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TAX INFORMATION Bulletin

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Inland Revenue
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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.

You can find a list of the items we are currently inviting submissions on as well as a list of expired items at **taxtechnical.ird.govt.nz** (search keywords: public consultation).

Email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

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

You can also subscribe at **ird.govt.nz/subscription-service/subscription-form** to receive regular email updates when we publish new draft items for comment.

Your opportunity to comment

Ref	Draft type	Title	Comment deadline
PUB00356	Question we've been asked	GST – Registered members of unregistered unincorporated bodies	18 April 2023
PUB00447	Rulings	Income tax - Cryptoassets and employees	20 April 2023
PUB00445	Rulings	Investing into a US limited liability company – New Zealand tax consequences	26 April 2023

IN SUMMARY

New legislation

Rulings

Determinations

NEW LEGISLATION

This section of the *TIB* covers new legislation, changes to legislation including general and remedial amendments, and Orders in Council.

Order in Council – Tax Administration (Research and Development Tax Credit Deadlines for Taxpayers Affected by Weather Events) Order 2023

Sections 33E, 68CB, and 68CC of the Tax Administration Act 1994

Order

The Tax Administration (Research and Development Tax Credit Deadlines for Taxpayers Affected by Weather Events) Order 2023 was made on 20 February 2023 and came into force on that day. The Order extended the deadline for filing an approval application or supplementary return required under sections 33E, 68CB, and 68CC of the Tax Administration Act 1994 until 31 March 2023 for taxpayers with a relevant deadline falling between 26 January 2023 and 7 March 2023, if they were significantly adversely affected by the weather events in their ability to meet the filing deadline.

Background

Between 26 January 2023 and 3 February 2023, a series of fronts crossed the upper North Island delivering extremely heavy rain, high winds, and widespread flooding. Then, from 12 February 2023 to 16 February 2023, Cyclone Gabrielle moved across the North Island, also resulting in heavy rain, high winds, and flooding.

These weather events impacted the ability of some businesses enrolled in the Research and Development Tax Incentive (RDTI) to be able to file on time. Filing may be for either an approval (a general approval, a criteria and methodologies approval, or a variation of those approvals) or for a supplementary return. Both an approval application and a supplementary return must be filed in time to claim R&D tax credits for the year. The due dates for these filings vary depending on factors like the taxpayer's balance date and whether they have an extension of time for filing their income tax return. Inland Revenue has no operational discretion it can apply in response to the weather events to accept late RDTI filings.

Key features

The Tax Administration (Research and Development Tax Credit Deadlines for Taxpayers Affected by Weather Events) Order 2023 provided relief from the weather events by allowing taxpayers more time to make an RDTI filing. Specifically, taxpayers with an RDTI filing deadline that fell between 26 January 2023 and 7 March 2023, and is required under sections 33E, 68CB, and 68CC of the Tax Administration Act 1994, were allowed an extension of that deadline until 31 March 2023.

The extension applied to taxpayers whose ability to meet the filing deadline was significantly adversely affected by the weather events. Due dates that may potentially have been affected include:

- 31 January 2023, for criteria and methodologies approval applications for July 2023 balance dates;
- 7 February 2023, for:
  - general approval variation requests for 2023 supporting activities for December 2021 balance dates;
  - general approval applications for September 2022 balance dates;
  - general approval applications and variation requests for December 2022 balance dates;
  - criteria and methodologies approval variation requests for December 2022 balance dates;
- 14 February 2023, for supplementary returns for September 2022 balance dates for taxpayers with no extension of time for their income tax return;
- 28 February 2023, for criterial and methodologies approval applications for August 2023 balance dates;

- 7 March 2023, for:
  - general approval variation requests for 2023 supporting activities for January 2022 balance dates;
  - general approval applications and variation requests for January 2023 balance dates;
  - criteria and methodologies approval variation requests for January 2023 balance dates.

The Order is made under section 226 of the Tax Administration Act 1994. That section allows for extensions of time to be granted by Order in Council to meet requirements under some of the Inland Revenue Acts, even if the deadline has already expired.

Effective date

The Order came into force on 20 February 2023.

Further information

The new regulations can be found at:
https://www.legislation.govt.nz/regulation/public/2023/0011/latest/whole.html#LMS817315

Order in Council – Tax Administration (Reportable Jurisdictions for the Application of CRS Standard) Amendment Regulations 2023

Section 226D of the Tax Administration Act 1994

Order

The Tax Administration (Reportable Jurisdictions for the Application of CRS Standard) Amendment Regulations 2023 was made on 27 February 2023 and comes into force 31 March 2023. It updates New Zealand's existing list of 97 reportable jurisdictions by adding Jamaica.

Background

Reportable jurisdictions are relevant to the Common Reporting Standard which was enacted in New Zealand in 2017 as part of New Zealand's implementation of the G20/OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters, or AEOI. Reportable jurisdictions are territories to which Inland Revenue (IRD) will provide certain information on their residents that is reported to IRD by financial institutions, in accordance with the CRS rules.

Pursuant to section 226D of the Tax Administration Act 1994 (the Act), additions and deletions to the list of reportable jurisdictions must be made by Order in Council.

Effective date

Jamaica will be a reportable jurisdiction for reporting periods beginning on or after 1 April 2023.

Further information

A full listing of reportable jurisdictions can be found on the IRD website and the Order in Council can be found at:
https://legislation.govt.nz/regulation/public/2023/0021/latest/LMS816524.html

Order in Council – Income Tax (Fringe Benefit Tax, Interest on Loans) Amendment Regulations 2023

Sections RA 21(3) and (4) of the Income Tax Act 2007

Order

The fringe benefit tax (FBT) prescribed rate of interest for low-interest employment-related loans will increase from 6.71% to 7.89%.

Background

The FBT rules tax non-cash benefits provided to employees. Included in the definition of 'fringe benefit' is any employment-related loan on which the employer is charging a rate of interest that is below the market rate. The interest differential is taxable.

A prescribed rate set by regulations is used as a proxy for the market rate of interest to save employers the compliance costs associated with determining the market rate relevant to loans they have provided to their employees.

Section RA 21(3) of the Income Tax Act 2007 permits the making of regulations by Order in Council to set a prescribed rate of interest for calculating FBT on low-interest loans. Once a rate is set, it remains the prescribed rate until changed by a subsequent Order in Council.

By administrative convention, the FBT prescribed rate of interest is based on the 'floating first mortgage new customer housing rate' series published by the Reserve Bank (RBNZ) each month. It is updated when there has been an increase or decrease in the RBNZ rate of 20 or more basis points since the FBT rate was last set. The RBNZ rate for December 2022 was 7.89%. This is up from 6.71%, the rate for August 2022, when the FBT prescribed rate of interest was last set. The FBT prescribed rate of interest is being lifted accordingly.

Effective date

The new prescribed rate of 7.89% applies for the quarter beginning 1 April 2023 and subsequent quarters.

Further information

The new regulations can be found at:
https://www.legislation.govt.nz/regulation/public/2023/0022/7.0/whole.html#LMS817024

Order in Council – Taxation (Use of Money Interest Rates) Amendment Regulations 2023

Sections 120E(1), 120E(2) and 120H of the Tax Administration Act 1994

Order

The Taxation (Use of Money Interest Rates) Amendment Regulations 2023 was made on 13 March 2023.

It changes the use of money interest (UOMI) rate on underpayments and overpayments of taxes and duties in line with market interest rates.

The new underpayment rate is 10.39% (previously 9.21%). The new overpayment rate is 3.53% (previously 2.31%).

Background

The UOMI underpayment rate is charged to taxpayers on underpayments of tax to Inland Revenue, while the UOMI overpayment rate is paid to taxpayers on money paid to Inland Revenue exceeding their tax liability.

Section 120H(1)(b) of the Tax Administration Act 1994 permits the making of regulations by Order in Council to set the UOMI underpayment and overpayment rates. Once a rate is set, it remains at that rate until changed by a subsequent Order in Council.

The UOMI underpayment rate is based on the 'floating first mortgage new customer housing rate' series published by the Reserve Bank (RBNZ) each month, while the UOMI overpayment rate is based on RBNZ's '90-day bank bill rate' series each month. The UOMI rates are both adjusted if either the RBNZ 90-day bank bill rate or the floating first mortgage new customer housing rate moves by 1% or more, or if one of these indexes moves by 0.2% or more and the UOMI rates have not been adjusted in the last 12 months.

The UOMI rates are reviewed regularly to ensure they are in line with market interest rates. The new UOMI underpayment and overpayment rates are consistent with the floating first mortgage new customer housing rate and the 90-day bank bill rate.

Effective date

The new UOMI underpayment and overpayment rates apply on and after 9 May 2023.

Further information

The new regulations can be found at:
https://www.legislation.govt.nz/regulation/public/2023/0028/5.0/whole.html#LMS820068

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 *Binding rulings: How to get certainty on the tax position of your transaction (IR715)*. You can download this publication free from our website at **www.ird.govt.nz**

BR Prd 22/15

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

Name of person who applied for the Ruling

This Ruling has been applied for by TSP Finance Limited Partnership.

Taxation Laws

This Ruling applies in respect of:

- the definition of "interest" in s YA 1 of the Income Tax Act 2007; and
- ss 5(7F), 9 and 60(1B) of the Goods and Services Tax Act 1985.

