifying what the dispute turns on, seeking potential resolution of the dispute or reaching agreements to enable the dispute to move forward to the next phase if it remains unresolved.

208. If the taxpayer has participated meaningfully during the conference phase and signed a declaration that all material information has been provided the Commissioner will agree to the taxpayer's request to opt out of the disputes process in circumstances where one of the following applies:

    a) the total amount of tax in dispute is $75,000 or less except where the dispute is part of a wider dispute;

    b) the dispute turns on issues of fact (eg, facts that are to be determined by reference to expert opinions or valuation) only;

    c) the dispute concerns facts and issues that are waiting to be resolved by a court; or

    d) the dispute concerns facts and issues that are similar to those considered by the Adjudication Unit of the Office of the Chief Tax Counsel if similar issues have been considered in a dispute in the past.

209. Where the dispute does not fall within the criteria listed at paragraph 208, the Commissioner may still agree to opt out of the disputes process if it is considered that the dispute can be resolved more efficiently at a hearing authority.

210. The taxpayer may request to opt out of the disputes process within two weeks from the end of the conference phase. The Commissioner will advise the taxpayer in writing within two weeks from the date of the request whether the request to opt out has been agreed to.

211. Where the opt-out request has been agreed to and the dispute remains unresolved after taking into account the information and discussion during the conference phase, the Commissioner will issue a challenge notice.

212. When it is considered that the taxpayer does not meet the criteria for opting out of the disputes process, the taxpayer will be advised of the decision in writing.

a) The $75,000 or less threshold

213. The Commissioner will agree to a taxpayer opting out of the disputes process if the total amount of core tax in dispute is $75,000 or less. The "$75,000 or less" threshold does not apply if the dispute is part of a wider dispute that involves a number of taxpayers. An example of this is a tax avoidance arrangement similar to the "Trinity forestry scheme" in *Accent Management Ltd v CIR* (2007) 23 NZTC 21,323; [2007] NZCA 230.

214. The "$75,000 or less" threshold excludes:

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

215. In some disputes, the Commissioner may propose adjustments in respect of more than one tax type or more than one return period/income year. The "$75,000 or less" threshold applies to the net total amount of tax in the **same** dispute. The threshold will take into account the following:

- any variation of the amount of tax in dispute due to the Commissioner's partial acceptance of the taxpayer's NOPA; and

- any variation of the net total amount of tax in dispute as agreed between the participants during the conference phase.

b) The dispute turns on issues of fact only

216. The Commissioner will agree to a taxpayer's request to opt out if the dispute turns on issues of fact or evidence only.

217. The "issues of fact" requirement may apply where the disputed facts are to be determined by reference to expert opinions or valuation.

218. Disputes on tax avoidance issues will not meet the "issues of fact" requirement. In these disputes, case law requires consideration of issues such as whether the arrangement has used a specific provision in a way that cannot have been within Parliament's contemplation when it enacted the provision. This will involve analysing mixed questions of law and fact.

c) The dispute concerns facts and issues that are waiting to be resolved by a court

219. The opt-out process is available if the facts and issues relating to the dispute are similar to those that are waiting to be resolved by a court. The Commissioner will agree to a taxpayer's request to opt out in those cases.

220. A taxpayer may become aware of a current court case that concerns facts and issues that they consider to be similar to their dispute. The Commissioner will consider this position when deciding whether to accept the taxpayer's opt-out request. In considering a taxpayer's request, Inland Revenue will advise the taxpayer of its views as to the similarity, but will not comment on the merit of the current court case or the plaintiff's tax affairs due to the secrecy provisions in section 81 of the TAA.

221. In some cases, a taxpayer may not be aware at the time of issuing the NOPA or during the conference phase of the existence of similar cases that are subject to court proceedings. The taxpayer may still request to opt out of the disputes process without this knowledge. In considering the request, the decision maker will consult with the Litigation Management Unit to determine whether there are any current court cases that concern facts and issues that are considered to be similar to the taxpayer's dispute.

d) The dispute concerns facts and issues that are similar to those considered by the Adjudication Unit

222. The-opt out process is available if the facts and issues relating to the dispute are similar to those already considered by the Adjudication Unit. A taxpayer may request to opt out of the disputes process because a previous adjudication decision was in favour of the Commissioner and they consider it would be unlikely that the Commissioner's view will change. In considering the taxpayer's request, Inland Revenue will advise the taxpayer of its views as to the similarity, but will need to bear in mind the secrecy provisions of the TAA.

223. In some cases, a taxpayer may not be aware of similar disputes that have been considered by the Adjudication Unit when the taxpayer issues the NOPA or participates at a conference meeting. Inland Revenue officers may be aware of such other similar disputes, and may choose to advise the taxpayer that, should the taxpayer request an opt out, Inland Revenue would be very likely to agree. However, Inland Revenue will need to bear in mind the secrecy provisions of the TAA when considering other disputes.

Challenge notice where the Commissioner has agreed to opt out

224. In agreeing to the taxpayer's request for opt out the Commissioner will issue a challenge notice to the taxpayer. In doing so the Commissioner will have taken into account the information and legal arguments raised in the NOPA, the NOR and during the conference phase. The taxpayer can then challenge the assessment by commencing proceedings in a hearing authority within the applicable response period, ie two months of receipt of the notice of assessment.

225. In issuing the challenge notice, the Commissioner is not bound by the facts, issues, evidence and propositions of law stated in the NOPA and NOR, and the Commissioner is able to take into account information and arguments raised during the conference phase. The Commissioner's administrative practice is that grounds of assessment which have not previously been referred to in the Commissioner's NOR and the taxpayers' NOPA will not be relied on, if they have not been notified or sufficiently discussed during the conference phase.

226. Where the parties have agreed to opt out the Commissioner will send to the taxpayer at or near the time of issuing the challenge notice, a letter confirming briefly the reasons why the Commissioner has not accepted the adjustment proposed by the taxpayer.

Challenge under section 138B(4)

227. It is also possible to shorten the disputes process in circumstances where:

- the adjustment relates to a matter for which the material facts and relevant law are identical to

another assessment for the taxpayer (for another period) which is the subject of court proceedings; or

- the adjustment seeks to correct a tax position taken by the taxpayer (or an associated person) as a consequence or result of an incorrect tax position be taken by another taxpayer, which is the subject of or was the subject of court proceedings.

228. If the Commissioner agrees that either of the above conditions are met, then he will issue a challenge notice enabling the disputant to file a challenge in a hearing authority.

229. When a taxpayer wishes to utilise the process to provided for in section 138B(4) it is recommended that contact is made with Inland Revenue prior to the issue of the NOPA to discuss the possibility of using the section.

230. Where the adjustment relates to one for another period contact should be made with the Inland Revenue staff who are involved in that dispute. It is envisaged that where the parties agree that the section 138B(4) process could apply, an abridged NOPA would be able to be issued in this circumstance cross-referencing to the dispute for the previous period.

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

231. Sometimes it is necessary for Inland Revenue to deal with a large number of taxpayers that are all affected by the same disputed matter. This can arise in situations where:

- the taxpayers are all investors in a particular scheme;
- the taxpayers have entered into similar arrangements and they have the same promoter;
- the taxpayers have entered into similar arrangements and they have the same tax agent;
- there exists a widespread but well-defined common problem involving many unrelated taxpayers (eg, taxpayers moving their private residence into an LAQC, or a number of taxpayers claiming non-deductible expenses such as fines for overloading).

232. Given Inland Revenue's limited resources, and bearing in mind taxpayer compliance costs it may not be appropriate for all the cases to proceed through the full dispute process.

233. The Commissioner's approach, in the context of taxpayer initiated disputes, to the different situations which arise where a large number of taxpayers are all affected by the same disputed matter is outlined in the following paragraphs.

Situation 1: There are a number of cases on the same issue under dispute. One case has been referred to the Adjudication Unit, who has still to reach a conclusion on the matter

234. In this situation it may be possible for other affected taxpayers and the Commissioner to merely agree, subject to statutory time bar issues, to place their case "on hold" while the Adjudication Unit undertakes its analysis.

235. However, care will need to be taken to ensure that the time bar will not be breached, and consideration should be given to obtaining a time bar waiver.

236. Again, as this approach requires the taxpayer to agree, the Commissioner can offer it to individual taxpayers but they still have the choice to progress the dispute through the full disputes process.

237. Taxpayers who agree to place their case "on hold" while adjudication considers the issues in question in relation to another taxpayer will not be bound by any decision reached by the Adjudication Unit and will be free to continue with their dispute should they wish

Situation 2: The Adjudication Unit has looked at an issue before and taken a view supporting the taxpayer

238. It is the Commissioner's policy that a finding for the taxpayer in previous dispute(s) will usually lead to the other disputes being withdrawn, particularly if the disputes are in respect of the same transaction.

239. However, in some situations further consideration of the issue is required at a national level before the Commissioner will apply the conclusions reached in a particular adjudication report more broadly to other taxpayers. In those cases, Inland Revenue officers may be advised that a specified or contrary approach (to that adopted by the Adjudication Unit) is to be followed pending further consideration of the issue at a national level.

Disclosure notice

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

a) does not have to complete the disputes process because any of the exceptions under section 89N(1)(c) apply (see the discussion in Appendix 2 of SPS 11/05: *Disputes resolution process commenced by the Commissioner of Inland Revenue* or any replacement SPS), or

b) does not have to complete the disputes process because the High Court has made an order that the dispute resolution process can be truncated pursuant to an application made by the Commissioner under section 89N(3), or

c) 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(1) and (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.

241. The meaning of disputable decision is discussed in paragraphs 61 to 71.

242. The Commissioner will usually advise the taxpayer two weeks before a disclosure notice is issued that it will be issued to them.

243. Where practicable, the Commissioner will contact the taxpayer shortly after the disclosure notice and SOP are issued to ascertain whether they have received these documents.

244. If the taxpayer has not received the Commissioner's disclosure notice, for example, due to a postal error or an event or circumstance beyond the taxpayer's control, the Commissioner will issue another disclosure notice to the taxpayer. In this circumstance, the response period within which the taxpayer must respond with their SOP will commence from the date that the Commissioner issued the initial disclosure notice.

245. Where the taxpayer cannot issue a SOP within the applicable response period, they should issue a late SOP with an explanation of why it is late. The Commissioner will consider the late SOP in terms of the discretion under section 89K(1) (see paragraphs 120 to 130 for details).

Evidence exclusion rule and issues and propositions of law exclusion rule

246. The evidence exclusion rule has been replaced by the issues and propositions of law exclusion rule, in relation to disputes where a disclosure notice is issued on or after 29 August 2011, being the date that the Taxation (Tax Administration and Remedial Matters) Act 2011 received the royal assent. A disclosure notice is the document that triggers the application of either rule under section 138G(1) and its replacement. The evidence exclusion rule restricts the evidence that the parties can raise in court challenges to matters disclosed in their SOP. (Both parties can refer to evidence raised by either party.) The new issues and propositions of law exclusion rule only confines the taxpayer and Commissioner to the issues and propositions of law set out in their respective SOPs, in subsequent challenge proceedings. There is no restriction on introducing new facts or evidence which has not previously been referred to in either party's SOP.

247. Any disclosure notice that the Commissioner issues will explain the effect of the exclusion rules and refer to section 138G.

Issue of a disclosure notice

248. The Commissioner can issue a disclosure notice at any time on or after the date that the taxpayer issues a NOPA because there is no statutory timeframe specifying when the notice must be issued.

249. The Commissioner does not have to issue a disclosure notice to a taxpayer when they ask for one to be issued. However, the Commissioner will usually discuss such a request with the taxpayer and advise whether a disclosure notice will be issued and, if not, the reasons why and the implications for the dispute.

250. Generally, the Commissioner's practice is to issue a disclosure notice after the exchange of a NOPA, NOR, notice rejecting the NOR, the conclusion of the conference phase and in accordance with any timeframe agreed with the taxpayer. The Commissioner will usually issue a disclosure notice within one month after the conference phase has been completed.

251. When possible, the responsible officer should use the relevant statutory power under the TAA to obtain any information needed to complete the conference or disclosure phases. This will ensure that the disputes process is conducted in a timely and efficient manner. If the Commissioner is waiting for information to be provided pursuant to a statutory power Commissioner will defer issuing a disclosure notice to ensure that any information provided by the taxpayer can be included in the Commissioner's SOP.

252. If a disclosure notice is issued earlier (for example, the facts are clear, the taxpayer agrees, or a conference is not required) the reasons must be documented and explained to the taxpayer.

Taxpayer's statement of position (SOP)

253. Pursuant to section 89M(5), once the Commissioner has issued a disclosure notice, the taxpayer must issue

to the Commissioner a SOP within the two-month response period that starts on the date that the disclosure notice is issued.

254. 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 would have been issued outside the applicable response period. The taxpayer must submit another SOP after the disclosure notice is issued to satisfy their obligation under section 89M(5).

255. Unless an "exceptional circumstance" or "demonstrable intention" in section 89K applies, if the taxpayer issues a SOP to the Commissioner outside the response period, the Commissioner will treat the dispute as if it was never commenced. The Commissioner does not have to issue an assessment to include or take account of the taxpayer's proposed adjustment. Section 89M(7)(b) reads:

> (7) A disputant who does not issue a statement of position in the prescribed form within the response period for the statement of position, is treated as follows:
>
> ...
>
> (b) if the disputant has proposed the adjustment to the assessment, the disputant is treated as not having issued a notice of proposed adjustment.

Contents of a taxpayer's SOP

256. Different elements of a SOP will be binding on the taxpayer, depending on whether the evidence, or issues and propositions of law exclusion rule apply. Either exclusion rule is subject to section 138G(2), which permits any party to a challenge to apply to the court to include new facts, evidence, issues and propositions of law in the challenge.

257. The taxpayer's SOP must be in the prescribed form (the *Statement of position (IR 773)* form that can be found on Inland Revenue's website: **www.ird.govt.nz**) and include sufficient detail to fairly inform the Commissioner of the facts, evidence, issues and propositions of law on which the taxpayer wishes to rely. In particular, the taxpayer must clarify what tax laws are being relied on and advise if any of these are different to those relied on in the taxpayer's NOPA.

258. However, if the Commissioner receives a SOP that is not in the prescribed form (as described in paragraph 257) the Commissioner's practice will be to advise the taxpayer that the SOP must be in the prescribed form. If this occurs on the last day of the response period the Commissioner will consider the resubmitted SOP under section 89K.

259. Section 89M(6) reads:

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

260. The minimum content requirement for a SOP is an outline of the relevant facts, evidence, issues and propositions of law. To allow the Adjudication Unit to successfully reach a decision, the outline in the SOP must contain full, complete and detailed submissions.

261. An outline that consists of a frank and complete discussion of the issues, law, arguments and evidence supporting the arguments is implicit in the spirit and intent of the disputes process. (In very complex cases the taxpayer should provide a full explanation of the relevant evidence.)

262. The disputes process does not require that relevant documents are discovered or full briefs of evidence or exhaustive lists of documents exchanged. Rather, providing an outline of relevant evidence in the SOP will ensure that both parties appreciate the availability of evidence in respect of the factual issues in dispute. The taxpayer should include an outline of any expert evidence on which they intend to rely in the SOP.

263. If the Commissioner considers that the SOP has insufficient detail to allow a correct assessment to be made the SOP can be treated as not complying with the requirements of section 89M(6).

264. Subject to any order made by the court under section 138G(2), the evidence exclusion rule found in section 138G(1) and the issues and propositions of law exclusion rule found in the replacement section 138G(1) (applying to disclosure notices issued after 29 August 2011) prevents a hearing authority from considering facts, evidence, issues and propositions of law (where the evidence exclusion rule applies) or issues and propositions of law (where the issues and propositions of law exclusion rule applies) 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), or

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).

265. 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.

266. Pursuant to section 89M(6B), the SOP must list any documentary evidence but not potential witnesses. Any witnesses' identities will continue to be protected without undermining the effect of the evidence exclusion rule, in disputes where that rule applies.

Receipt of a taxpayer's SOP

267. If a taxpayer has issued a SOP the Commissioner can accept the SOP or issue a SOP in response to the taxpayer's SOP. Furthermore, section 89P allows the Commissioner to issue a challenge notice after the Commissioner has issued the SOP. (However, the Commissioner's practice is to send the dispute through the adjudication process. See paragraphs 287 to 302 for details.)

268. The Commissioner will make reasonable efforts to contact the taxpayer or their tax agent 10 working days before the response period expires to determine whether the taxpayer will issue a SOP in response to the disclosure notice. Such contact will 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 of the SOP, 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 salient features of the SOP including any deficiencies in its content.

269. Where practicable, the Commissioner will acknowledge that the taxpayer's SOP is received within 10 working days after it is received. However, the Commissioner will advise the taxpayer or their agent of any deficiencies in the SOP's content as soon as they become aware of the deficiency. They will be further advised when the response period expires that those deficiencies must be rectified and whether the Commissioner intends to provide any additional information to the taxpayer.

270. Where a SOP is issued outside the applicable response period, the taxpayer can apply for consideration of exceptional circumstances or that the disputant had a demonstrable intention to continue the dispute under section 89K. The responsible officer will notify the taxpayer of the decision to accept the application in writing within one month after Inland Revenue has received the taxpayer's application. Where the application is rejected, the responsible officer must notify the taxpayer by issuing a refusal notice.

271. If the taxpayer issues a SOP outside the applicable response period and none of the exceptional circumstances under section 89K apply, the dispute will be treated as if it was never commenced (see paragraph 255). Where practicable, the Commissioner must advise the taxpayer of this within 10 working days after the response period for the disclosure notice has expired.

Commissioner's SOP in response

272. When the taxpayer has issued a NOPA, section 89M(3) allows the Commissioner to issue a disclosure notice without a SOP. If the dispute remains unresolved the Commissioner's practice is to issue a SOP that addresses and responds to the substantive items in the taxpayer's SOP within the applicable response period (that is, within two months starting on the date that the taxpayer issued their SOP).

273. However, in very rare circumstances the Commissioner may not issue a SOP in response to the taxpayer's SOP. For example, an exception arises under section 89N(1)(c) or the High Court has made an order that the disputes process can be truncated pursuant to an application made under section 89N(3).

274. If there is insufficient time to provide a SOP in response the Commissioner can apply to the High Court for further time to reply to the taxpayer's SOP under section 89M(10) if the application is made before the response period expires and the Commissioner considers that it is unreasonable to reply within the response period because of the number, complexity or novelty of matters raised in the taxpayer's SOP.

275. Such applications are expected to be rare but can arise if the taxpayer is less than cooperative with supplying information and/or has failed to maintain proper and adequate records.

276. The Commissioner's SOP must be in the form that the Commissioner has prescribed under section 35(1) and include sufficient details to fairly inform the taxpayer of the facts, evidence, issues and propositions of law on which the Commissioner wishes to rely.

277. 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.

278. If the Commissioner has issued a SOP, the Commissioner can also provide to a taxpayer additional information in response to matters raised in their SOP under section 89M(8) within two months starting on the date that the taxpayer's SOP is issued.

279. However, the Commissioner's practice is to issue a SOP to the taxpayer towards the end of the response period to allow sufficient time for gathering any further information in response and considering the SOP's content. This minimises the occasions when additional information needs to be provided under section 89M(8) as the information in question will be in the SOP. In any event, as any additional information must be provided within the same response period as the Commissioner's SOP in most case it will be unlikely that the Commissioner will be able to issue additional information within the response period.

280. The taxpayer cannot reply to the Commissioner's SOP (or any additional information provided) unless the Commissioner agrees to accept additional information under section 89M(13).

Agreement to include additional information

281. The parties can agree to include additional information in their SOP under section 89M(13) at any time during the disputes process including after the dispute has been referred to the Adjudication Unit. Although there is no statutory time limit, the Commissioner's practice is to allow one month (from the later of the date that the Commissioner issues a SOP or provides any additional information under section 89M(8)) for such an agreement to be reached and information provided.

282. However, before agreeing to a request made by the taxpayer under section 89M(13) the Commissioner will consider the taxpayer's prior conduct and whether they could have provided the information earlier through the application of due diligence.

283. The Commissioner will usually also consider the materiality and relevance of the additional information and its capacity to help resolve the dispute and may decide to take it into account in coming to an assessment. In this circumstance, both parties will be expected to cooperate in resolving the relevance and accuracy of any such material. The Commissioner may wish to apply resources to verification and comment and this will be considered by the adjudicator.

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

285. Any agreements to add further information to the SOP will be made subject to the taxpayer agreeing that the Commissioner can also include responses to the additional information to the SOP under section 89M(13), if required.

286. Any additional information that the parties provide under section 89M(13) will be deemed to form part of the provider's SOP under section 89M(14). The evidence exclusion rule under section 138G(1) and the issues and propositions of law exclusion rule under the new section 138G(1) apply to the additional information.

Preparation for adjudication

287. The Adjudication Unit is part of the Office of the Chief Tax Counsel and represents the final step in the disputes process. The adjudicator's role is to review unresolved disputes by taking a fresh look at the tax dispute and the application of law to the facts in an impartial and independent manner and provide a comprehensive and technically accurate decision that will ensure the correctness of the assessment.

288. Generally, the adjudicator will make such a decision within three months after the case is referred to the Adjudication Unit (although sometimes a decision can be made in a few weeks). The length of time taken to make a decision will depend on the number of disputes that are before the Adjudication Unit, any allocation delays and the technical, legal and factual complexity of those disputes.[1]

289. Judicial comments have been made in *C of IR v Zentrum Holdings Limited and Another, Ch'elle Properties (NZ) Limited v CIR* (2004) 21 NZTC 18,618

[1] For further information on the timeframe for adjudication of disputes see the article titled "Adjudication Unit – Its role in the dispute resolution process" that was published in the *Tax Information Bulletin* Vol. 19, No. 10 (November 2007).

and *ANZ National Bank Ltd and others v C of IR (No. 2)* (2006) 22 NZTC 19,835 indicating that, as a matter of law, it is not strictly necessary for Inland Revenue officers to send all disputes to the Adjudication Unit for review, and Inland Revenue officers are not necessarily bound by the Adjudication Unit's decisions.

290. Notwithstanding the above judicial comments, if the parties have not agreed on all the issues at the end of the conference and disclosure phases or to truncate the disputes process under section 89N(1)(c)(viii), it is the Commissioner's policy and practice that all disputes are to be sent to the Adjudication Unit for review, irrespective of the complexity or type of issues or amount of tax involved unless any of the following exceptions arise:

    a) the Commissioner has considered the taxpayer's SOP for the purposes of section 89N(2)(b) and referred the dispute to the Adjudication Unit for their preliminary consideration and the Adjudication Unit has determined that it has insufficient time to reach a decision in respect of the dispute before a statutory time bar would prevent the Commissioner from subsequently increasing the assessment (see paragraph 294 for further discussion), or

    b) any of the legislative exceptions specified in section 89N(1)(c) apply (see Appendix 2 of SPS 11/05: *Disputes resolution process commenced by the Commissioner of Inland Revenue* for further discussion) so that the Commissioner can amend an assessment without first completing the disputes process, or

    c) the High Court has made an order that the disputes process can be truncated pursuant to an application made by the Commissioner under section 89N(3).

291. Inland Revenue officers will adequately consider the facts and legal arguments in the taxpayer's SOP before deciding whether to amend the assessment. It is expected that this will occur only in very rare circumstances.

292. Whether the Commissioner has adequately considered a SOP will depend on what is a reasonable length of time and level of analysis for that SOP given the circumstances of the case (for example, the length of the SOP and the complexity of the legal issues).

293. Thus a simple dispute could take only a couple of days to consider adequately while a complex dispute could take a few weeks.

294. The decision not to refer the case to adjudication must be made by a senior person in Service Delivery (for example, at the time of writing the delegation was with Assurance Manager level or above). In respect of the first exception mentioned in paragraph 290(a) it is necessary that the parties have exchanged a SOP and it is a matter solely for the Adjudication Unit to determine whether it has insufficient time to fully consider the dispute.

295. If the dispute is to be referred to the Adjudication Unit, the Commissioner should not the challenge notice before the adjudication process is completed unless a time bar is imminent. The responsible officer will prepare a cover sheet that records all the documents that must be sent to the Adjudication Unit.

296. 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 must be sent to the Adjudication Unit.

297. When the dispute is to be referred to adjudication, the responsible officer will issue a letter and copy of the cover sheet to the taxpayer before sending the submissions, notes and evidence to the Adjudication Unit. The cover sheet and letter is usually completed within one month after the date that the Commissioner issues the SOP or provides additional information under section 89M(8).