The Arrangement to which this Ruling applies

The Arrangement is the IFF Funding and Administration Agreement (the Agreement) entered into by the Tauranga City Council (the Council) and TSP Finance Limited Partnership (FSPV) on 30 November 2022. The Agreement provides for two matters:

- FSPV providing grant funding to the Council for transport system projects located in Tauranga (the Projects); and
- the Council agreeing to collect a levy from local ratepayers for FSPV to use to service the senior debt finance it raised for the purposes of the Projects.

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

Background

1. The Western Bay of Plenty Transport System Plan (the System Plan) comprises a series of 72 individual transport projects. Together, those projects are designed to better connect the Western Bay of Plenty region and enable Tauranga City to become a more liveable and carbonefficient city.
2. The Projects comprise 13 specific transport system projects located in Tauranga, each of which forms part of the broader System Plan. Each of the Projects may be partially funded and financed under the Infrastructure Funding and Financing Act 2020 (the IFFA).
3. The Council issued a levy proposal under the IFFA in respect of the Projects. The Ministry of Housing and Urban Development, as recommender under the IFFA, reviewed the levy proposal and provided a recommendation report to the responsible Minister. The responsible Minister recommended authorising a levy order in respect of the Projects.
4. On 28 November 2022 the Infrastructure Funding and Financing (Western Bay of Plenty Transport System Plan Levy) Order (the Levy Order) was made by Order in Council. Under the Levy Order FSPV is the "responsible SPV" referred to in the IFFA for the purposes of the Levy.
5. FSPV is a limited partnership under the Limited Partnerships Act 2008. The sole limited partner of FSPV is CIP (IFF Holdings) Limited (the Limited Partner). The general partner is TSP Finance GP Limited, a wholly owned subsidiary of CIP. CIP and its wholly owned subsidiaries are "public purpose Crown-controlled companies" (as defined in s YA 1 of the Income Tax Act 2007). FSPV and the Limited Partner use IFRS (as defined in s YA 1) to prepare financial statements and to report for financial arrangements.

6. FSPV was incorporated to structure, procure and draw down debt and equity finance for the Projects. FSPV will service the senior debt finance it raised for the purposes of the Projects through a levy the Council collects on FSPV's behalf.

IFF Funding and Administration Agreement

7. The two main purposes of the Agreement are to:
   - set out the process under which FSPV will provide funding to the Council to finance the Council's construction of the Projects; and
   - operate as the "levy administration agreement" contemplated by s 55 of the IFFA, describing how the Levy will be collected.

Funding Agreement

8. FSPV will disburse funding for the Projects to the Council by making Drawdowns on each Quarter Date, capped in total at the Maximum Funding Amount (cl 5.1 of the Agreement). The Maximum Funding Amount is defined in cl 1.1 as the lesser of $200,000,000 and the amount set out in a specific cell of the Financial Model as at Financial Close (in each case, excluding GST).
9. Other than in relation to the first Drawdown, the Council must provide a Drawdown Request at least 10 business days prior to each Quarter Date on which it wishes to receive a Drawdown. The Drawdown Request must specify the amount of the Drawdown requested and certify (cl 5.2 of the Agreement):
   (a) the Drawdown (when aggregated with all previous Drawdowns) does not exceed the cumulative amount specified for the First Drawdown Date or the relevant Quarter Date in Schedule 3 (Drawdown Profile) (disregarding for the purpose of clause 6.1(c) any amounts previously drawn down but repaid by Council under clause 6.1(b));
   (b) the Drawdown will be applied to reimburse expenditure on Eligible Costs in respect of some or all of the Projects (including reasonable particulars of these costs and their split across Projects) where Council has not sourced and does not intend to source funding from any third party to meet such Eligible Costs;
   (c) where any part of the Drawdown will be applied towards Eligible Costs in relation to a Capped Funding Project, the cap on Eligible Costs for that Project, as set out in Schedule 1, has not been exceeded and will not be exceeded from the proceeds of the Drawdown; and
   (d) the application of the Drawdown towards the Eligible Costs for any Project will not breach the requirements of clause 5.5.
10. The Council will be solely responsible for meeting the funding required for any Project, without recourse to FSPV, to the extent that (cl 5.4(a) of the Agreement):
    - the relevant project is not fully funded after the Maximum Funding Amount is drawn down under the Agreement; and/or
    - in the case of a Capped Funding Project, Drawdowns applied towards the Eligible Costs of that Project have reached the cap specified.
11. The parties also acknowledge (cl 5.4(b) of the Agreement) that it is the Council's decision as to which of the projects a Drawdown will fund, and that the Council is able to apply for additional sources of funding for the Projects. At least ten percent of the estimated total cost of each Project must come from external sources (cl 5.5), other than in situations where the Council has:
    - included the Project in its then applicable long term plan; or
    - passed a resolution noting the Project is in the best interests of ratepayers.
12. The Drawdowns the FSPV provides to the Council will comprise grant funding and are not repayable by the Council in any circumstances (cl 6.1(a) of the Agreement). However, the Council must apply Drawdowns solely to the Eligible Costs of the Projects (subject to any relevant caps for Capped Cost Projects). If the Council applies the Drawdowns for any other purpose they will be repayable by the Council to FSPV on demand with interest (cl 6.1(b) of the Agreement). The Council and FSPV agree that a Drawdown Request issued by Council will constitute a tax invoice, or taxable supply information, as applicable, at such time that FSPV accepts the Drawdown Request in full (cl 6.2(b) of the Agreement).

Levy administration and collection

13. FSPV appoints the Council as the exclusive agent of FSPV for the purpose of carrying out or undertaking the levy collection and enforcement services (cl 7.1 of the Agreement). The Council accepts that appointment and agrees that it must perform those services until the appointment expires or is terminated (cl 7.2 of the Agreement). No fee is payable by FSPV to the Council for undertaking these services (cl 7.4 of the Agreement).
14. The Levy Payments are set in accordance with the Levy Order and are based on a resolution by FSPV that sets an Annual Levy under s 45 or 50 of the IFFA. In order to assess the Levy Payments that each Levypayer will pay in each year, the Council will provide FSPV with all ratings information from its Ratings Information Database that FSPV requests (cl 8.1 of the Agreement).
15. The Council must notify the Levypayers of the assessment made either as part of the general rates assessment or, if agreed with FSPV in writing, as a separate notice of assessment. The Council must collect the Levy Payments and deposit all Levy Revenue it receives from Levypayers into the Levy Account by the required dates (cls 8.1 and 8.2 of the Agreement).
16. Clause 8.3 of the Agreement relates to GST on the Levy and states:
    (a) For the avoidance of doubt, Council and FSPV acknowledge that the underlying supply of the Levy to the Levypayers is a taxable supply subject to GST at the prevailing rate in accordance with section 5(7F) of the GST Act.
    (b) For GST purposes only, in accordance with section 60(1B) of the GST Act, Council and FSPV agree to opt out of the default GST agency rules in section 60 of the GST Act in respect of the Levy amounts that are collected by the Services:
        (i) FSPV agrees that it will treat the deemed supply under section 60(1B) of the GST Act from itself to Council as a taxable supply for GST purposes; and
        (ii) Council agrees that it will treat the deemed supply under section 60(1B) of the GST Act between itself and the Levypayers as a taxable supply for GST purposes and will invoice Levy amounts to the Levypayer on this basis.
        (c) FSPV agrees to issue a tax invoice, or taxable supply information, as applicable, to Council (or Council agrees to generate a buyer created tax invoice/buyer created taxable supply information) in respect of the taxable supply portion of the Levy Revenue.
        (d) To the extent that supply correction information (GST credit notes or debit notes) is required to be issued under the GST Act in respect of a supply in this Agreement, Council or FSPV as applicable agrees to do so.
        (e) In the event that the standard rate of tax applied to taxable supplies pursuant to section 8(1) of the GST Act is changed to a rate other than 15%, Council and FSPV agree to take action to endeavour to mitigate any positive or negative effect arising as a result of that tax rate change.
        (f) In addition to clause 9.2. below, FSPV and Council agree to take all reasonable steps to manage, in a mutually beneficial manner, any GST operational complexities that arise as a result of either FSPV or Council complying with their respective obligations under the GST Act. Such reasonable steps will be agreed between FSPV and Council and recorded in a separate document.
        (g) All words and phrases in this clause 8.3 have the same meaning as given in the GST Act unless otherwise defined in this Agreement.
17. Where a Ratepayer pays some, but not all, of an invoice for its combined Rates and Levy liability, the Council will first apply the amounts received toward the payment of Rates (cl 8.4 of the Agreement). The Council will impose penalties in addition to any Levy amount that a Levypayer has not been paid, at the same rate as penalties authorised by the Council in relation to unpaid Rates (cl 8.5 of the Agreement). The Council will take action to recover any Levy amounts that have not been paid in a manner consistent with its procedures for collecting unpaid Rates (cl 8.6 of the Agreement). In addition, FSPV may start legal proceedings against a Levypayer to recover as a debt due any Levy amount that remains unpaid for four months after the due date for payment (cl 11(a) of the Agreement). In certain situations, FSPV can write off a Levy Amount under s 79A of the IFFA, which will involve the debt being written off as bad in FSPV's accounts.
18. The Council has no liability to FSPV to pay any Levy Amount to FSPV except to the extent the Council has received that Levy Amount from a Levypayer (cl 8.9 of the Agreement).

Crown Support Deed

19. FSPV sought credit support from the Crown in order to provide comfort to lenders that any relevant legal or regulatory change that has the effect of reducing the Levy revenue would not impact on FSPV's ability to collect revenue to repay the bank loans.