298. The purpose of this letter is to seek the taxpayer's concurrence on the materials to be sent to the adjudicator—primarily in regard to the documentary evidence that has been disclosed at the SOP phase. This letter will allow the taxpayer no more than 10 working days from when it is received to provide a response.

299. Once the taxpayer has concurred on the materials to be sent to the Adjudication Unit, those materials will usually be so forwarded. However, if the taxpayer does not provide a response 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. The adjudicator can also contact the parties after the initial materials have been received to obtain further information.

300. Where an investigation has covered multiple issues, the cover sheet will outline any issues that the parties have agreed upon and any issues that are still disputed. The adjudicator can then consider the disputed issues and not reconsider those issues that have been agreed upon.

301. Generally, the adjudicator only considers the materials that the parties have submitted. They do not usually seek out or consider further information, unless

it is relevant. The adjudicator may consider such additional information notwithstanding that the parties have not agreed that the provider can include this information in their SOP under section 89M(13).

302. However, any additional material which amounts to a legal or factual issue, or a proposition of law, that the parties have not included in their SOP (or is not deemed to be included in their SOP under section 89M(14)) cannot later be raised by the parties as evidence in the TRA or a hearing authority because of the issues and propositions of law exclusion rule in section 138G(1).

Adjudication decision

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

304. If the Adjudication Unit makes a decision that is not in the Commissioner's favour, the Commissioner is bound by and cannot challenge that decision. The dispute will come to end. The Commissioner will issue an assessment or challenge notice to the taxpayer to reflect the decision.

305. If a taxpayer commences the disputes process, they can file challenge proceedings in the TRA or the High Court within the applicable response period if any of the following conditions are met:

    a) The Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed and Commissioner rejected within the applicable response period and the Commissioner has later issued an amended assessment to the taxpayer (section 138B(2)).

    b) For taxpayer-initiated disputes where the taxpayer NOPA is issued after 29 August 2011, a new section 138B(3) applies. A taxpayer may issue challenge proceedings where: the Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed and the Commissioner rejected within the applicable response period by a NOR; and the Commissioner has issued a challenge notice to the disputant. The latter requirement has the effect of deferring the commencement of challenge proceedings, as the Commissioner's challenge notice can only generally be issued after the Commissioner has issued a SOP.

    c) For taxpayer-initiated disputes where the taxpayer NOPA is issued before 29 August 2011, a taxpayer may issue challenge proceedings where the Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed and the Commissioner rejected within the applicable response period by a NOR or other written disputable decision and the Commissioner has not issued an amended assessment (section 138B(3)).

    d) The Commissioner or taxpayer has issued an assessment that is the subject of an adjustment notified to the Commissioner, where:

        - the adjustment relates to a matter for which the material facts and relevant law are identical to another assessment for the taxpayer (for another period) which is the subject of court proceedings; or
        - the adjustment seeks to correct a tax position taken by the taxpayer (or an associated person) as a consequence or result of an incorrect tax position taken by another taxpayer, which is the subject of or was the subject of court proceedings; and
        - the Commissioner has issued a challenge notice.

    e) The Commissioner or taxpayer has issued a disputable decision that is not an assessment that was the subject of an adjustment that the taxpayer proposed and the Commissioner rejected within the applicable response period (section 138C).

306. A 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:

    a) the amended assessment if the challenge proceedings are filed under section 138B(2), or

    b) the challenge notice if the challenge proceedings are filed under section 138B(3) or (4), or

    c) the written disputable decision rejecting the taxpayer's proposed adjustment if the challenge proceedings are filed under section 138C.

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

This Standard Practice Statement is signed on 13 October 2011.

Rob Wells
LTS Manager, Technical Standards
Legal and Technical Services

NEW LEGISLATION

This section of the *TIB* covers new legislation, changes to legislation including general and remedial amendments, and Orders in Council.

STUDENT LOAN SCHEME ACT 2011

The Student Loan Scheme Bill 2010 was introduced into Parliament on 27 August 2010. It received its first reading on 14 October 2010 and its second and third readings on 16 August 2011.

The Act reforms the way student loans are repaid by removing the end-of-year assessment process for the majority of borrowers, and the way borrowers manage their loans by increasing use of online services. It also rewrites the Student Loan Scheme Act 1992 and replaces the Student Loan Scheme Act 1992 from 1 April 2012.

Several changes were made to the bill at the Select Committee stage. The main changes were to delay the application of certain provisions until 1 April 2013 to give Inland Revenue more time to implement the changes in the bill. The Government also introduced Supplementary Order Paper No 200 at the Select Committee stage giving Inland Revenue the ability to recall student loans in cases of significant default in the repayment of a loan.

The resulting Act received Royal assent on 29 August 2011. This Act also amends a number of other Acts, including the Student Loan Scheme Act 1992, the Credit Contracts and Consumer Finance Act 2003 and the Tax Administration Act 1994.

ESTABLISHMENT OF A STUDENT LOAN

Sections 9–20, 222 and part of schedule 8

Changes have been made to allow information to be transferred between StudyLink and Inland Revenue to enable the establishment of a loan account. The Act also provides for a near real-time transfer of loan advances from StudyLink to Inland Revenue to allow Inland Revenue to provide borrowers with a consolidated view of their loan balance.

Background

Previously, borrowers had to contact two agencies to determine the total amount of student loan they owed as loan advances were held by StudyLink for a year before being transferring to Inland Revenue for collection. This increased the compliance costs involved for borrowers.

The Act introduces changes which provide for a near real-time transfer of loan advances from StudyLink to Inland Revenue. This ensures borrowers will only need to contact one agency to view their consolidated loan balance.

Key features

- When a borrower applies for a loan, information will be transferred from StudyLink to Inland Revenue. Inland Revenue will use this information to check it against the information it holds on the borrower and set up the borrower's account.
- When a loan is approved, a borrower's contact details will be transferred to Inland Revenue. If the borrower's details change, StudyLink will advise Inland Revenue of the updated details.
- When StudyLink provides a loan advance to a borrower, the loan advance will be transferred to Inland Revenue in a near real-time basis.
- The loan establishment fee charged to a borrower by StudyLink has been increased from $50 to $60.
- Inland Revenue will issue statements to borrowers outlining loan advances, instead of StudyLink.
- Borrowers will continue to have at least 31 days from the date of the statement to object to the loan advances outlined in the statement.
- Student loans will be removed from the requirement to comply with the Credit Contracts and Consumer Finance Act 2003, while changes have been made to the Student Loan Scheme Act to incorporate similar rights that borrowers would have had under the Credit Contracts and Consumer Finance Act.

Application dates

The following changes apply from 1 January 2012:

- the transfer of information from StudyLink to the Commissioner on establishment of the loan;
- the transfer of the loan advances to Inland Revenue on a near real-time basis; and
- the requirement for the Commissioner to notify borrowers of loan advances and the consolidated loan balance.

The disclosure requirements of the Credit Contracts and Consumer Finance Act apply from 30 August 2011, being the day after the date of Royal assent.

All other changes apply from 1 April 2012.

Detailed analysis

Preparation for loan being transferred

Information on a borrower will be transferred from StudyLink to Inland Revenue on a near real-time basis when a borrower applies for a loan.

StudyLink will transfer information on an applicant to Inland Revenue to confirm that the information provided by borrowers is consistent with the information held by Inland Revenue. This will also allow an account to be set up for the borrower with Inland Revenue and facilitate the transfer of loan advances. The information transferred will be the applicant's name, IRD number and date of birth. If the information transferred from StudyLink to Inland Revenue differs from information held by Inland Revenue, the Commissioner must advise the Loan Manager that the information differs. The Loan Manager will then go back to the borrower to acquire the correct information.

Once the borrower has entered into the loan contract, the Loan Manager will transfer further details on a borrower to Inland Revenue, such as when the loan entitlement letter advising the borrower of their loan was issued and the borrower's contact details.

Real-time transfer of information

Changes were made to the bill at the Select Committee stage to provide for the near real-time transfer of loan advances from StudyLink to Inland Revenue. This will enable borrowers to have a consolidated view of their loan and allow them to access this at any time and from anywhere in the world. Borrowers will be able to manage their loan in an electronic environment.

Loan advances will appear on statements provided by Inland Revenue, rather than StudyLink, and borrowers will have a period of time (at least 31 days) from the date of this statement to object to a loan advance. Statements will be issued by Inland Revenue at least twice a year. Objections by borrowers to loan advances outlined in the statement will continue to be dealt with by StudyLink.

Student loan establishment fee

The current administration fee imposed by StudyLink when the loan is established will be incorporated into legislation and referred to as an "establishment fee". The current fee of $50 will be increased to $60.

Disclosure requirements and CCCFA implications

As student loan contracts came within the definition of a "credit contract" under the Credit Contracts and Consumer Finance Act 2003 (CCCFA), an amendment was made to remove the requirement for the Student Loan Scheme to comply with the Credit Contracts and Consumer Finance Act.

The CCCFA was enacted to protect consumers who enter into contracts when there are generally no other legislative protections available. Student loan borrowers have protection under the Student Loan Scheme Act. There are also major differences between the features of student loans and other credit contracts, for example, the provision of hardship criteria and the income-contingent nature of repayment obligations and other protections available to borrowers which reduce the need to extend the requirements of the CCCFA to student loans. To strengthen protections provided under the student loan scheme, a number of amendments were made to the bill at the Select Committee stage to incorporate similar rights that a borrower would have under the CCCFA. These changes are as follows:

- The right to receive a copy of the loan contract within six working days of signing. This change reflects StudyLink's current administrative practice.
- The right to cancel the contract within seven working days of the date of the loan entitlement letter.
- The right to disclosure of information in the loan contract, namely, the annual repayment threshold, base interest rate, repayment percentage, student loan establishment and administration fees, the right to cancel the contract within seven days and the right to object to loan advances.
- The requirement for the Commissioner to notify the borrower of loan advances made by StudyLink to the borrower, the date and amount of any interest or penalty imposed, and the date and amount of any establishment or administrative fees charged.
- The requirement for the Commissioner to notify the borrower of unilateral changes to the contract or statute that increase the borrower's obligations if the borrower's updated contact details are known.

Definition of "unpaid amount"

For the 2012–13 tax year, the current period-based approach to dealing with unpaid amounts will be retained. The period-based approach looks at the unpaid amounts for different periods and different obligations separately. This treatment reflects a tax approach whereby penalties and interest are applied separately to tax types and to tax periods. The provision has been retained until April 2013 to give Inland Revenue time to implement changes as detailed below.

Changes from 1 April 2013

The period-based approach to unpaid amounts is not in keeping with a loan approach whereby an aggregate approach to unpaid amounts is more appropriate. Therefore, from 1 April 2013, the definition of "unpaid amount" will be replaced with a new definition which reflects a "whole of loan" approach to outstanding amounts. "Unpaid amounts" will therefore be defined as the aggregate amount of the borrower's obligations as has not been paid by the due date.

DETERMINING WHETHER BORROWERS ARE NEW ZEALAND-BASED OR OVERSEAS-BASED

Sections 21–29 and schedule 1

Changes have been made to the way borrowers who qualify for one of the exemptions from the requirement to be present in New Zealand are treated for the purposes of determining whether they are New Zealand-based.

Background

The rules determining when a borrower is New Zealand-based or overseas-based mainly remain the same. This includes the current exemptions from the requirement that a borrower must be present in New Zealand for at least 183 consecutive days, which are continued in the new Act.

The original intent of the exemptions was that for borrowers who meet the requirements of one of the exemptions, the period covered by the exemption would go towards meeting the requirement that the borrower be New Zealand-based.

However, the Student Loan Scheme Act 1992 contained an error whereby a borrower was treated as New Zealand-based for the period they qualify for the exemption, rather than this period contributing towards determining whether the borrower was New Zealand-based.

Key features

The new Act contains changes that ensure a borrower is treated as being physically in New Zealand for the days that they qualify for one of the exemptions. This means that the borrower must still be in New Zealand or treated as being in New Zealand for 183 days in order to become a New Zealand-based borrower and to qualify for an interest-free loan and have New Zealand-based repayment obligations.

Application date

This change applies from 1 April 2012.

BORROWER'S REPAYMENT OBLIGATIONS

Sections 30–117, 221 and schedules 2, 3, 4 and 7

The basis of assessment for salary and wage earners has been changed from an annual basis with an end-of-year assessment, to a pay-period basis. This means student loan deductions from salary and wages will be considered correct each pay day, unless there has been a significant over- or under-deduction.

Background

Currently, the same repayment obligations apply to all New Zealand-based borrowers. That is, the repayment obligation is 10% of the borrower's annual net income if it exceeds the current repayment threshold of $19,084.

The majority of borrowers who receive salary and wages only are required to file an end-of-year personal tax summary to square-up their repayment obligations for the year. The annual basis of assessment ensures accuracy of repayments only at the end of the year. There is no incentive to encourage correct deductions to be made during the year.

Changing from an annual basis of assessment to a pay-period basis for salary and wage deductions removes the requirement for salary and wage earners to file an end-of-year return and reduces compliance costs for the majority of borrowers. It will also enable Inland Revenue to shift resources from undertaking the end-of-year assessment and collecting large debts to ensuring deductions made during the year are correct, providing higher value services to borrowers.

Key features

The Act changes the way New Zealand-based borrowers repay their loans by providing different repayment obligations for different classes of New Zealand-based borrowers as follows:

- For borrowers with salary or wages only or salary and wages and pre-taxed income, the repayment obligation on their salary and wages will be determined on a pay-period basis.
- For borrowers with pre-taxed income (which is defined as income from interest, dividends, taxable Māori authority distributions, or salary or wages from employment as a casual agricultural employee or as an election-day worker) or salary and wages and pre-taxed income only, the repayment obligations on their pre-taxed income will be determined on an annual basis and will apply when this income exceeds $1,500.
- For borrowers with other income (income other than from salary or wages and pre-taxed income) the repayment obligation on the borrower's taxable income (including salary and wages, pre-taxed income, and other income) will be determined on an annual basis.

The bill simplifies the loan repayment process by removing the current annual assessment for the vast majority of borrowers whose income is from salary and wages only. Repayment deductions from salary and wages will be determined on a pay-period basis. That is, deductions made on a pay-period basis will be the borrower's repayment obligation, provided the employer has not made a significant under- or over-deduction. This will provide greater certainty for borrowers about their repayment obligations.

A separate loan repayment mechanism is provided for borrowers who have pre-taxed income. These borrowers will now be required to make a declaration of their pre-taxed income rather than the annual return as previously. The new legislation sets out how and when their repayment obligation must be paid.

Borrowers with business or other income will be required to file an end-of-year return to determine their other-income repayment obligations. The new legislation sets out how and when their repayment obligation must be paid, including the requirement to make interim payments during the year.

The current interim payment rules will continue to apply to borrowers with pre-taxed income and borrowers with other income. These rules require borrowers to pay their repayment obligation for the year in instalments during the year, similar to the way provisional tax operates.

Also, the current terminal payment will be replaced with remaining repayments due on the same dates as interim payments. Remaining repayments are discussed later in this bulletin.

Overseas-based borrowers will continue to have a repayment obligation of $1,000, $2,000 or $3,000, depending on their loan balance. These borrowers will continue to be required to make repayments in two equal instalments, on 30 September and 31 March.

Application dates

The provisions that deal with special assessments issued to borrowers with salary or wage income to recoup a significant under-deduction and the changes to enable six-monthly interim payments to be made when borrowers pay provisional tax six-monthly, apply from 1 April 2013.

Applications for special deduction rates for unused thresholds and declarations for full-time study exemptions and requests for borrower deductions to be made from salary and wages apply from 1 March 2012. This enables deduction rate certificates and exemptions, and borrower-requested deductions to be in place for a 1 April 2012 commencement of salary and wage deductions.

The remaining changes apply from 1 April 2012.

Detailed analysis

New Zealand-based borrowers will be required to make repayments from salary and wage income, pre-taxed income, and other income.

Repayments from salary and wages

Repayment codes

New Zealand-based borrowers are required to have repayment deductions made from their salary and wage income. They are required to apply one of the following repayment codes to their salary or wages to enable repayment deductions to be made at the correct rate:

- SL – this is the standard code when deductions are made at the rate of 10 cents in the dollar on income above the pay-period repayment threshold (annual repayment threshold is $19,084/number of pay days per year); or
- STC – this code is applied if a reduced deduction is required to be made and the borrower has applied to the Commissioner for a reduced rate. Reduced rates are available to a borrower when there is an unused repayment threshold from their primary job which can be used to reduce their deductions from their secondary job, if the borrower is in hardship, or when repayment deductions are reduced to take account of a business loss.
- SLBOR and SLCIR – these codes apply in cases where the employer is instructed to make additional deductions from a borrower's salary or wages by either the borrower or the Commissioner.

The SLCIR code is applied when the borrower is required to make additional deductions to repay a previous significant under-deduction which arose in either the current year or a prior year.

The SLBOR code is applied when the borrower wishes to make additional repayments to count towards qualifying for the 10% excess repayment bonus. The application of this tax code enables these additional payments to be identified so they are not included in the borrower's standard repayment deductions for the pay-period.

Significant under- and over-deductions

Standard deductions made from a borrower's salary or wages are considered correct and final unless there is a significant under-or over-deduction. The Commissioner will determine the threshold for what is a significant over-deduction or a significant under-deduction, having regard to the resources available to the Commissioner and the need to maintain the integrity of the student loan scheme. The Commissioner must inform borrowers on or before 31 March of the significant over-deduction threshold that will apply for the following tax year.

When an error is made in the collection of standard repayment deductions from salary or wages, and the amount is considered to be a significant under-deduction or over-deduction, the borrower will either receive a refund or be required to repay the under-deduction.

There are two mechanisms available to recoup a significant under-deduction, either by way of a special deduction rate (SLCIR) from future salary or wages or by the Commissioner issuing a special assessment with a due date (at least 30 days after the date of the assessment notice) for the repayment of the under-deduction.

Significant over-deductions may be refunded or the borrower can choose to leave the over-payment against their loan to be considered as an excess repayment. Excess repayments are outlined later in this commentary.

If a borrower has been over-deducted or under-deducted but the amount does not exceed the significant threshold amount, the borrower's deduction will be considered to be correct and final and the amount will not be refunded or collected.

Unused repayment threshold

Borrowers with two or more jobs who estimate that the income from their main job for a three-month period will be below the repayment threshold for that period, can apply to the Commissioner to have the unused repayment threshold applied against their second job. The Commissioner will calculate the special deduction rate that should apply to the borrower's secondary job and issue a special deduction-rate certificate code to the borrower for the borrower to give to their employer.

The borrower will be required to review their estimate each quarter and advise Inland Revenue if any of the information or circumstances on which the special deduction rate is based change.

Full-time study exemption

Borrowers who study full-time but also work and earn under the annual repayment threshold can apply for a repayment exemption. This exemption ensures students are not disadvantaged as a result of the introduction of the pay-period basis of assessment where, but for the exemption, students would be required to make repayments if their earnings are above the pay-period threshold.

To qualify for the exemption, borrowers must:

- be engaged in a full-time study workload, being a programme of study which is 32 weeks or longer in a year and the study is at least 0.8% of equivalent full-time student units; or
- a period of at least 12 weeks or longer in a year and the study is at least 0.3% of equivalent full-time student units.

The exemption period commences when a borrower has a loan advance and continues while the borrower is undertaking a programme of study. The exemption period will not be broken by holiday periods between semesters provided there has been at least one semester of study completed and the holiday period does not exceed 15 weeks over the Christmas holiday period or three weeks for any other holiday period.

The exemption does not apply if the borrower has other income (income other than salary or wage or pre-taxed income).

Also, generally the PAYE rules in the Tax Administration Act 1994 apply to student loan deductions, and these deductions are in addition to PAYE deductions for income tax.

Pre-taxed income and other income repayment obligations

Repayment obligations on pre-taxed income

Pre-taxed income is income that is not required to have student loan deductions made from it. If a borrower has income other than salary or wages and pre-taxed income, such as business income, they are an "other-income" borrower and are not required to comply with the pre-taxed repayment obligations.

For borrowers who derive solely pre-taxed income or salary and wages, and pre-taxed income, they will only have a pre-taxed income repayment obligation if the net pre-taxed income is $1,500 or more and their total income is above the annual repayment threshold.

A borrower's net pre-taxed income is their total pre-taxed income less the borrower's allowable expenses for the year. Borrowers will be required to make an annual declaration of their pre-taxed income. The declaration must be made by 7 July following the end of the tax year, or another date specified by the Commissioner where the borrower has requested an extension to file the declaration or the Commissioner considers it appropriate.

The Commissioner will determine the borrower's pre-taxed repayment obligation once the borrower files the declaration.

The calculation used to determine a borrower's pre-taxed repayment obligation depends on whether their annual salary or wage income exceeds the annual repayment threshold.

If the borrower's annual salary and wage income is less than the annual repayment threshold, the borrower's pre-taxed repayment obligation is determined by the following formula:

$$a = b \times (c - d)$$

where:

a is the amount of the borrower's pre-taxed repayment obligation

b is the repayment percentage (currently 10%)

c is the sum of the borrower's net pre-taxed income (gross pre-taxed income less allowable expenses) and salary and wage income for the tax year

d is the annual repayment threshold (currently $19,084).

If the borrower's pre-taxed repayment obligation is zero or negative, the borrower will have no pre-taxed repayment obligation for the year.

If the borrower's annual salary and wage income is equal to or greater than the annual repayment threshold, the borrower's pre-taxed repayment obligation is determined by the following formula:

$$a = b \times c$$

where:

a is the borrower's pre-taxed repayment obligation

b is the repayment percentage (currently 10%)

c is the borrower's net pre-taxed income (gross pre-taxed income less allowable expenses).

The Commissioner will notify the borrower of their pre-taxed repayment obligation and the requirement for the borrower to make interim payments for the following year. These rules are outlined below under "Interim payment obligations".

Other income repayments

Borrowers with other income (defined as income other than salary or wages and pre-taxed income) will be required to make student loan repayments based on their net income. A borrower's net income is defined as their annual gross income less annual total deductions. If a borrower's net income is less than the annual repayment threshold (currently $19,084), the borrower has no other income repayment obligation.

If the borrower's net income is above the annual repayment threshold and they have other income they will be required to file either a return at the end of the year (for New Zealand-based borrowers) or a declaration of details for New Zealand-based borrowers who are non-resident,

outlining their annual gross income and their annual total deductions in order to determine the borrower's net income. Once the return or declaration is filed, the Commissioner must assess the borrower's other income repayment obligation for the year and advise them of the amount of their other income repayment obligation and the due dates on or before which the amount must be repaid.

A borrower's other income repayment obligation for a tax year is determined using the following formula:

$$a = (b \times (c - d)) - e$$

where:

a is the amount of the borrower's other income repayment obligation

b is the repayment percentage (currently 10%)

c is the borrower's net income for the year

d is the annual repayment threshold (currently $19,084)

e is the standard deduction made from the borrower's salary and wages derived during the year.

However, if the "other income" repayment obligation determined by the formula is zero or negative, the borrower will have no other income repayment obligation for the year.

Remaining repayments

If the borrower's interim payments made during the year do not fully satisfy the borrower's pre-taxed repayment obligation or the borrower's other "income repayment" obligation (as applicable) for the year, the difference is the borrower's "remaining repayments".

A borrower's remaining repayment due dates are determined as follows:

- For borrowers whose pre-taxed repayment obligation or other income repayment obligation for the year is less than $1,000, the total remaining repayment is due in one instalment. The due date for the remaining repayment will be the interim payment date that immediately follows the date for filing the borrower's pre-taxed declaration, return of income, or details of annual gross income for New Zealand-based non-residents (as applicable).
- For borrowers whose pre-taxed repayment obligation or other income repayment obligation is $1,000 or more but less than $16,000, and who do not estimate their repayment obligation, the remaining repayments are due on the interim payment dates for the following tax year, that occur after the date the borrower is required to file their pre-taxed declaration or return of income. For example, a borrower with other income is required to file a return for the 2012–13 year on 7 July 2013 is required to pay remaining repayments in relation to their other income repayment obligation on the three interim payment dates that occur after the date the borrower was required to file a return of income (7 July 2013), being 28 August 2013, 15 January 2014 and 7 May 2014.
- Where the borrower's pre-taxed repayment obligation or other income repayment obligation is $16,000 or more, or their pre-taxed repayment obligation or other income repayment obligation is $1,000 or more and they estimated their pre-taxed or other income repayment obligation, the remaining repayments are due on the interim payment dates for the same tax year that the declaration or return of income relates to. The effect of this is to impose late payment interest on borrowers who pay less than their repayment obligation during the year. For example, a borrower with other income who is required to file a return for the 2012–13 year on 7 July 2013 will have remaining repayments in relation to their other income repayment obligation due on the three interim payment dates during the 2012–13 year being 28 August 2012, 15 January 2013 and 7 May 2013.