20. The Crown agreed to provide FSPV with credit support on the terms set out in the Crown Support Deed. FSPV and The Sovereign in right of New Zealand, acting by and through the Minister of Finance entered into the Crown Support Deed on 1 December 2022. The Crown Support Deed provides FSPV with a Crown guarantee in three situations:
    - a "Crown Support Event", where a law change (including a judicial review of the Order in Council) has the effect of reducing the total Levy that FSPV would otherwise be legally entitled to impose in any Levy Year (i.e. the relevant rating period) (cl 2.1 of the Crown Support Deed);
    - a "Terminal Event", where, following a Crown Support Event, the Crown fails to pay any amount under the Crown Support Deed by no later than ten business days after the last day for payment, or if the Crown elects to treat a Crown Support Event as a Terminal Event (cl 2.2 of the Crown Support Deed); and
    - where an "Indemnified PML Rebate Amount" arises, being an amount in respect of a refund of Levy by the Council in respect of protected Māori land (as defined in the IFFA), where relevant conditions are satisfied such that it is subject to indemnification by the Crown (cl 2.7 of the Crown Support Deed).

21. When one of these events occurs, and provided that the applicable demand procedures in cl 5 of the Crown Support Deed are followed, the Crown will be required to pay to FSPV the "Indemnified Amount". The definition of "Indemnified Amount" in cl 1.1 of the Crown Support Deed, provides that the amount the Crown pays will be:
    - for a Crown Support Event that is not treated as a Terminal Event, the amount of the reduction in Levy that triggered the Crown Support Event (a Shortfall Amount); or
    - for a Terminal Event, the outstanding balance of the bank funding, together with certain amounts associated with early repayment of the debt and equity; and
    - in either case, any further costs incurred as a result of the Crown Support Event.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

Income Tax Act 2007

(a) A payment of the Levy does not include an amount of "interest" (as defined in s YA 1) for the purpose of the RWT rules.

Goods and Services Tax Act 1985

(b) Under ss 5(7F) and 60(1B), the Levy Payments will be treated as being consideration for the following supplies:
    (i) a supply of goods and services from FSPV to the Council; and
    (ii) a supply of those goods and services from the Council to the Levypayers, treating the Council as if it was FSPV for the purposes of the supply.

(c) In respect of the Levy, the "time of supply" under s 9 for each of the deemed supplies of goods and services (from FSPV to the Council and from the Council to the Levypayers) arising under s 60(1B) will be the earlier of the time that each payment becomes due and the time that the payment is received (under s 9(3)(a)).

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 6 December 2022 and ending on 30 June 2055.

This Ruling is signed by me on the 21st day of December 2022.

Howard Davis
Group Leader, Tax Counsel Office

BR Prd 22/16: Vivid Living Limited

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

Name of person who applied for the Ruling

This Ruling has been applied for by Vivid Living Limited Vivid. – IRD number 134-025-146

Taxation Laws

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

This Ruling applies in respect of s BD 1(1) and Part C of the Act.

The Arrangement to which this Ruling applies

The Arrangement is the occupation right agreement (ORA) between Vivid and residents (Residents) of a Vivid retirement village (Village).

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

Documents

1. The following documents describe the Arrangement:
   a) the draft ORA provided to Inland Revenue on 22 November 2022; and
   b) the disclosure statement submitted to the Companies Office on 26 October 2022 (bar code 10066227710).
2. The final executed documentation will not be materially different from the draft documentation provided to Inland Revenue, as set out at para [1] above.

Vivid

3. Vivid carries on a business of operating retirement villages in New Zealand.
4. Vivid is a New Zealand tax resident that will enter into the ORA with Residents, granting them a personal contractual right to occupy a specified residential unit, chattels within the residential unit and a carpark (if applicable).
5. The Village in Red Beach is under construction and is expected to be complete in 2023. This Ruling will apply to the Red Beach Village Residents and Residents of other Villages where there is an ORA, with other terms and features, materially the same as those set out in this Arrangement description.

Terms of ORA

6. Under the ORA, the following terms apply:
   a) When Residents enter into the ORA, an amount based on the market value of their unit is payable to Vivid (Residence Advance) (cl 49). This amount is payable before the residency starts and Residents are not entitled to occupy their unit or enjoy other benefits under the ORA until the Residence Advance is paid in full.
   b) The Residence Advance is refundable when Residents vacate their unit and is offset against any applicable costs or charges specified (Repayment Sum) (cl 46).
   c) Residents pay a monthly fee for Village outgoings (Village Fee) (cl 50).
   d) Residents pay the deferred management fee (DMF) on termination of the ORA. No liability for the DMF arises on Residents before then and Vivid cannot claim or issue an invoice for the DMF before then (cl 55).
   e) The DMF is a payment made by Residents in exchange for the supply of accommodation over the entire period of the ORA (cl 3). The DMF has a maximum amount set at 15% of the Residence Advance (cl 3). If Residents vacate their unit before three years have expired, a reduced DMF is charged, based on a daily basis of 5% per annum (cl 56).

f) Residents are not liable for the DMF if:
   i) a destructive event occurs and Vivid decides not to repair or rebuild the unit (cl 40.1(e) and cl 45.1(d)); or
   ii) Residents cancel the ORA under s 28(1) of the Retirement Villages Act 2003, which allows Residents to give notice to cancel no later than 15 working days after signing the ORA (cl 8).

g) The ORA can be terminated (cls 39 and 40) by:
   i) Residents giving written notice to permanently leave;
   ii) a destructive event occurring;
   iii) death;
   iv) Vivid, if Residents:
      - materially breach the ORA;
      - abandon their unit;
      - health deteriorates; or
      - have caused or may cause serious damage to their unit or Village, or to another person in a Village.

h) On termination of the ORA, Vivid pays the Repayment Sum to Residents (cl 46), being:
   i) an amount equal to the Residence Advance; less
   ii) any agreed deductions (ie, the DMF); plus
   iii) the Capital Gain Share (see Part G of the ORA).

i) A portion of the Repayment Sum is paid within five working days following vacation and removal of all personal items from the unit (cl 45). The remainder of the Repayment Sum is payable at the earlier of:
   i) Vivid relicensing the unit (where a new Resident has signed the ORA and paid the Residence Advance); and
   ii) four months after termination of the ORA (except the Capital Gain Share – this is only payable after Vivid has relicensed the unit).

7. For financial reporting purposes, the industry standard revenue recognition approach will be adopted under which the DMF is recognised on a straight-line basis over the expected tenure of the residency. This period of spreading for accounting purposes is yet to be determined but is expected to be between 7- 10 years.
8. For accounting purposes, a Village will be revalued annually using external valuers.
9. Vivid will not spread the DMF income over six years under s EI 7.

Capital Gain Share

10. The ORA sets out the following terms for the Capital Gain Share:

a) The Capital Gain Share is payable if Residents (cl 46):
   i) die;
   ii) elect to permanently leave;
   iii) leave because of health conditions; or
   iv) receive notice to leave from Vivid, because they have materially breached the ORA or because they have caused or may cause serious damage to their unit or Village, or to another person in a Village

b) The Capital Gain Share is not payable if a destructive event occurs.

c) The Capital Gain Share is calculated under cl 46.2. Broadly, if the unit has been relicensed, the Capital Gain Share is calculated as 50% of the gain (being the Residence Advance from the incoming Resident less the Residence Advance of the outgoing Resident, refurbishment costs and a 2% sales and marketing fee). In detail, this calculation is:

$0.5 \times (a - (b + c))$

where:

a = the Residence Advance received by Vivid for the relicensing;

b = the Residence Advance paid by the Resident; and

c = the costs incurred by Vivid in relicensing the unit, which are:

- refurbishment costs under cl 47.1.2; and
- a sales and marketing fee of 2% (cl 3).

If (b + c) is greater than a, the Capital Gain Share payable to Residents is zero.

d) If Vivid elects not to relicense the unit under cl 44, the Capital Gain Share is instead calculated as:

$0.5 \times (a - (b + c))$

where:

a = the market value, as assessed by an independent valuer;

b = the Residence Advance paid by the Resident; and

c = refurbishment costs payable to Vivid under cl 35.1.

11. Page 23 of the disclosure statement provides example calculations of the Capital Gain Share:

2.0 example calculations of Repayment Sum and Capital Gain Share

Term	Residence Advance you paid	Deferred Management Fee (15%)	**Repayment Sum without Capital Gain Share**	Estimated Refurbish-ment Cost	Residence Advance received under Agreement for Resale	Sales and Marketing Fee (2% of resale Residence Advance)	Capital Gain Share	Total (Repayment Sum + Capital Gain Share)
2 Years	$850,000	$85,000	**$765,000**	$10,000	$900,000	$18,000	$11,000	$776,000
2 Years	$850,000	$85,000	**$765,000**	$10,000	$850,000	$17,000	0	$765,000
5 Years	$850,000	$127,500	**$722,500**	$20,000	$1,000,000	$20,000	$55,000	$777,500
10 years	$850,000	$127,500	**$722,500**	$38,500	$1,300,000	$26,000	$192,750	$9515,250

12. The Capital Gain Share is payable by Vivid under cl 46.2 of the ORA:

a) on the date the Repayment Sum is payable under cl 45, if the unit is relicensed within four months of the ORA ending;

b) five working days after the unit is relicensed, if the unit is not relicensed within four months of the ORA ending, but Vivid continues to market the occupation rights to the unit under cl 43.1; or

c) five days after Vivid has received an assessment of the market value for the unit, if Vivid elects not to relicense the occupation rights to the unit under cl 44.

Summary of ORA termination terms

Termination event	Termination date	Repayment Sum date	DMF payable	Capital Gain Share
Cancel within 15 days of signing ORA or within 60 days of moving in (cl 8)	Notice	Later of date vacated or five days after cancelling (cl 45.1(a))	No	No
By Residents giving two months written notice to permanently leave (cl 39.1(a))	Expiry of notice period	10% after leaving, and 90% at the earlier of resale and four months after notice expires (cl 45.1(b))	Yes	Yes
Destructive event occurs (cl 39.1(b))	Notice period expires or destructive event date	Receipt of insurance proceeds (cl 45.1(c) and (d))	Yes (unless Vivid elects not to rebuild unit)	No
Death (cl 39.1(c))	Date of death (unless joint Residents)	At the earlier of relicensing and four months after death (cl 45.1(e))	Yes	Yes
Health deteriorates – transfer to a third-party health care facility (cl 36)	Transfer date (unless joint Residents)	See next row	Yes	Yes
Residents materially breach the ORA, abandon their unit, cause serious damage to the unit or Village, or to another person in a Village (cl 40.1(a) – (d)) or their health deteriorates under cl 36	After final notice given	Five days after final notice given (cl 45.1(f))	Yes	Yes

Notes for above table

13. Relicensing of the unit is defined as a new signed ORA and payment of the Residence Advance.
14. If Vivid does not elect to relicense the unit under cl 44, the Repayment Sum is payable five days after receipt of a market value assessment (cl 45.1(g)).
15. The Capital Gain Share is payable on the dates stated at para [12] above. This may occur after the Repayment Sum is payable if the unit is not sold within four months.

Residents

16. The Residents meet all of the following requirements:
    a) are not associated with Vivid under subpart YB;
    b) do not use their unit for commercial or business purposes;
    c) do not acquire their unit for the purpose of disposal;
    d) occupy their unit as a place to live and do not derive income from the unit; and
    e) are not engaged in a regular pattern of acquiring and disposing of their main home.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- The Capital Gain Share is not income of Residents under s BD 1(1) and Part C.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 23 December 2022 and ending on 31 March 2029.

This Ruling is signed by me on the 23rd day of December 2022.

Howard Davis
Group Leader, Tax Counsel Office

BR Pub 23/01: Goods and Services Tax – Directors' fees

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

Taxation laws

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

This Ruling applies in respect of sections 6(3)(b), 6(4), 6(5), 8, 20, and 57(2)(b).

The arrangement to which this Ruling applies

The arrangement is the engagement, occupation, or employment of a person as a director (the Director) of a company (the Company). The engagement may be by direct contract between the Director and the Company. Alternatively, the Director may be engaged as a director of the Company under an agreement between the Company and:

- a third party (the Third Party);
- the Director's employer (the Employer); or
- a partnership of which the Director is a partner (the Partnership).

How the taxation laws apply to the Arrangement

The Director contracts directly with the Company

If the Director has not accepted the office in carrying on the Director's taxable activity, then the:

- engagement is excluded from the term "taxable activity" under section 6(3)(b), and section 6(5) does not apply because the Director did not accept the office in carrying on the Director's taxable activity; and
- Company cannot claim an input tax deduction for any directors' fees paid to the Director because GST will not be charged on the supply of the Director's services to the Company.

If the Director has accepted the office in carrying on the Director's taxable activity, then the following is the case:

- The engagement is excluded from the term "taxable activity" under section 6(3)(b). However, section 6(5) will apply and the services will be deemed to be supplied in the course or furtherance of the Director's taxable activity. If the Director is registered or liable to be registered for GST, the Director will be required to account for GST on the fees received for the supply of the directorship services.
- If the Company is carrying on a taxable activity and is registered for GST, the Company may claim a deduction for input tax under section 20(3) for any GST charged on the supply of the directorship services by the Director, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The Director's services are contracted by the Third Party to the Company

If the Third Party contracts with the Company to provide the Director's services as a director of the Company and the Director has accepted the office, but not as part of carrying on a taxable activity, then the following is the case:

- The Director's engagement as director of the Company is excluded from the term "taxable activity" under section 6(3)(b). Section 6(5) does not apply because the Director did not accept the office in carrying on the Director's taxable activity.
- Section 6(3)(b) does not apply to the Third Party's provision of the Director's services to the Company because the Third Party is not engaged as a director of the Company. If the Third Party is registered or liable to be registered for GST, the Third Party will be required to account for GST charged under section 8 on the supply of the Director's services.
- If the Company is carrying on a taxable activity and is registered for GST, the Company may claim a deduction for input tax under section 20(3) for any GST charged on the supply of the Director's services by the Third Party, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

If the Third Party contracts with the Company to provide the Director's services to the Company and the Director accepts the office in carrying on the Director's taxable activity, then the following is the case:

- The Director's engagement as a director of the Company is excluded from the term "taxable activity" under section 6(3)(b). However, because the Director accepted the office in carrying on their taxable activity, section 6(5) applies and any directorship services provided by the Director are deemed to be supplied in the course or furtherance of the Director's taxable activity.
- Two supplies are relevant for GST purposes: first, the Director providing their services to the Third Party and, secondly, the Third Party providing the Director's services to the Company.
- For the first supply:
  - the Director is required to account for GST charged under section 8 on the supply of their services to the Third Party; and
  - if the Third Party is carrying on a taxable activity and is registered for GST, the Third Party may claim a deduction for input tax under section 20(3) for the GST charged on the supply of the Director's services by the Director, provided the other requirements in the Act, such as those in section 20(2), are satisfied.
- For the second supply, the following is the case:
  - Section 6(3)(b) does not apply to the Third Party's supply of the Director's services to the Company because the Third Party is not engaged as a director of the Company. If the Third Party is registered or liable to be registered for GST, the Third Party is required to account for GST charged under section 8 on the supply of the Director's services.
  - If the Company is carrying on a taxable activity and is registered for GST, the Company may claim a deduction for input tax under section 20(3) for any GST charged on the supply of the Director's services by the Third Party, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The Director's services (as employee) are contracted by the Employer to the Company

If the Director, as part of their employment, is engaged as a director of the Company under a contract between the Employer and the Company, the following is the case:

- The Director's engagement as director of the Company is excluded from the term "taxable activity" under section 6(3)(b). Section 6(5) does not apply because the Director did not accept the office in carrying on the Director's taxable activity. The office was accepted as part of the Director's employment with the Employer.
- Section 6(3)(b) does not apply to the Employer's supply of the Director's services to the Company because the Employer is not engaged as a director of the Company. If the Employer is registered or liable to be registered for GST, the Employer is required to account for GST charged under section 8 on the supply of the Director's services to the Company.
- If the Company is carrying on a taxable activity and is registered for GST, the Company may claim a deduction for input tax under section 20(3) for any GST charged on the supply of the Director's services by the Employer, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The Director contracts their services directly to the Company and the Director is an employee who is obliged to account to their Employer for the director's fees received

The Director may be engaged by the Company to be a director of that company, where:

- the Director is an employee who is required to account to their Employer for the director's fees received;
- there is no contract between the Company and the Employer; and
- the Director has not accepted the office in carrying on their own taxable activity.

In this situation the following is the case:

- The Director's engagement as director of the Company is excluded from the term "taxable activity" under section 6(3)(b). Section 6(5) does not apply because the Director did not accept the office in carrying on the Director's taxable activity.

- Under section 6(4), any fees paid by the Company to the Director (and accounted for to the Employer) are treated as consideration for a supply of services by the Employer to the Company. If the Employer is registered or liable to be registered for GST, then the Employer is required to account for GST charged under section 8 on this deemed supply.
- If the Company is carrying on a taxable activity and is registered for GST, the Company may claim a deduction for input tax under section 20(3) for any GST charged on the deemed supply by the Employer, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The Director's services are contracted to the Company, and the Director is a partner in a partnership who is obliged to account to the Partnership for the director's fees received

If the Director is a partner in a partnership and accepts an office as a director of the Company as part of the Partnership's business, then the Director is obliged to account to the Partnership for the director's fees received:

- The Director's engagement as director of the Company is excluded from the term "taxable activity" under section 6(3)(b). Section 6(5) does not apply because, although the Director may be carrying on the taxable activity of the Partnership, the services are deemed to be supplied by the Partnership under section 57(2)(b).
- Section 6(3)(b) does not apply to the Partnership's provision of the Director's services to the Company because the Partnership is not engaged as a director of the Company. If the Partnership is registered or liable to be registered for GST the Partnership is required to account for GST charged under section 8 on the supply of the Director's services.
- If the Company is carrying on a taxable activity and is registered for GST the Company may claim a deduction for input tax under section 20(3) for any GST charged on the supply of the Director's services by the Partnership provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The period or tax year for which this Ruling applies

This Ruling will apply for an indefinite period beginning on 1 April 2023.

This Ruling is signed by me on 22 February 2023.

Susan Price
Group Leader, Public Advice and Guidance, Tax Counsel Office

BR Pub 23/02: Goods and Services Tax – Fees of Board Members not appointed by the Governor-General or Governor-General in Council

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

Taxation laws

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

This Ruling applies in respect of sections 6(3)(c)(iii), 6(4), 6(5), 8, 20, and 57(2)(b).