Interim payment obligations

Borrowers with either a pre-taxed repayment obligation or another income repayment obligation will be required to pay interim payments during the year in the same manner as provisional tax with payments due on the three standard provisional tax dates.[1] For example, if a borrower has a March balance date, payments would be due on 28 August, 15 January and 7 May.

The following exceptions apply when a borrower has other income and they pay provisional tax:

- On a six-monthly basis: the borrower would pay their interim payments on the three standard provisional tax dates. For a March balance date borrower, these are 28 August, 15 January and 7 May. This rule will change from 1 April 2014.
- Using the GST ratio method, the borrower's interim payments will be due on the three standard provisional tax dates.

Changes from 1 April 2013

From 1 April 2013, borrowers who account for provisional tax on a six-monthly basis will be required to pay interim payments on the same two dates as they pay provisional tax. For a March balance date borrower, this will be 28 October and 7 May.

[1] When a borrower is in a transitional year (due to changing their balance date), the interim payment dates are the same dates as the provisional tax dates for that transitional year. The exception is when the borrower only has one payment date or when there is an odd number of payment dates.

As with provisional tax, borrowers can choose between two methods to calculate interim payments for student loan purposes: the standard method or an estimation of their liability.

Standard method

Borrowers who use the standard method to calculate their interim payments are required to uplift their prior year's pre-taxed repayment obligation or other income repayment obligation by 5%. If the borrower has not filed their prior year's pre-taxed declaration or other income return, their interim payments will be based on their repayment obligation for the prior year uplifted by 10%. If a borrower's uplifted pre-taxed repayment obligation or other income repayment obligation is less than $16,000, the amount of each interim payment is determined by the following formula:

$$a = b \times \frac{c}{d} - e$$

where:

a is the amount of the borrower's interim payment

b is the amount of the borrower's uplifted pre-taxed repayment obligation or other income repayment obligation

c is the number reflecting which of the interim payments is being calculated (eg, first, second or third)

d is the total number of interim payment due dates the borrower has for the tax year

e is the total of interim payments that were previously due.

Example

A borrower with a March balance date who has an other income repayment obligation for the 2013–14 tax year, uses the standard method to calculate their interim payments. As they have not filed their 2012–13 return of income, their other income repayment obligation for the 2011–12 tax year ($9,000) will be uplifted by 10% to determine their interim payments for the 2013–14 tax year. Their interim payments are calculated as follows:

First interim payment

$$= \frac{(\$9{,}000 \times 110\%) \times 1}{3} - 0$$

= $3,300 which is due on 28 August 2013 and is paid on that date

If the borrower then files their 2012–13 return of income on 17 September 2013, and their other income repayment obligation for that year is $11,428.6, the second interim payment will be calculated as follows:

Second interim payment

$$= \frac{(\$11{,}428.6 \times 105\%) \times 2}{3} - \$3{,}300$$

= $4,700 which is due on 15 January 2014 and is paid on that date

This calculation is repeated for the final interim payment, giving an amount due of $4,000 on 7 May 2014.

If the borrower's interim payment is not divisible into equal amounts, the final interim payment makes up any difference.

If the borrower's uplifted pre-taxed repayment obligation or uplifted other income repayment obligation exceeds the borrower's loan balance at the beginning of the year plus any loan advances made, the uplifted repayment obligation will be reduced accordingly.

Estimation method (including borrowers whose uplifted repayment obligation is $16,000 or more)

Borrowers whose pre-taxed repayment obligation or other income repayment obligation is $1,000 or more, and who estimated their pre-taxed repayment obligation or other income repayment obligation or their uplifted repayment is $16,000 or more, will determine their interim payments by dividing their estimated repayment obligation (or uplifted repayment obligation) by the number of interim payment due dates for the year.

Example

A borrower with a March balance date, and who is required to make three interim payments for the 2013–14 tax year estimates that their other income repayment obligation for the year will be $9,000. Their interim payments will be calculated as follows:

Interim payment

$$= \frac{\$9{,}000}{3}$$

= $3,300

This amount will be payable on 28 August 2013, 15 January 2014 and 7 May 2014. If the borrower makes another estimate of their other income repayment obligation, the above calculation is performed for the remaining interim payment dates following the date of the new estimate.

Special deduction rate certificate for lower repayment obligation

If a borrower derives other income and salary and wages in a tax year, and considers that their standard deductions from salary or wages will exceed their repayment obligations for the year, they can apply to the Commissioner for a special deduction rate certificate to apply a lower deduction rate to their salary or wages.

If the Commissioner accepts the application, the Commissioner will issue the borrower with a special deduction rate certificate, specifying the lower deduction rate and the period the rate applies for. The borrower will be required to provide the certificate to their employer. The certificate will cease when either the period outlined on the certificate is exceeded or the borrower or Commissioner withdraws the certificate by advising the employer accordingly.

Extensions of time to file a declaration of pre-taxed income

With the introduction of the requirement to file a declaration of pre-taxed income, a new provision has been introduced to enable the borrower to apply (in a manner acceptable to the Commissioner) for an extension of time to file the declaration. The Commissioner also has the ability to provide borrowers with an extension of time to file a declaration without the borrower requesting such an extension.

Overseas-based borrowers' repayment obligations

The current repayment obligations for overseas-based borrowers continue in this Act. That is, a borrower's repayment obligation is either $1,000, $2,000 or $3,000, depending on their loan balance. These borrowers will continue to be required to make repayments in two equal instalments, on 30 September and 31 March.

Under the new provisions, the repayment obligations of overseas-based borrowers ($1,000, $2,000 or $3,000) and repayment thresholds ($1,000, $15,000 and $30,000) can be changed by Order in Council rather than by primary legislation. This ensures consistency with the way changes can be made to the annual repayment threshold and the repayment percentage that applies to New Zealand-based borrowers.

Changes have also been made to the definitions of "consolidated loan balance" and "loan balance" to ensure overseas-based borrowers' repayment obligations reflect adjustments to the loan balance at 31 March, including any administration fee charged, but excluding the excess repayment bonus. This gives effect to the original policy intent.

EXCESS REPAYMENTS

Sections 118–132, 222 and schedule 8

Changes have been made to the way excess repayments are dealt with to account for the move towards loan repayments being determined on a pay-period basis. This includes re-enacting the existing excess repayment bonus provisions.

Background

When a borrower makes payments or deductions of $500 or more in excess of their compulsory repayment obligation for the year, they are entitled to a 10% excess repayment bonus. The bonus is calculated following the end-of-tax year assessment. The bonus is available to both New Zealand-based and overseas-based borrowers.

As a result of the repayment obligations on salary and wages being determined on a pay-period basis under the new rules, changes have been required to reflect the pay-period basis of assessment on the excess repayment bonus provisions.

There are also different time periods within which a borrower is required to request a refund of an excess repayment depending on whether the borrower is New Zealand-based or overseas-based.

Key features

The major change to the excess repayment provisions policy is to exclude minor over-deductions that occur through the PAYE system from counting towards the 10% excess repayment bonus. This change is required to enable the pay-period assessment basis to apply to salary and wages. Any over-deductions that are determined as significant will be eligible for the 10% bonus, provided the other criteria for the bonus are met.

In addition, as a result of the introduction of the pay-period assessment basis for salary or wages, borrowers who want to make voluntary repayments through the PAYE system and qualify for the bonus can do so by separately tagging these payments with a new deduction code, SLBOR. This will allow Inland Revenue to separate these payments from standard salary or wage deductions when paid through the employer monthly schedule. This will allow the current practice, whereby some borrowers have their employer deduct additional amounts from their salary and wages, to continue.

When a borrower has a repayment or deduction made that exceeds their compulsory repayment obligations, the Student Loan Scheme Act 1992 only enabled borrowers to either apply the amount to their loan balance or have the amount refunded. The new rules provide another option for borrowers—to have their excess repayment applied to a future repayment obligation. This will be of benefit to borrowers whose excess repayment is below the $500 threshold to qualify for the bonus. In this situation, the borrower could apply the excess to satisfy the following year's repayment obligation and thereby combine it with any other excess payments in that future year in the hope of the amount exceeding the $500 threshold and thereby qualifying for the bonus in that year.

Previously, when the Commissioner advised a borrower that they had an excess repayment, overseas-based borrowers had two months from the date of the statement to request a refund of the excess, whereas New Zealand-based borrowers had six months.

The new rules standardise the period to request a refund at six months for both New Zealand-based and overseas-based borrowers.

Generally the excess repayment bonus is credited:

- on the day that the final excess repayment was made, if the borrower repays their loan in full; or
- on the date the borrower died or was declared bankrupt; or
- on 1 April in the year that follows the tax year that the excess repayment was made, in all other cases.

Changes from date of enactment to 1 April 2012

Changes have been made to the Student Loan Scheme Act 1992 to ensure that from the date of enactment of the new rules, until 1 April 2012, the excess repayment bonus will be credited:

- on the date the borrower died or was declared bankrupt; or
- on 1 April in the year that follows the tax year that the excess repayment was made, in all other cases.

If a borrower has repaid their loan in full part-way through the year, has died or been declared bankrupt, the excess repayment bonus is calculated based on the borrower's obligations up to the date the borrower repaid their loan,

died, or was declared bankrupt. This treatment should benefit the majority of borrowers. However, if finalising the excess repayment bonus part-way through the year would disadvantage the borrower, the borrower can request that the bonus be finalised as at the end of the year.

During the Select Committee stage of the bill, a technical amendment was made to ensure that borrowers who receive other income in addition to salary or wages are able to receive a refund of overpaid loan deductions from their salary or wage income.

Application date

The changes apply from 1 April 2012, with effect from the 2012–13 tax year.

INTEREST, RELIEF, PENALTIES AND OFFENCES, OBJECTIONS, DISPUTES AND CHALLENGES

Sections 133–188, 221 and schedule 7

Changes have been made to the interest and penalty provisions to bring the offences and penalty amounts up to date and into line with those that apply for tax offences more generally. These will have the effect of strengthening the rules applying to those who default on their student loan repayments.

Background

The offences and penalties in the Student Loan Scheme Act 1992 have not been changed since the Act came into effect. This means that offences and penalties that apply to non-compliant borrowers have not kept up with the changes to offences and penalties that apply for not complying with tax obligations more generally. An incentive therefore exists for borrowers to comply with tax obligations (due to higher penalties) ahead of student loans repayment obligations.

The bill will bring penalties for not complying with filing, information provision, and repayment obligations more into line with the penalties applying to taxes. These changes are intended to:

- encourage borrowers to pay the correct interim payments when they are due;
- bring the rules up to date with changes to equivalent tax obligations (for example, higher penalties for evasion and the introduction of a late filing penalty); and
- reduce any tendency for borrowers to give student loan obligations a lower priority than tax repayment obligations.

The relief provisions currently available to a borrower namely, relief from late payment interest, hardship relief (limited to the current year, prior years or the next year), and financial relief by way of instalment arrangements have been retained.

The borrower currently has the contractual right to object to any loan advance that has been attributed to a borrower. These objections are dealt with by StudyLink. The borrower can also object to the Commissioner regarding any assessment made by the Commissioner, any penalty imposed, any decision concerning significant financial hardship, or the assessment of a repayment obligation. These objections are dealt with by the Commissioner and are retained in the new Act.

Key features

The new rules include the following changes:

- The late payment penalty of 19.56% per annum has been replaced with a late payment interest of 10.6% per annum.
- Late filing penalties will be imposed for incomplete or absent declarations, or notifications in certain circumstances.
- The underestimation penalty that applies when a borrower has underestimated their repayment liability has been replaced with the ability to charge late payment interest from each overdue interim payment, and the penal repayment penalties that apply in cases of evasion will be replaced with a student loan shortfall penalty for borrowers who have taken an incorrect tax position.
- Student loan shortfall penalties will be imposed at the same rate that would apply for taking an incorrect tax position.
- The previous student loan criminal offences "rules" relating to wilfully or negligently failing to provide correct information will be replaced with the criminal offences that apply for tax purposes, such as absolute liability offences and knowledge and evasion offences. The same maximum penalty amounts that apply for income tax offences will also apply to student loan offences.
- The previous offence rules for aiding and abetting an offence will be retained in the student loan rules, but with higher penalties to reflect those imposed in relation to tax.
- The Commissioner can also enter into arrangements with borrowers for the repayment of outstanding amounts by way of instalments.
- The Commissioner can refrain from collecting amounts due if this would cause significant hardship to the borrower. The Commissioner can also refrain from issuing notices of assessment and collecting small amounts.
- The ability for borrowers to object to loan advances has been retained in the new Act. The current objection and challenge process has also been updated to reflect the process used in the Tax Administration Act 1994.