The arrangement to which this Ruling applies

The Arrangement is the engagement, occupation, or employment of a person as a chairman or member (the Board Member) of a local authority, board, council, committee, or other body (the Organisation). The engagement may be by direct contract between the Board Member and the Organisation. Alternatively, the Board Member may be engaged as a Board Member of the Organisation under an agreement between the Organisation and:

- a third party (the Third Party);
- the Board Member's employer (the Employer); or
- a partnership of which the Board Member is a partner (the Partnership).

The Arrangement does not include the appointment of a person as a Board Member of an Organisation by the Governor-General or the Governor-General in Council.

How the taxation laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

The Board Member contracts directly with the Organisation

If the Board Member has not accepted the office in carrying on the Board Member's taxable activity, then the following is the case:

- The engagement is excluded from the term "taxable activity" under section 6(3)(c)(iii). Section 6(5) does not apply because the Board Member did not accept the office in carrying on the Board Member's taxable activity.
- The Organisation cannot claim an input tax deduction for any fees paid to the Board Member because GST will not be charged on the supply of the Board Member's services to the Organisation.

If the Board Member has accepted the office in carrying on the Board Member's taxable activity, then the following is the case:

- The engagement is excluded from the term "taxable activity" under section 6(3)(c)(iii). However, section 6(5) will apply and the services will be deemed to be supplied in the course or furtherance of the Board Member's taxable activity. If the Board Member is registered or liable to be registered for GST, then the Board Member is required to account for GST on the fees received for the supply of board member services.
- If the Organisation is carrying on a taxable activity and is registered for GST, the Organisation may claim a deduction for input tax under section 20(3) for any GST charged on the supply of board member services by the Board Member, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The Board Member's services are contracted by the Third Party to the Organisation

If the Third Party contracts with the Organisation to provide the Board Member's services to the Organisation and the Board Member has accepted the office, but not as part of carrying on a taxable activity, then the following is the case:

- The Board Member's engagement as a board member of the Organisation is excluded from the term "taxable activity" under section 6(3)(c)(iii). Section 6(5) does not apply because the Board Member did not accept the office in carrying on the Board Member's taxable activity.

- Section 6(3)(c)(iii) does not apply to the Third Party's provision of the Board Member's services to the Organisation because the Third Party is not engaged as a board member of the Organisation. If the Third Party is registered or liable to be registered for GST, the Third Party is required to account for GST charged under section 8 on the supply of the Board Member's services to the Organisation.
- If the Organisation is carrying on a taxable activity and is registered for GST, the Organisation may claim a deduction for input tax under section 20(3) for any GST charged on the supply of the Board Member's services by the Third Party, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

If the Third Party contracts with the Organisation to provide the Board Member's services as a board member of the Organisation and the Board Member accepts the office in carrying on the Board Member's taxable activity, then the following is the case:

- The Board Member's engagement as board member of the Organisation is excluded from the term "taxable activity" under section 6(3)(c)(iii). However, because the Board Member accepted the office in carrying on their taxable activity, section 6(5) applies and any services provided by the Board Member are deemed to be supplied in the course or furtherance of the Board Member's taxable activity.
- Two supplies are relevant for GST purposes: first, the Board Member providing their services to the Third Party, and secondly, the Third Party providing the Board Member's services to the Organisation.
- For the first supply:
  - the Board Member is required to account for GST charged under section 8 on the supply of their services to the Third Party; and
  - if the Third Party is carrying on a taxable activity and is registered for GST, the Third Party may claim a deduction for input tax under section 20(3) for the GST charged on the supply of the Board Member's services by the Board Member, provided the other requirements in the Act, such as those in section 20(2), are satisfied.
- For the second supply, the following is the case:
  - Section 6(3)(c)(iii) does not apply to the Third Party's provision of the Board Member's services to the Organisation because the Third Party is not engaged as a board member of the Organisation. If the Third Party is registered or liable to be registered for GST, the Third Party is required to account for GST charged under section 8 on the supply of the Board Member's services to the Organisation.
  - If the Organisation is carrying on a taxable activity and is registered for GST, the Organisation may claim a deduction for input tax under section 20(3) for the GST charged on the supply of the Board Member's services by the Third Party, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The Board Member's services (as employee) are contracted by the Employer to the Organisation

If the Board Member, as part of their employment, is engaged as a board member of the Organisation under a contract between the Employer and the Organisation, then the following is the case:

- The Board Member's engagement as board member of the Organisation is excluded from the term "taxable activity" under section 6(3)(c)(iii). Section 6(5) does not apply because the Board Member did not accept the office in carrying on the Board Member's taxable activity. The office was accepted as part of the Board Member's employment with the Employer.
- Section 6(3)(c)(iii) does not apply to the Employer's provision of the Board Member's services to the Organisation because the Employer is not engaged as a board member of the Organisation. If the Employer is registered or liable to be registered for GST, the Employer is required to account for GST charged under section 8 on the supply of the Board Member's services to the Organisation.
- If the Organisation is carrying on a taxable activity and is registered for GST, the Organisation will be able to claim a deduction for input tax under section 20(3) for the GST charged on the supply of the Board Member's services by the Employer, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The Board Member contracts their services directly to the Organisation and the Board Member is an employee obliged to account to their Employer for the fees received

The Board Member may be engaged by the Organisation to be a board member where:

- the Board Member is an employee who is required to account to their Employer for the board member fees received;
- there is no contract between the Organisation and the Employer; and
- the Board Member has not accepted the office in carrying on their own taxable activity.

In this situation, the following is the case:

- The Board Member's engagement as board member of the Organisation is excluded from the term "taxable activity" under section 6(3)(c)(iii). Section 6(5) does not apply because the Board Member did not accept the office in carrying on the Board Member's taxable activity, it was accepted in the course of their employment with their Employer.
- Under section 6(4), any fees paid by the Organisation to the Board Member (and accounted for to the Employer) are treated as consideration for a supply of services by the Employer to the Organisation. If the Employer is registered or liable to be registered for GST, the Employer is required to account for GST charged under section 8 on this supply.
- If the Organisation is carrying on a taxable activity and is registered for GST the Organisation may claim a deduction for input tax under section 20(3) for any GST charged on the deemed supply by the Employer provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The Board Member's services are contracted to the Organisation and the Board Member is a partner in a partnership who is obliged to account to the Partnership for the fees received

If the Board Member is a partner in a partnership and accepts an office as a board member of the Organisation as part of the Partnership's business and is obliged to account to the Partnership for the Board Member's fees received, then the following is the case:

- The Board Member's engagement as board member of the Organisation is excluded from the term "taxable activity" under section 6(3)(c)(iii). Section 6(5) does not apply because although the Board Member may be carrying on the taxable activity of the Partnership, the services are deemed to be supplied by the Partnership under section 57(2)(b) and not by the individual partner.
- Section 6(3)(c)(iii) does not apply to the Partnership's supply of the Board Member's services to the Organisation because the Partnership is not engaged as a board member of the Organisation. If the Partnership is registered or liable to be registered for GST, the Partnership is required to account for GST charged under section 8 on the supply of the Board Member's services to the Organisation.
- If the Organisation is carrying on a taxable activity and is registered for GST, the Organisation may claim a deduction for input tax under section 20(3) for the GST charged on the supply of the Board Member's services by the Partnership, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The period or tax year for which this Ruling applies

This Ruling will apply for an indefinite period beginning on 1 April 2023.

This Ruling is signed by me on 22 February 2023.

Susan Price
Group Leader, Public Advice and Guidance, Tax Counsel Office

Public Ruling BR Pub 23/03 Goods and Services Tax – Fees of Board Members appointed by the Governor-General or Governor-General in Council

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

Taxation laws

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

This Ruling applies in respect of sections 6(3)(c)(iia), 6(4), 6(5), 8, 20, and 57(2)(b).

The arrangement to which this Ruling applies

The Arrangement is an engagement, occupation, or employment as a chairman or member (the Board Member) of an organisation (the Organisation) pursuant to an appointment made by the Governor-General or the Governor-General in Council and evidenced by a warrant, an Order in Council or a notice published in the *New Zealand Gazette*.

How the taxation laws apply to the Arrangement

The Arrangement is the engagement, occupation, or employment of a person as a chairperson or member (the Board Member) of a local authority, board, council, committee, or other body (the Organisation). The engagement may be by direct contract between the Board Member and the Organisation. Alternatively, the Board Member may be engaged as a Board Member of the Organisation under an agreement between the Organisation and:

- a third party (the Third Party);
- the Board Member's employer (the Employer); or
- a partnership of which the Board Member is a partner (the Partnership).

Board Member supplies their services to the Organisation following appointment by the Governor-General or the Governor-General in Council

If the Board Member is appointed as a board member of the Organisation by the Governor-General or the Governor-General in Council, then the following is the case:

- The Board Member's engagement as board member of the Organisation is excluded from the term "taxable activity" under section 6(3)(c)(iia). Section 6(5) does not apply to engagements under section 6(3)(c)(iia).
- Even if the Organisation is carrying on a taxable activity and is registered for GST, the Organisation cannot claim a deduction for input tax under section 20(3) on the supply of the Board Member's services because GST will not be charged on that supply.

The Board Member contracts their services directly to the Organisation following their appointment and the Board Member is an employee obliged to account to their Employer for fees received

If the Board Member is appointed as a board member of the Organisation by the Governor-General or the Governor-General in Council in circumstances in which :

- the Board Member is an employee who is required to account to their Employer for the board member fees received; and
- there is no contract between the Organisation and the Employer;

then, the following is the case:

- The Board Member's engagement as a board member of the Organisation is excluded from the term "taxable activity" under section 6(3)(c)(iia). Section 6(5) does not apply as that provision does not apply to engagements under section 6(3)(c)(iia).