Detailed analysis

Interest

The legislation imposes interest on the loan balances of all borrowers and then provides a full interest write-off to borrowers for each day that they are New Zealand-based. The effect of this is to impose interest only on the loan balances of borrowers who are overseas-based.

The interest rate is determined by the following formula:

$$a\% = b\% + 0.74$$

where:

a is the interest rate for the tax year

b is the interest rate determined as the average of the monthly average 10-year Government bond yield rate published by the Reserve Bank for the 5 years ending in December in the year preceding the relevant tax year.

The interest rate for the year is currently 6.6%. Interest is calculated each day and charged and added to the loan balance on the last day of the tax year. The Commissioner is required to notify the borrower in writing of the amount of interest charged as soon as practical after interest is added to the borrower's loan balance.

Changes from 1 April 2013

Up to 31 March 2013, the current treatment will remain whereby loan interest will be imposed on all borrowers and a full interest write-off will be provided for New Zealand-based borrowers. From 1 April 2013, loan interest will only be imposed on overseas-based borrowers. This will contribute towards reducing the complexity of statements issued to borrowers as interest will not be shown on the statements of borrowers who are New Zealand-based.

The calculation of loan interest will also change. Previously, loan interest was calculated daily, charged and compounded annually. From 1 April 2013, loan interest will be calculated daily but charged and compounded monthly. This change in calculation method will not affect the overall annual interest rate imposed on a borrower. However, any change in the 10-year Government bond yield rate, on which the interest rate is based, will influence the interest rate charged.

Penalty for late payment

From 1 April 2012, the penalty for late payment will change its name from "late payment penalty" to "late payment interest". Also, when a borrower has not paid an amount by the due date and each individual unpaid amount is $334 or more, late payment interest will be imposed on each amount outstanding as follows:

- 0.843% of the unpaid amount on the day after it was due; and
- 0.843% of the unpaid amount as at the day that is one month since the last time the late payment interest was imposed.

Late payment interest will be calculated, charged and compounded monthly.

Again, the Commissioner must notify the borrower as soon as possible, after the late payment penalty is imposed.

Changes from 1 April 2013

From 1 April 2013, the way late payment interest is imposed will change.

Late payment interest will be calculated each day on the borrower's total unpaid amount above $500 and the interest will be charged and compounded each month.

Also, instead of late payment interest being charged on each individual unpaid amount of $334 or more, the threshold will be increased and late payment interest will apply if the total amount outstanding is $500 or more.

Small amounts

The Commissioner does not have to:

- issue a notice of assessment to borrowers if the repayment obligation or total remaining repayment for the tax year is less than $20;
- collect a repayment obligation or a total remaining repayment for the tax year if the amount payable is less than $20. This amount is not written off and remains part of the borrower's loan balance;
- collect and may write-off an amount payable by an employer or PAYE intermediary if the amount payable is less than $20;
- collect a repayment obligation if the amount has not been paid by the due date and is less than $334. This amount is not written off and is added back to the loan balance.

Relief

There are three types of relief that a borrower can apply to the Commissioner for:

- relief from late payment interest;
- hardship relief (limited to the current year, prior years or the next year);
- financial relief by way of instalment arrangements.

Relief from late payment interest

Relief from late payment interest is available to the borrower when the borrower applies and the Commissioner considers that, having regard to the circumstances, it is equitable to do so and the relief is warranted. The relief can cancel all or some of the late payment interest imposed and refund any amount paid in relation to the cancelled interest.

Changes from 1 April 2013

From 1 April 2013, more detailed payment priority rules will apply. These rules are reflected in the provisions providing relief to borrowers from the late payment interest.

Some minor amendments will be required to the provisions providing relief to borrowers from the late payment interest both from 1 April 2012 and 1 April 2013 to correct technical errors. These amendments are included in the Student Loan Scheme Amendment Bill, which was before Parliament at the time of writing.

Hardship relief

When a borrower applies for hardship relief on the grounds that the payment of the repayment obligation would cause or has caused hardship or there are special reasons that make it fair and reasonable to provide relief, the Commissioner can decrease the borrower's repayment obligation.

The relief can be provided by either refunding a repayment obligation previously paid for the current year or for the previous tax year, or by reducing future deductions from salary and wages (by way of a special deduction rate) or a future pre-taxed repayment obligation or future other income repayment obligation. If the Commissioner reduces the borrower's repayment obligation due to hardship, the reduced amount is not written off and is not added to an unpaid amount but remains part of the borrower's loan balance.

Should the borrower's circumstances change and the change would have affected the borrower's entitlement to hardship, the borrower is required to notify the Commissioner who may review the previous decision to grant hardship relief. The hardship relief may be reversed and/or the borrower's repayment obligation may be reinstated.

Financial relief by way of instalment arrangements

Borrowers who have an unpaid amount can apply to the Commissioner to enter into an instalment arrangement for the repayment of the unpaid amount. Should the Commissioner grant the instalment arrangement, the borrower will continue to be liable for late payment interest on the amount outstanding during the instalment arrangement. If at the end of the arrangement the borrower has met all of the requirements of the instalment arrangement, the late payment interest that has accrued during the instalment arrangement will be reduced.

Changes from 1 April 2013

Up to 31 March 2013, borrowers who enter into an instalment arrangement and meet their obligations under the arrangement will have the late payment interest reduced to reflect their compliance.

From 1 April 2013, for each month that a borrower under an instalment arrangement meets their obligations, the late payment interest the borrower is liable for will be reduced by two percentage points. This ensures that borrowers receive the benefit of compliance sooner, while removing the previous requirement to apply for the reduction in late payment interest. These changes to instalment arrangements for student loans reflect the way tax instalment arrangements are generally administered.

Late filing penalty

A late filing penalty has been introduced to encourage borrowers to file their pre-taxed income declaration or declaration of world-wide income by New Zealand-based non-resident borrowers. Before the penalty can be imposed, the Commissioner must notify the borrower in writing or by public notice that the late filing penalty will be imposed if the borrower does not provide the declaration to the Commissioner within 30 days of the date of notice.

Once the 30-day period has passed, the Commissioner can impose the penalty. The penalty depends on the borrower's net income as follows:

- a $50 penalty will be imposed if the borrower's net income is less than $100,000;
- a $250 penalty will be imposed if the borrower's net income is between $100,000 and $1 million (inclusive);
- a $500 penalty will be imposed if the borrower's net income is over $1 million.

To ensure that two penalties are not imposed for the same offence, a late filing penalty for student loan purposes will not be imposed if a late filing penalty has been imposed under the Tax Administration Act 1994 in relation to the same return.

The late filing penalty will be due and payable on the later of:

- 60 days after the notification that the late filing penalty would be imposed;
- the same date as the first standard interim payment[2] for the borrower if the borrower does not have an extension of time to file a return. For a March balance date borrower, this will be 28 August;

[2] If a borrower is not liable to make interim payments, the date is the date at which the borrower would be liable to make interim payments if they were an interim payer.

- the same date as the final standard interim payment[3] for the borrower if the borrower has an extension of time to file a return. For a March balance date borrower, this will be 7 May.

Shortfall penalties

Currently, if a borrower evades or attempts to evade their repayment obligation, they can be subject to a penal repayment penalty of up to 300 % of the amount evaded. This penalty is now outdated and has been replaced with a range of shortfall penalties. These penalties increase in severity according to the offence ranging from not taking reasonable care in complying with repayment obligations to evasion.

The shortfall penalties will apply when a borrower:

- has taken an incorrect tax position which is lower than the correct tax position; and
- is also liable to pay a shortfall penalty for income tax.

Borrowers may also be liable to pay a student loan shortfall penalty if taking an incorrect tax position has also reduced their student loan repayment obligation.

The student loan shortfall penalty can be up to 150% of the shortfall in the borrower's repayment obligation, and will be the same percentage rate imposed for the borrower's income tax shortfall. This will ensure that borrowers who do not comply are penalised on the whole shortfall, and not just the income tax amount.

Offences

Criminal offences currently in the Student Loan Scheme Act relate to wilfully or negligently failing to provide correct information. These offences will be replaced with the criminal offences that apply for tax purposes, such as strict liability offences, and knowledge and evasion offences. The same maximum penalty amounts that apply for income tax offences will also apply to student loan offences.

The current offences for aiding and abetting an offence will be retained, but with higher penalty amounts to reflect those imposed in relation to tax, as will the offence relating to prejudicing employees because of their student loan liability. However, there will be no change to the penalty amount for the latter offence and the $2,000 penalty will continue to apply.

The following table provides a summary of the offences and penalties under both the Student Loan Scheme Act 1992 and the Student Loan Scheme Act 2011.

Civil offences	Student Loan Scheme Act 1992		Student Loan Scheme Act 2011	
	Offence	Penalty	Offence	Penalty
Failure to pay	Late payment penalty	1.5% per month (19.56% pa)	Late payment interest	0.84% per month (10.6% pa)
Failing to file	n/a	n/a	Late filing penalty	Penalties range from $50 to $500, depending on borrower's net income
Short-payment of interim payments	Underestimation penalty (failure to pay 80% of liability by 3rd interim payment date	10% of under-estimation	Short payment was due on interim payment dates for the same year with payments spread evenly over those dates	Late payment interest imposed from interim payment due dates
Evasion	Penal repayment obligation	Up to 300% of deficient repayment obligation	Shortfall penalties[4]: • Not taking reasonable care or taking an unacceptable tax position 20% • Gross carelessness 40% • Abusive tax position 100% • Evasion 150%	

[3] If a borrower is not liable to make interim payments, the date is the date at which the borrower would be liable to make interim payments if they were an interim payer.

[4] These penalties are adjusted to take account of reductions due to borrower's good behaviour, voluntary disclosure or temporary shortfall and increased penalty due to obstruction.

Criminal offences	Student Loan Scheme Act 1992		Student Loan Scheme Act 2011	
	Offence	Penalty	Offence	Penalty
Prejudice employees	Prejudice employees because of student loan	Max $2,000 plus ability to award damages	Prejudice employees because of student loan	Max of $2,000 plus ability to award damages
Failure to provide information	Refuses, fails or negligently fails to: • provide information or a return; or • attempts to mislead or obstruct. Negligently: • fails to notify employer; or • misleads in relation to repayment deduction	Max. of: $2,000 for 1st offence $4,000 for 2nd offence $6,000 for 3rd offence	Does not provide information or returns to the Commissioner or other person	Max. of: $4,000 for 1st offence $8,000 for 2nd offence $12,000 for 3rd offence
	Wilfully: • gives false information or returns; or • misleads or attempts to mislead; • fails to notify employer	Max. of: $15,000 for 1st offence $25,000 for 2nd offence	Knowingly: • does not provide information or returns; • gives false or altered information or returns; • misleads; • does not make deductions; with intent to evade the assessment or payment of a repayment obligation	Max. penalty of $50,000 and/or a maximum term of imprisonment of 5 years
	Aids, abets, incites, conspires to commit offence	Max. of: $15,000 for 1st offence $25,000 for 2nd offence	Aids, abets, incites, conspires to commit offence	Same maximum fine or term of imprisonment as person who committed offence

Objection rights

A borrower can:

- object to a loan advance;
- dispute a decision by the Commissioner; or
- challenge a Commissioner's decision once the borrower has completed the disputes process.

Objections

A borrower can object to the details of loan advances outlined on a statement issued by the Commissioner. The borrower has at least 31 days from the date of the statement to object, unless StudyLink has allowed an extension of time to object.

The Loan Manager must consider the objection and, as soon as practicable, notify the borrower and Inland Revenue of their decision and the reasons for that decision. If the objector does not agree with the Loan Manager's decision, the borrower can require the Chief Executive to determine the decision. The request must be made within 21 days of the Loan Manager's decision or the Chief Executive may provide an extension of time for the borrower to request a determination of decision by the Chief Executive.