- Section 6(4) does not apply to deem the Employer to be making a supply of services as section 6(4) does not apply to engagements under section 6(3)(c)(iia).
- Even if the Organisation was carrying on a taxable activity and was registered for GST, the Organisation cannot claim a deduction for input tax under section 20(3) on the supply of the Board Member's services because GST will not be charged on that supply.

The Board Member's services are provided to the Organisation following appointment by the Governor-General or by the Governor-General in Council, and the Board Member is a partner obliged to account to the Partnership for the fees received

If the Board Member is a partner in a partnership and is appointed to the Organisation by the Governor-General or by the Governor-General in Council and the appointment is accepted as part of the Partnership's business (such that the Board Member is obliged to account to the Partnership for the Board Member's fees received), then the following is the case:

- The Board Member's engagement as a board member of the Organisation is excluded from the term "taxable activity" under section 6(3)(c)(iia). Section 6(5) does not apply because section 6(5) applies only for the purposes of sections 6(3)(b) and 6(3)(c)(iii). In addition, the Board Member services are deemed to be supplied by the Partnership under section 57(2)(b) and not by the individual partner.
- Section 6(3)(c)(iia) does not apply to the Partnership's provision of the Board Member's services to the Organisation because the Partnership is not engaged as a board member of the Organisation. If the Partnership is registered or liable to be registered for GST, the Partnership is required to account for GST output tax charged under section 8 on the supply of the Board Member's services to the Organisation. This is because the Board Member's services are deemed to be supplied by the Partnership under section 57(2)(b).
- If the Organisation is carrying on a taxable activity and is registered for GST, the Organisation may claim a deduction for input tax under section 20(3) for the GST charged on the supply of the Board Member's services by the Partnership, provided the other requirements in the Act, such as those in section 20(2), are satisfied.

The period or tax year for which this Ruling applies

This Ruling will apply for an indefinite period beginning on 1 April 2023.

This Ruling is signed by me on 22 February 2023.

Susan Price
Group Leader, Public Advice and Guidance, Tax Counsel Office

Commentary on Public Rulings BR Pub 23/01-03

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Rulings BR Pub 23/01-03 ("the Rulings").

Legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated. Relevant legislative provisions are reproduced in Appendix 2 to this Commentary.

Summary

1. The Rulings and Commentary explain whether directors' fees and board members' fees are subject to GST. The Rulings and Commentary also consider whether a company engaging a director or an organisation engaging a board member is entitled to claim input tax deductions for fees paid to that director or board member.
2. The Rulings and Commentary set out the GST treatment for fees paid to a director or board member in two broad categories. The first category is where the director or board member contracts either directly with a company or through a third party. The second category is where a director or board member is either an employee of a third party or a partner in a partnership. The GST treatment of board members appointed by the Governor-General or the Governor-General in Council is different to the GST treatment for other board members (as explained from [47]). Until that part of this Commentary, the discussion of board members is generally about board members not appointed by the Governor-General or the Governor-General in Council.
3. A director or board member must charge GST on their supply of services when the director or board member:
   - is registered or liable to be registered in respect of a taxable activity that they undertake; and
   - accepts the office in carrying on that taxable activity.
4. A director or board member is not required to charge GST on their supply of services where they are engaged:
   - as a director or board member in their capacity as an employee of a third-party employer; or
   - in their capacity as a partner in a partnership.
5. Essentially, if a registered person accepts an office as a director or board member in carrying on their taxable activity, the fees that person receives for providing their services are subject to GST.
6. A flowchart that illustrates the GST treatment of directors' or board members' fees from a director's or board member's perspective is in Appendix 1.
7. Where the director or board member has been engaged in their capacity as an employee, they may be required to account for their fees to their employer. In this situation, the payment received by the employer is treated as consideration for a supply of services by the employer to the person who made the payment to the director or board member (section 6(4)). If the employer is registered or liable to be registered for GST, the employer is required to account for GST on this deemed supply to the company.
8. Where the director or board member has been engaged in their capacity as a partner in a partnership, the partnership is deemed to make the supply of services, rather than the director. If the partnership is registered or liable to be registered for GST, the partnership is required to account for GST on the supply of the director's services.
9. If a board member is appointed by the Governor-General or the Governor-General in Council, the services that board member provides will always be excluded from the definition of "taxable activity".
10. From the perspective of a company or an organisation that engages a director or board member, the company or organisation may claim an input tax deduction for the fees it pays, if:
    - the company or organisation is GST registered; and
    - GST was charged on the directors' or board members' fees (or there was a deemed supply by an employer under section 6(4)) and the company or organisation holds a tax invoice for those fees.
11. Other requirements of the Act may also need to be satisfied, depending on individual circumstances.

Background

12. The Rulings set out the Commissioner's views on the GST treatment of directors' fees and board members' fees. This Commentary explains the reasoning adopted.

13. The previous ruling for directors' fees, BR Pub 15/10, was issued on 29 June 2015 for an indefinite period with effect from 30 June 2014.[1] However, with the addition of the two rulings relating to board members' fees and the expansion of this Commentary to cover both directors' fees and board members' fees, it has been decided to withdraw BR Pub 15/10 on 31 March 2023 and reissue the public ruling on GST and directors' fees as BR Pub 23/01 with effect from 1 April 2023.
14. BR Pub 15/10 replaced BR Pub 05/13 from 30 June 2014 for an indefinite period.[2] BR Pub05/13 itself replaced BR Pub 00/11 from 1 April 2005 for an indefinite period.[3] BR Pub 00/11 applied from 26 October 2000 to 31 March 2005. BR Pub 00/11 replaced BR Pub 00/09, which contained an application period that was seen to be retrospective.[4] BR Pub 00/09 replaced policy items published in the *Public Information Bulletin in 1987 and 1988*.[5]

Summary of the legislation

15. This part of the Commentary summarises the legislation relevant to whether:
    - directors' fees and board members' fees are subject to GST; and
    - a company or an organisation is entitled to claim input tax deductions for fees paid to a director or board member who is also an employee of a third-party employer.

Scheme of the Act

16. Section 8(1) provides that GST is charged on the supply (but not an exempt supply) in New Zealand of goods and services by a registered person in the course or furtherance of a taxable activity carried on by that person. GST is regarded as a transactions tax because it is imposed on supplies of goods and services. On this basis, it is the contractual relationship between the parties (founded on a genuine basis) that determines the GST treatment of the relevant transactions (*Wilson & Horton v CIR (1995) 17 NZTC 12,325 (CA)*).
17. GST is imposed on supplies made by registered persons. A "registered person" is a person who is registered or liable to be registered for GST (section 2). A person may be liable to be registered for GST, if the value of their total supplies in New Zealand in a 12-month period exceeds the threshold amount in section 51. However, to be liable to account for GST, a registered person must carry on a "taxable activity".

Requirements of a "taxable activity"

18. Section 6 defines the term "taxable activity" for the purposes of the Act. Section 6(1) defines a taxable activity as an activity that is carried on continuously or regularly and involves or is intended to involve the supply of goods and services to another person for a consideration. Therefore, a person conducts a taxable activity when all of the following characteristics are present:
    - There is some form of activity.
    - The activity is carried on continuously or regularly.
    - The activity involves, or is intended to involve, the supply of goods and services to another person for a consideration.
19. The section also includes within the term "taxable activity" the activities of any public or local authority.
20. Under section 6(2) anything done in connection with the commencement or termination of a taxable activity is deemed to be carried out in the course or furtherance of that taxable activity.

    Exclusions from the definition of "taxable activity"
21. Section 6(3) provides certain exclusions from the term "taxable activity". Relevantly, for the purposes of the Rulings and this Commentary, excluded from the definition of "taxable activity" are any engagement, occupation, or employment:
    - of a person as a director (section 6(3)(b));
    - under an appointment made by the Governor-General or the Governor-General in Council and evidenced by a warrant, an Order in Council or a notice published in the *New Zealand Gazette (section 6(3)(c)(iia))*; or.

1 "Goods and services tax – directors' fees": Public Ruling BR Pub 15/10:, *Tax Information Bulletin Vol 27, No 7 (August 2015): 3.*
2 "Directors' fees and GST": Public Ruling – BR Pub 05/13, *Tax Information Bulletin Vol 17, No 7 (September 2005): 9.*
3 "Directors' fees and GST": Public Ruling – BR Pub 00/11, *Tax Information Bulletin Vol 12, No 11 (November 2000): 3.*
4 "Directors' fees and GST": Public Ruling – BR Pub 00/09, *Tax Information Bulletin Vol 12, No 9 (September 2000): 9.*
5 "GST on directors' fees", *Public Information Bulletin 164 (August 1987); "GST on directors' fees", Public Information Bulletin 175 (July 1988).*

- as a Chairman or member of any local authority or any statutory board, council, committee, or other body (section 6(3)(c)(iii)) (and note, for ease of reference, this Commentary uses the term "board member" to apply to all the situations that fall within section 6(3)(c)(iii)).[6]

Section 6(5) and limitations on the section 6(3) exclusions

22. However, in certain circumstances a director or board member can be deemed to provide their services as part of a taxable activity under section 6(5). Section 6(5) applies where a person, in carrying on a taxable activity, accepts an office as director or board member. Section 6(5) applies to a person appointed as a director who would otherwise be excluded under section 6(3)(b) and to a person appointed as a board member who would otherwise be excluded under section 6(3)(c)(iii). In these situations, any services provided by the director or board member are deemed to be supplied in the course or furtherance of the person's taxable activity. Therefore, if a GST-registered sole trader accepts a directorship or board membership in carrying on their taxable activity, section 6(5) applies and the sole trader is liable to return GST on any director's fees or board member's fees received. Section 6(5) does not apply to appointments by the Governor-General or the Governor-General in Council that are excluded from the definition of "taxable activity" under section 6(3)(c)(iia).

23. If the person holds several offices (as director or board member), those offices, on their own and even when combined, are not a taxable activity. Each individual office is excluded from the meaning of "taxable activity" under sections 6(3)(b) and/or 6(3)(c)(iii). Section 6(5) cannot apply in this situation unless the office holder accepts the office in carrying on some other taxable activity separate to the holding of directorships or board memberships. For example, if a person held multiple directorships (such that they could be described as a "professional director"), and also had a legal or accounting or consulting practice in relation to which the opportunity for those directorships arose, then section 6(5) could apply. (Just to be clear, section 6(5) can apply whether there is one office or multiple offices accepted.) Where the separate taxable activity ceases to exist, and the person currently only holds a number of offices (directorships or board memberships), then section 6(5) would not apply. That is, it is not enough that the office was originally accepted in carrying on a taxable activity, that taxable activity must continue.

24. Examples 1 and 2 below illustrate circumstances in which section 6(5) may or may not apply because the directorship (or board membership) was or was not accepted in carrying on a taxable activity.

Example 1 - Is an office accepted in carrying on a taxable activity?

Variation 1 - Directorship accepted in carrying on a taxable activity

Eriksen has a shop ("Danes-R-Us") selling sporting gear, including supporters merchandise (replica shirts, scarves and so on) for Elsinore FC, the local football club. Danes-R-Us is a great supporter of Elsinore FC and supports many initiatives of the club to increase support at the games and for youth player participation at the club. These include giving away free tickets to matches as part of in-store promotions, providing free transport for youth players to get to out-of-town matches and so on. In recognition of the support of Eriksen and Danes-R-Us the club asks Eriksen to join the board of directors of Elsinore FC and he agrees to do so.

Although section 6(3)(b) applies to exclude the directorship from the definition of "taxable activity", section 6(5) brings the directorship back into the definition of "taxable activity" as it was accepted by Eriksen in carrying on a taxable activity (Danes-R-Us). The directorship was offered because of the activities Eriksen and Danes-R-Us undertook to benefit the club in the course of carrying on the taxable activity of selling sporting gear.

[6] This Commentary also refers to "board members" in respect of Governor-General and Governor-General in Council appointments as that is the relevant subset of appointments of relevance for BR Pub ZZ/zz and this Commentary.

Variation 2 - Directorship not accepted in carrying on a taxable activity

Assume Danes-R-Us has the same taxable activity. However, Danes-R-Us does not support any initiatives of Elsinore FC. Instead, Eriksen, in his own time and at his own expense, supports the club by assisting with fundraising for junior teams, providing free transport to practices and games for youth players, and organising supporters' club functions. In recognition of the support of Eriksen the club asks him to join the board of directors of Elsinore FC and he agrees to do so.

Section 6(3)(b) applies to exclude the directorship from the definition of "taxable activity". Section 6(5) does not apply to bring the directorship back into the definition of "taxable activity" as it was not accepted by Eriksen in carrying on a taxable activity (Danes-R-Us). Instead, the directorship was offered in recognition of his efforts outside of the taxable activity.

In light of the particular activity of Danes-R-Us (sporting gear sales including Elsinore FC merchandise) a careful consideration of the facts would be critical.

Example 2 - Is an office accepted in carrying on a taxable activity?

Variation 1 - Directorship not accepted in carrying on a taxable activity

Cornelius is a butcher in Elsinore and a good friend of Eriksen. She is also a great supporter of Elsinore FC. She spends many hours of her own time coaching the club's women's team, running a branch of the supporters' club, and lobbying the local council to provide enhanced sporting facilities for young girls and women who wish to play football. Elsinore FC asks Cornelius to become a director of the club in recognition of her efforts, and she agrees to do so.

Section 6(3)(b) applies to exclude the directorship from the definition of "taxable activity". Section 6(5) does not apply to bring the directorship back into the definition of "taxable activity" as it was not accepted in carrying on her taxable activity as a butcher. Instead, the directorship was offered in recognition of her efforts outside of her taxable activity as a butcher..

Variation 2 - Directorship accepted in carrying on a taxable activity

As above, Cornelius is a butcher in Elsinore but she is not a football fan or supporter of Elsinore FC. However, she recognises the club's popularity in the local community and wants to tap into that to promote her business, Ham-4-All. As a result Ham-4-All finances the club's junior teams, participates in free ticket giveaways at the store, and contributes to the cost of redeveloping the club's ground. Elsinore FC asks Cornelius to become a director of the club in recognition of Ham-4-All's support and she agrees to do so.

Although section 6(3)(b) applies to exclude the directorship from the definition of "taxable activity", section 6(5) brings the directorship back into the definition of "taxable activity" as it was accepted by Cornelius in carrying on the taxable activity of Ham-4-All. The directorship was offered because of the activities the business undertook to benefit the club.

Deemed supplies by employers

25. A company may engage a person as a director or board member who is an employee of a third-party employer. An employer may agree to an employee being engaged as a director of a company or a board member of an organisation on the condition that the employee accounts to the employer for any directors' fees or board members' fees received. In this situation, the company or organisation would ordinarily be precluded from claiming any GST input tax deductions on director's fees or board member's fees paid to the employee of a third-party employer. The reason for this is that, generally, the employee would not be carrying on a taxable activity. This is because the term "taxable activity" excludes any engagement, occupation, or employment under any contract of service (section 6(3)(b)).

26. Section 6(4) was introduced to allow a company or organisation to claim input tax deductions for fees paid to a director or board member who is an employee of a third-party employer. Section 6(4) provides that when an employee of a third-party employer is engaged by a company or an organisation to be a director or board member and the employee is required to account for any fees received to their employer, the employer is deemed to make a supply of services to the company or organisation. Section 6(4) applies to genuine employment relationships where the employee has a fiduciary obligation to account to their employer for any fees from an office. Therefore, a GST registered employer is liable for GST output tax on the supply of the services and the company or organisation can claim input tax on the payment for those services if they are also GST registered. For more information on the introduction of this subsection, see "Directors' fees" in the August 2014 *Tax Information Bulletin*.[7]

[7] "Directors' fees", Tax Information Bulletin Vol 26, No 7 (August 2014): 96.

Application of the legislation

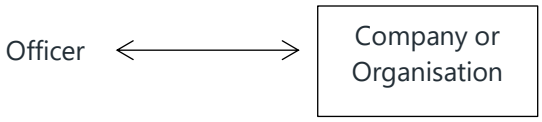
27. These Rulings consider the GST treatment of the supply of services as a director or board member. Except where a board member is appointed by the Governor-General or Governor-General in Council, the tests for determining whether a director or board member is carrying on a taxable activity, and their subsequent tax treatment, are the same.

28. The following analysis explains the GST treatment of supplies of services provided by a director or board member when

- a person (with or without a taxable activity) is engaged in their personal capacity as a director of a company or a board member of an organisation;
- a person (with or without a taxable activity) is contracted as a director of a company or a board member of an organisation by a third party;
- an employee of a third-party employer is engaged as a director of a company or a board member of an organisation; and
- a partner in a partnership is engaged as a director of a company or a board member of an organisation.

29. In analysing any office holder appointment it will be critical to understand the legal effect of the arrangements entered into. Careful consideration will need to be given to the capacity in which an office is accepted and whether the office holder is legally obliged to account to another party for the fees received. It is important that in each situation there is clarity as to which of the categories listed in paragraph [28] apply.

Director or board member[8] engaged in their personal capacity



30. A person may accept an office as a director or board member in their personal capacity and not as part of carrying on any taxable activity. Alternatively, a person may accept an office as a director or board member as part of carrying on their taxable activity.

31. If the person accepts an office in their personal capacity and not as part of carrying on a taxable activity, then the activity of supplying services as a director or board member falls within the exclusion in section 6(3)(b) or section 6(3)(c)(iii). Section 6(5) does not apply because the person has not accepted the office as part of carrying on a taxable activity. See Example 3.

32. However, if the director or board member has accepted the office as part of carrying on a taxable activity, section 6(5) overrides the exclusions in section 6(3)(b) and section 6(3)(c)(iii) and deems the services to be supplied in the course or furtherance of that taxable activity. If the director or board member is registered or liable to be registered for GST, the director or board member will be required to account for GST output tax on the fees received for the services they supply. See Example 4.

Example 3: Director engaged in their personal capacity and does not have taxable activity

Claudius, who is not registered for GST, is an employee of a marketing agency. Fortinbras Ltd engages Claudius as a director and pays him fees for his services. The appointment of Claudius as a director is not connected with his employment, nor has he accepted the directorship as part of carrying on a taxable activity. He retains the fees, having received them in his personal capacity.

Claudius is engaged as a director of a company, an activity that is excluded from the term "taxable activity" by section 6(3)(b). Section 6(5) does not apply, because Claudius did not accept the directorship as part of carrying on a taxable activity. Claudius is not required to account for GST on the fees received for directorship services.