Once the Chief Executive has received a request to consider the objection, they must consider the objection and, as soon as practicable, notify the borrower in writing of their decision and the reasons for that decision.

If a borrower disagrees with the decision of the Chief Executive, the borrower can, within 30 days[5] of being notified of the Chief Executive's decision, apply to the Disputes Tribunal or District Court for determination of the

[5] The referee of a Disputes Tribunal or a District Court judge may extend the time allowed to apply to a Disputes Tribunal or District Court.

dispute. The Court or Tribunal will only consider objections once they have been considered by the Loan Manager and the Chief Executive.

Dispute and challenge process

The same disputes process that applies for income tax disputes will apply to disputes involving a decision by the Commissioner under this Act.

Once a borrower has concluded the disputes process, and the dispute has not been resolved, the borrower may challenge the decision.

A borrower may dispute any of the following matters (excluding the details of a loan advance) under the Act:

- any information (other than a loan advance) provided to the borrower;
- the Commissioner's decision not to treat a borrower as being physically in New Zealand or regarding the start and end dates of the borrower being treated as a New Zealand resident;
- the Commissioner's decision not to issue a special deduction rate certificate or that the certificate issued is erroneous;
- that the additional deduction rate certificate is incorrect or has been issued in error;
- the Commissioner's determination as to the salary or wage deduction to be made on the grounds that the determination is erroneous;
- the Commissioner's determination that a significant over-deduction was not made was erroneous or that the amount of the significant over-deduction stated in the notice was erroneous;
- the Commissioner's decision to prohibit a borrower from making an application for the borrower's unused repayment threshold to be allocated to their secondary income or an application for the exemption for full-time study;
- an assessment of the borrower's repayment obligations on the basis that the assessment is erroneous, excessive or issued in error;
- the imposition of interest or late payment interest, or the amount of interest charged or late payment interest charged;
- the Commissioner's decision not to provide relief from late payment interest, hardship relief, or financial relief by way of an instalment arrangement. The borrower can also challenge the relief provided on grounds that relief is not fair and reasonable; and
- the imposition of the late filing penalty or a shortfall penalty on the grounds that the penalty was imposed in error.

After considering the challenge the Commissioner must notify the borrower that the Commissioner has either:

- allowed the challenge in full;
- allowed the challenge in part; or
- disallowed the challenge.

Application dates

The changes relating to shortfall penalties, late filing penalties, and criminal offences for not complying with obligations, apply from 1 April 2012 onwards. However, they apply to obligations for the tax year and therefore cannot be determined until the end of the year.

The changes relating to the rights of a borrower to object to the details of loan advances and challenge details of their consolidated loan balance, apply from 1 January 2012, being the date from which that the loan advances provisions apply.

The other changes outlined above apply from 1 April 2012.

MISCELLANEOUS AMENDMENTS

Sections 189–226 and schedules 5–10

Changes have been made to the way payments are allocated and offset against a borrower's consolidated loan balance, and an annual administration fee of $40 introduced to reflect the cost of administering the loan. There are also a number of other general amendments made to the Act, which are outlined below, together with the introduction of a new provision that allows the Commissioner to recall a loan, on demand, in certain circumstances.

Administration fee

A new Inland Revenue administration fee has been introduced to recover more of the costs of administering the student loan scheme from borrowers. The administration fee reflects the costs incurred by Inland Revenue in administering borrowers' loans.

To ensure that borrowers are not charged two fees in the same year, the administration fee will only be charged in years when a borrower is not charged an establishment fee through StudyLink.

The administration fee will be imposed when the borrower's loan is $20 or more as at 31 March each year and imposed on 1 April each year.

The annual administration fee applies from 30 August, being the day after the date of Royal assent.

Payment allocation rules

The payment allocation rules specify the order in which the Commissioner offsets payments made by a borrower against their consolidated loan balance. For the period 1 April 2012 until 31 March 2013, the payment allocation rules reflect the rules enacted as part of the Student Loan Scheme Act 1992 namely, that payments satisfy interest first and any remainder is applied to the principal of the loan.

Changes from 1 April 2013

From 1 April 2013, more detailed payment priority rules will come into force, although the underlying concept remains that payments will go to repay debt first before current year obligations and debt repayments will go to pay interest first and then the loan principal.

The payment allocation rules are as follows.

For standard salary and wage deductions and additional deductions required by the Commissioner to repay a significant under-deduction, any amounts received must be offset against the borrower's consolidated loan balance.

Amounts received through salary and wage deductions required by the Commissioner to repay debts, or deductions required by the borrower or payments in respect of the borrower's consolidated loan balance (for example, from overseas-based borrowers), will first go towards paying any unpaid amount. Any remainder will be used to satisfy current year obligations. Any further amounts remaining will be offset against a borrower's loan balance.

There is an exception to these rules where payments are received by or for a borrower who is in an instalment arrangement. Borrowers who are in an instalment arrangement are required to comply with their current year obligations in order to continue to qualify for the instalment arrangement. The payment allocation rules in the Act reflect this requirement and therefore payments from or for borrowers in an instalment arrangement will first go to meet the current year's obligations, then any remainder will be offset against any unpaid amount. If there is any remainder, that amount will be offset against the borrower's loan balance.

Cancellation of interest when loan balance is repaid early

The Act continues the current practice whereby interest is calculated and accrued daily and is charged and compounded annually. When a borrower pays the amount outstanding as outlined in the last statement they received, they will still have a small amount of interest outstanding for the period between the last statement and the date of payment.

To address this issue, the new legislation ensures that when the loan is repaid in full within 30 days of the last statement, any loan interest incurred during the 30-day period is cancelled.

This amendment will only apply from 1 April 2012 until 1 May 2013, when the new method of calculating, charging and compounding loan interest applies and removes the need to provide specific rules for the cancellation of interest if the loan balance is repaid early.

Recall of loan balance

New section 204 allows the Commissioner of Inland Revenue to exercise existing powers in student loan contracts that provide for the full amount of student loans to be recalled or repaid on demand.

Previously, the Commissioner only had the ability to collect loan amounts that were due and owing and had the power under the relevant Acts to enforce only the payment of arrears.

All student loan contracts contain a clause allowing the loan balance to be recalled in certain circumstances, but in most cases this power is not available to Inland Revenue (instead this rests with another Crown agency).

The new legislation allows the Commissioner to exercise existing powers in student loan contracts that provide for the full amount of student loans to be recalled or repaid on demand.

The powers conferred on the Commissioner are no greater than the powers in the loan contracts as signed by borrowers in terms of the amount that can be demanded and the circumstances in which the recall powers can be exercised.

The powers clarify that Inland Revenue as the agency responsible for collecting student loan repayments, has the ability to exercise this existing recall term of the student loan contract. This will enable it to better manage cases of serious non-compliance.

The application of the change to enable the Commissioner to recall the loan will be 30 August 2011, being the day after the date of Royal assent.

Write-off of consolidated loan balance

From 1 April 2012, a borrower's consolidated loan balance must be written off (reduced to zero) if:

- the borrower dies; or
- the Commissioner has reasonable grounds for considering that the borrower has died; or
- the borrower's consolidated loan balance is less than $20 at the end of the year.

When a borrower dies or the Commissioner considers the borrower has died, the write-off has effect from the date the borrower dies or is suspected to have died.

When the borrower's consolidated loan balance is less than $20 at the end of the year, the write-off occurs at that date.

Changes from 1 April 2013

From 1 April 2013, when a borrower's loan balance is less than $20 at any time during the year, the Commissioner may write-off the consolidated loan balance with effect from that date. This change will result in loans of less than $20 being closed off sooner, thereby reducing both compliance and administration costs.

Other changes

A number of consequential amendments have been made. These:

- provide the ability to make regulations, which applies from 30 August 2011;
- prescribe the way a borrower and the Commissioner may provide information to each other, which comes into force on 1 January 2012; and
- include specific provisions to ensure a smooth transition between the Student Loan Scheme Act 1992 and the commencement of the new Act which apply from 1 January 2012.

Also, an amendment has made to ensure borrowers cannot gain an unintended advantage from the interest-free policy. The change precludes borrowers from obtaining a refund of excess payments made in the 2004 and 2005 years. This amendment applies from 30 August 2011, being the day after the date of Royal assent.

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.

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.

TAXPAYER'S APPLICATION FOR LEAVE TO APPEAL TO THE SUPREME COURT DECLINED

Case	J G Russell v TRA & Commissioner of Inland Revenue
Decision date	26 August 2011
Act(s)	Supreme Court Act 2003
Keywords	Judicial bias

Summary

The taxpayer was declined leave to appeal to the Supreme Court as any potential bias had been cured—on these facts—by the taxpayer's exercise of appeal rights from the allegedly biased judicial officer at the Taxation Review Authority (TRA).

Impact of decision

The case at the Court of Appeal is a useful guide to both the tests for bias and the circumstances in which exercise of appeal rights will cure any apparent bias in a lower Court. The Supreme Court decision confirms the correctness of the Court of Appeal's approach.

Facts

Mr Russell is the architect of the "Russell template", an avoidance arrangement marketed to his clients. This case is about his personal tax affairs which have been reassessed on the basis that Mr Russell was personally involved in a separate tax avoidance arrangement (differing from, but similar to, the Russell template).

Mr Russell challenged his tax assessments in the TRA. However, before the tax case commenced, he sought that Judge Barber disqualify himself from hearing Mr Russell's personal tax case on the basis that the Judge could be perceived as being biased against Mr Russell (as a result of the Judge consistently finding against Mr Russell in the template cases).

The Judge declined to do this (reported as *Case Z3* (2009) 24 NZTC 14,027). Mr Russell sought to judicially review the TRA's decision. The High Court considered there was no risk that the judge was either actually biased or that a layperson familiar with the case and the role of a judge would see a risk of bias (reported at (2009) 24 NZTC 23,284). Mr Russell appealed to the Court of Appeal.

While this was occurring, the tax case proceeded. The TRA upheld the Commissioner's assessments (reported as *Case Z19* (2009) 24 NZTC 14,217) and the matter went on appeal to the High Court on the basis that the facts were agreed between the parties. The High Court dismissed the taxpayer's appeal (*Russell v Commissioner of Inland Revenue (No 2)* (2010) 24 NZTC 24,463).

With regard to the Judicial Review appeal, the Court of Appeal dismissed the appeal by Mr Russell. It accepted there was a potential risk that apparent (but not actual) bias may be present but the Court of Appeal concluded it did not need to decide this as the TRA decision had been appealed to the High Court and there was no risk of bias by the High Court judge (reported as *Russell v Taxation Review Authority & Anor* (2011) 25 NZTC 20-044).

Mr Russell sought leave to appeal to the Supreme Court.

Decision

The Supreme Court declined to grant leave for Mr Russell to appeal further.

It considered that the Court of Appeal was correct to regard any taint of bias at the TRA "as having been overtaken by the substantive appeal". Decisive was the fact that the appeal of the tax case was on agreed facts.

The Supreme Court considered that the Court of Appeal had correctly applied the principles governing bias as set out in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35.

TAXPAYER'S ATTEMPT TO CONSOLIDATE TWO SEPARATE PROCEEDINGS FAILS

Case	Yandina Investments Limited v Commissioner of Inland Revenue
Decision date	16 September 2011
Act(s)	High Court Rules
Keywords	Consolidation of proceedings

Summary

The taxpayer sought to consolidate (into a single hearing) two separate matters, a tax matter and the taxpayer's attempt to recover funds from a third party. The High Court declined to order the consolidation.

Impact of decision

Both the earlier joinder application and this consolidation application could have made tax litigation more difficult as, if successful, taxpayers could delay tax cases by adding other parties to the case (or by consolidating separate cases). This result avoids this risk of delay.

Facts

This was an application by the taxpayer to consolidate two separate trials into a single hearing under High Court Rule 10.12, these being a:

1. challenge to the tax assessment for the 1997–1998 tax years. The assessments removed deductions and losses attributed to an alleged tax avoidance arrangement entered into by the taxpayers;
2. claim in equity ("the equity case") against ANZ, Westpac and BNZ ("the Banks"). The case related to an assignment of a right to income by a partnership of the Banks to Yandina (itself in partnership with another entity). Yandina alleged that the Banks had failed to pay it the full amount of income arising under the assignment of the right to income.

For the 1996, 1997 and 1998 tax years the Banks advised Yandina partnership that the total income was $83 million, being the combination of cash and non-cash income. Yandina partnership filed tax returns stating the $83 million as income. The returns included tax losses and deductions, and had the effect of no tax payable.

In 2002, the Commissioner issued a Notice of Proposed Adjustment to the Yandina partnership for the 1996 and 1997 tax years. This led to three decisions by the Commissioner on 26 September 2003 for the 1996, 1997 and 1998 tax years. These decisions disallowed the losses and deductions claimed on the basis of a tax avoidance arrangement.

On 23 December 2010, the taxpayer commenced the equity case against the Banks. The taxpayer alleged that the failure of the Banks to pay $72 million of income meant that the taxpayer could not pay its tax liabilities.

The taxpayer alleges that both proceedings (the tax case and the equity case) spring from the same facts and that the same issues arise in both cases. Consequently he claimed that both cases should be heard together. The taxpayer had previously sought to add the Banks to the tax case (called a joinder). However, the attempt to join was rejected by the High Court (CIV 2006-485-1228 HC Wellington, 20 December 2010, McKenzie J).

Decision

Justice Mallon declined to exercise the discretion at HCR 10.12 to consolidate the two cases.

The Judge identified two principal grounds that the taxpayer had relied upon in its application.

The Banks were potentially affected by the tax case

1. The taxpayer argued that the income was assessable to the Banks (who were part of a wider tax avoidance arrangement) and not the taxpayer so the Banks should be heard in the tax case.
2. The Judge rejected this saying that "it is difficult to see that Yandina could be prevented from raising whatever arguments it seeks to make in respect of the Commissioner's assessments of it, even if they involve the Banks who are not represented at the [tax] hearing".
3. The Judge recognised this as an attempt to achieve the joinder as previously rejected.

The equity case was relevant to the tax case

1. The taxpayer argued that success in the equity case meant it could no longer oppose the tax case as it would be entitled to the income assessed to it and should pay the tax.
2. Again the Judge recognised this had been raised and rejected the joinder application.
3. The Judge said that "the assessment of tax and recovery of a debt by the taxpayer as against a third party are separate matters. As the Commissioner submits, to allow the two separate matters to be joined in this case has potential ramifications in other cases. Tax assessments in other cases could be challenged and then delayed by the taxpayer's pursuit of another claim."

In addition the Judge considered the possibility of different decisions on common issues. His Honour held that ordering the proceedings to be heard at the same time will not alter the taxpayers' position. The consequence of the tax case for the Banks is irrelevant to the taxpayers' position in its equity claim.

JUDICIAL REVIEW APPLICATION DISMISSED

Case	Hanh Duc Nguyen v Commissioner of Inland Revenue
Decision date	29 September 2011
Act(s)	Judicature Amendment Act 1972
Keywords	Judicial review, income tax, GST, default assessments, provisional taxpayer, exercise of discretion, priority of applying funds

Summary

The High Court dismissed the taxpayer's judicial review proceedings as the taxpayer failed to show that when making the default assessments the Commissioner could not have exercised a genuine and honest judgment, and that the Commissioner erred in considering the exercise of his discretionary powers to amend the assessments under section 113 of the Tax Administration Act 1994 ("TAA").

Impact of decision

No implications arise from this decision.

Facts

The taxpayer in this proceeding ("the taxpayer") and associates came to the attention of Inland Revenue following a police raid at an Auckland hotel in October 2005, in which a large sum of cash ($137,980), money bags, four Lexus vehicles, methamphetamine and drug paraphernalia were found.

The taxpayer claimed ownership of the money. However, he gave multiple explanations of how he obtained it, including from a money-lending business, buying and selling scrap metal and from the sale of his grandmother's property in Vietnam.

On 16 December 2005, default assessments for income tax and goods and services tax (GST) were issued to the taxpayer, for the periods 1 April 2004 to 31 March 2005. He was advised that a total sum of $153,518.57 was owed to Inland Revenue, and that this amount would be deducted from the money held by the police.

The taxpayer failed to issue a Notice of Proposed Adjustment and challenge the assessments pursuant to the applicable statutory procedures in the TAA.

Subsequently, bankruptcy proceedings were commenced in March 2010 on the basis of a default judgment in the District Court. The taxpayer sought to oppose the bankruptcy proceedings and requested the Commissioner correct the assessments under section 113 of the TAA.

Further information provided by the taxpayer to Inland Revenue was considered. However, it did not adequately show a clear and unambiguous error had been made in making the default assessments.

Decision

Mallon J dismissed the taxpayer's judicial review proceeding.

Issue 1: Whether errors in the default assessments are such that the Commissioner cannot have exercised a genuine and honest judgment when making those assessments

The Court stated that in order to challenge a default assessment the taxpayer is required to follow the statutory procedures, and the scope for judicial review is limited. A purported assessment may be challenged in judicial review proceedings if it "is not an assessment at all" or if exceptional circumstances exist bringing it outside sections 109 and 114 of the TAA (*Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] NZLR 99).

Also, an assessment is not an assessment at all if the assessment was "no more than an arbitrary conjecture or was demonstrably unfair". The Commissioner is required to "exercise judgment" and make the assessment "on an intelligible basis" and not act "arbitrarily in disregard of the law or facts as known to him" (*Lowe v Commissioner of Inland Revenue* [1981] 1 NZLR 326). However, there is not a "high threshold as to the material on which that judgment is based" (*Commissioner of Inland Revenue v New Zealand Wool Board* (1999) 119 NZTC 15,476). But there must be a genuine attempt to ascertain the income "even if carried out cursorily or perfunctorily".

The Court found that the taxpayer failed to show that in making the default assessments, the Commissioner could not have exercised a genuine and honest judgement or that any exceptional circumstances existed.

Mallon J also commented on several occasions that the taxpayer had the opportunity to dispute the default assessments under the statutory procedures but failed to do so.

Issue 2: Whether the Commissioner erred in considering the exercise of the discretionary power to amend the assessments under section 113 of the TAA

The Court stated that a decision not to amend an assessment under section 113(1) of the TAA is not a disputable decision for which there is a right to invoke the statutory dispute and challenge proceedings [section 138E(1)(e)(iv) and 138E(2) of the TAA]. Nor does section 113 confer a reviewable statutory duty or obligation to reassess on request by the taxpayer (*Lawton v Commissioner of Inland Revenue* (2003) 21 NZTC 18,042). However, section 113 does confer a discretionary statutory power which can be exercised on the Commissioner's own motion or on request, in accordance with statutory criteria and the purpose of the legislation (*Commissioner of Inland Revenue v Wilson* (1996) 1 NZTC 12,512). The Commissioner is not obliged to reinvestigate the taxpayer's liability where the taxpayer provides information and/or seeks to have the Commissioner exercise the power under section 113.

In this case, the Court identified two points that warranted possible further consideration. However, the Court was not prepared to direct the Commissioner to reconsider the default assessments on those two points, as the two requests by the taxpayer were non-specific and incomplete. Further, the Commissioner had shown a preparedness to reconsider matters and use section 113 of the TAA to amend assessments where genuine errors were made.

Issue 3: Whether the taxpayer was liable to pay interest in the income year ending 2005 for unpaid provisional tax

The Court found that the taxpayer fell within the definition of provisional taxpayer in section OB 1 of the Income Tax Act 1994, and was therefore, correctly charged interest.

Issue 4: Whether the Commissioner was correct to apply the taxpayer's money to his GST liability ahead of his income tax liability

The Court accepted the Commissioner's explanation that the application of funds is applied according to the priority protocol, which lists GST above income or provisional tax.

COMMISSIONER UNSUCCESSFUL AGAINST APPEAL OF HIS STRIKE-OUT APPLICATION

Case	John David Hardie v Commissioner of Inland Revenue
Decision date	28 September 2011
Act(s)	Tax Administration Act 1994, Income Tax Act 1994, Goods and Services Tax Act 1985
Keywords	Appeal against strike-out, genuine assessments of the Commissioner, judicial review

Summary

The Court of Appeal allowed the appeal by Mr Hardie and the order striking out the application for judicial review by the High Court was set aside.

Impact of decision

The Court confirmed that a default assessment must not be arbitrary, disregard the law or known facts and must be a genuine attempt to ascertain the taxable income. The implications of the judgment to the Commissioner's guidelines for making default assessments are being considered.

Facts

Mr Hardie failed to file his income tax returns for the years ended 31 March 1999 to 2005 and goods and services tax (GST) returns for the monthly periods ended 31 March 2003 to 30 April 2006. The Commissioner made default assessments. Mr Hardie did not, and had not, filed returns or issued Notices of Proposed Adjustments. The Commissioner obtained a judgment by default in the District Court in respect of Mr Hardie's tax liability. Mr Hardie was not successful in his appeals of this judgment.

Mr Hardie filed a judicial review application claiming that the default assessments were grossly excessive. He asserted that his failure to file returns is excusable because until recently he did not know on what basis the assessments had been made.

The Commissioner was successful in having Mr Hardie's judicial review application struck out. Mr Hardie appealed against that decision.

Decision

GST default assessments

For the GST default assessments, the first default assessment was likely to have been based on Mr Hardie's last filed GST return. The previous returns filed by Mr Hardie showed that there were input credits and zero-rated supplies that resulted in him receiving GST refunds. The Court observed that the Commissioner appeared to have ignored those refunds when issuing the default assessments, all of which resulted in GST being payable.

With regard to the subsequent GST default assessments, 10% was added. There was no evidence in the strike-out application but it was pleaded by Mr Hardie that the evidence in the District Court was that 10% was added to each monthly default assessment to encourage taxpayers to file their returns.

Income tax default assessments

The evidence was that the income tax assessments were based on details taken from GST returns filed by Mr Hardie, with an allowance of 20% for any expenses. The resulting net income had a tax rate of 33% applied to it.

Mr Hardie sought to persuade the Court by reference to the GST returns he did file and his PAYE records that 20% was not a reasonable estimate. The Court found that "All that can properly be said is that there is no evidence that the Commissioner considered Mr Hardie's actual deductible expenses …".

Judicial review of tax assessments

The Court confirmed that "an assessment may be set aside in judicial review notwithstanding that it might have been challenged under the Tax Administration Act, where it is not an assessment of the sort the legislature had in mind". When the Commissioner exercises his judgment in making an assessment he is not entitled to act arbitrarily or in disregard of the law or facts known to the Commissioner. There must be a genuine attempt to ascertain the taxable income of a taxpayer.

The Court noted it had confirmed in *Westpac v CIR* [2009] NZCA 24 that judicial review is available, exceptionally, when there has been no genuine assessment.

Were the default assessments genuine exercises of judgment?

Turning to the facts of this case, the Court said it is clearly arguable that these assessments were not genuine exercises of judgment of the Commissioner for four reasons:

1. It is likely that the Commissioner did not credit Mr Hardie with input credits or zero-rated transactions when making the first assessments. The Commissioner put to the Court that it would be an unreasonable result if Mr Hardie received an overall GST refund in a default assessment. However, the Court said it saw no reason why in those circumstances the Commissioner must issue a default assessment at all.
2. It appeared that the Commissioner added 10% to each succeeding monthly default assessment, not as a genuine estimate of Mr Hardie's liability but to encourage him to file his returns.
3. It was arguable that relying on monthly compounding increases in the GST assessments was not the Commissioner's genuine judgement as to Mr Hardie's actual income tax liability.
4. It was also arguable that the allowance of 20% for expenses did not take into account the evidence, albeit limited, that the Commissioner had about Mr Hardie's expenses.

Mr Hardie sought to excuse his "longstanding and serial defaults" by asserting that he could not issue a Notice of Proposed Adjustment because he did not know on what basis the default assessments had been issued. The Court responded that there was no authority that the Commissioner must deliver reasons for an assessment, nor are reasons a prerequisite to use of the statutory dispute process. It is axiomatic that Mr Hardie "cannot excuse his non-compliance by pointing to his own failings, still less found an application for judicial review upon them".

Finally, the Court observed that it is not to be taken as having precluded a finding that the Mr Hardie's application for judicial review is an abuse of process, should the Commissioner elect to pursue that allegation.

Result

The appeal was allowed. The order striking out the application for judicial review was set aside.

As this was an appeal by Mr Hardie against the High Court striking out Mr Hardie's judicial review application, the Court did not express a view on whether relief would be granted. The Court of Appeal said it will be for the High Court to decide whether the assessments are indeed susceptible to being set aside, and if so whether relief should be granted or denied to Mr Hardie in the exercise of the Court's remedial discretion.

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