Fortinbras Ltd cannot claim input tax deductions on the fees paid to Claudius because no GST was charged on those fees.

[8] In the diagrams the term "officer" is used to refer to either a director or a board member.

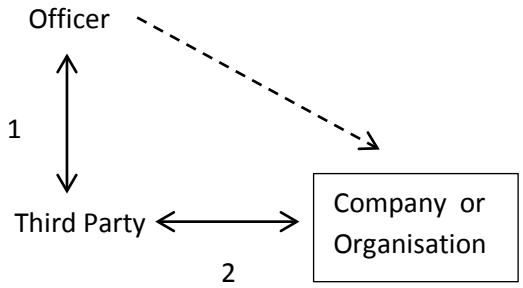
Example 4: Board member engaged in their personal capacity and has a taxable activity

Ophelia is a human resources consultant in business on her own. She is registered for GST. Ophelia accepts a position as a member of the Elsinore Employment Equality Council ("the EEEC") as part of carrying on her taxable activity. She receives fees for her services.

Because Ophelia has accepted the office as part of carrying on her taxable activity, section 6(5) deems her services to be supplied in the course or furtherance of her taxable activity. Therefore, Ophelia should provide the EEEC with a tax invoice and account for GST output tax on the fees she is paid.

The EEEC may claim input tax deductions for the fees paid to Ophelia, provided the requirements of the Act, such as those in section 20(2), are met.

Director or board member contracted to company or organisation by third party



33. A third party may agree to provide the services of a director or board member to a company or an organisation. In this situation, two supplies are relevant for GST purposes. The first supply is the director or board member providing their services to the third party. The second supply is the third party providing the director's or board member's services to the company or organisation.
34. In relation to the first supply, the director or board member may accept the office in the course or furtherance of a taxable activity. If the office is not accepted in the course or furtherance of a taxable activity, the director's or board member's engagement is excluded from the term "taxable activity" under section 6(3)(b) or section 6(3)(c)(iii). Section 6(5) would not apply because the director's or board member's services are not supplied as part of carrying on a taxable activity. Therefore, there can be no supply for GST purposes between the director or board member and the third party. See Example 5.
35. However, if the director or board member accepts the office in carrying on a taxable activity, section 6(5) deems the director's or board member's services to be supplied in the course or furtherance of their taxable activity. In this situation, the director or board member will invoice the third party for providing the director's or board member's services. Therefore, the director or board member is required to account for GST output tax on the fees they receive for these services. See Example 6.
36. In relation to the second supply, the third party invoices the company or organisation for the third party's services in providing the director's or board member's services. If the third party is registered or liable to be registered for GST, they are required to account for GST output tax on the fees received for the supply of the director's or board member's services. Section 6(3)(b) will not apply because the third party is not engaged as a director of a company or as a board member of an organisation.

Example 5: Director contracted to company by third party and does not have taxable activity

A GST-registered financial management company, Polonius Ltd, agrees to supply Osric Ltd with the services of a director. Polonius Ltd supplies the services of Marcellus, one of its specialist employees, to Osric Ltd. Directors' fees are paid by Osric Ltd to Polonius Ltd for the services provided by Marcellus.

The engagement of Marcellus as a director is excluded from the term "taxable activity" under section 6(3)(b). Section 6(5) does not apply as Marcellus has not accepted the office as part of carrying on a taxable activity. Marcellus has accepted the office as part of his employment with Polonius Ltd. Therefore, Marcellus is not required to account for GST on the supply of his directorship services.

Section 6(3)(b) does not apply to the activity of Polonius Ltd because that company is not engaged as a company director. The fees are paid in consideration of Polonius Ltd providing the services of Marcellus to Osric Ltd. This is a supply in the course or furtherance of Polonius Ltd's taxable activity and that company will be required to account for GST output tax on the fees received for this supply.

If Osric Ltd is registered for GST, it may claim input tax deductions for the fees paid to Polonius Ltd, provided the requirements of the Act, such as those in section 20(2), are met.

Example 6: Board member contracted to organisation by third party and has taxable activity

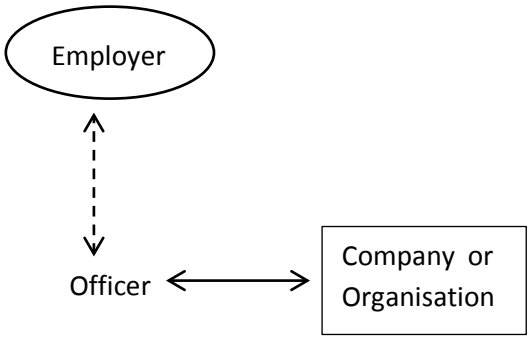
Horatio is a GST-registered accountant in business on his own. A consulting firm, Voltimand Ltd, agrees to supply the EEEC (from Example 4) with the services of a board member to monitor the EEEC's financial systems. Horatio agrees with Voltimand Ltd to provide his services as a board member of the EEEC. Two supplies are involved in this arrangement. First, Horatio provides his services to Voltimand Ltd. Secondly, Voltimand Ltd supplies the services of Horatio to the EEEC.

Horatio's engagement as a board member of the EEEC is excluded from the term "taxable activity" under section 6(3)(c)(iii). However, as Horatio has accepted the office as part of carrying on his taxable activity as an accountant, section 6(5) deems his services as a board member to be supplied in the course or furtherance of his taxable activity. In relation to the first supply, Horatio is, therefore, required to account for GST output tax on the fees he receives from Voltimand Ltd for these services.

In relation to the second supply, Voltimand Ltd's supply of Horatio's services to the EEEC does not fall within section 6(3)(c)(iii) because Voltimand Ltd is not engaged as a board member of an organisation. Provided Voltimand Ltd is registered or liable to be registered for GST, it will be required to account for GST output tax on the fees received for the supply of Horatio's services.

If the EEEC is registered for GST, it may claim input tax deductions for the fees paid to Voltimand Ltd, provided the requirements of the Act, such as those in section 20(2), are met.

Employee engaged as a director or board member

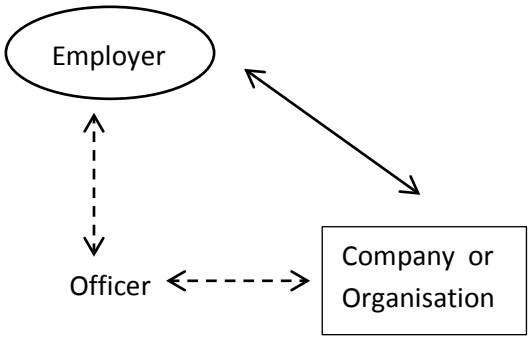


37. A company or an organisation may engage a person as director or board member who is also an employee of a third-party employer. In this situation, either the employee holds the office as part of their employment duties or the employee holds the office outside their employment. In this situation, no contract exists between the employer and the company or organisation.

38. If the employee holds the office outside their employment (the office does not arise from carrying on their employment), they are a director or board member in their personal capacity (see Examples 3 and 4). Because the director or board member is also an employee, it is unlikely they will have a taxable activity, but this will depend on the circumstances of each case.

39. Sometimes an employer will permit an employee to accept an office, provided the employee accounts to the employer for the fees received. If the employee has accepted the office in the course of their employment, the engagement of the employee as a director or board member is excluded from the term "taxable activity" under section 6(3)(b) or section 6(3)(c)(iii). Section 6(5) does not apply as the director or board member has not accepted the office as part of carrying on a taxable activity—the director or board member is merely carrying out his or her employment duties.

40. Section 6(4) provides that when an employee is engaged as a director of a company or a board member of an organisation and the employee is required to account for any fees received to their employer, the payment is treated as consideration for a supply of services by the employer to the company or organisation. This is illustrated by the following diagram:



41. The employer (provided it is registered or liable to be registered for GST) will, therefore, return GST output tax on the deemed supply of services and provide a tax invoice to the company or organisation. The company or organisation will then be able to claim input tax on the payment for these services. See Example 7.

Example 7: Employee engaged as a director

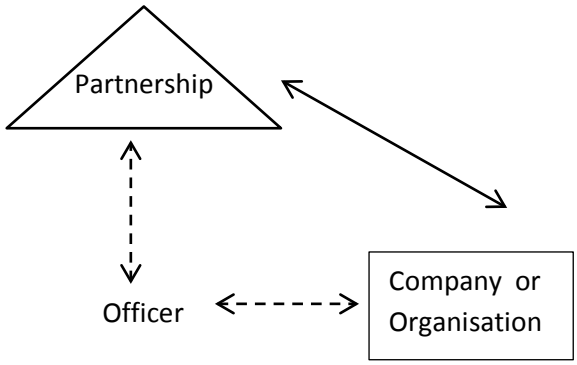
Guildenstern Ltd agrees to one of its employees, Laertes, taking up a directorship with Thebard Ltd on the proviso that Laertes accounts for the fees he receives to Guildenstern Ltd. No contract exists between Guildenstern Ltd and Thebard Ltd. Thebard Ltd is GST registered.

The engagement of Laertes as a director is excluded from the term "taxable activity" under section 6(3)(b). Section 6(5) does not apply as Laertes has not accepted the office as part of carrying on a taxable activity. Therefore, Laertes is not required to account for GST on the supply of the directorship services.

Guildenstern Ltd is treated as making a supply of services to Thebard Limited under section 6(4). If Guildenstern Ltd is registered or liable to be registered for GST it is required to account for GST on the supply of the services and provide a tax invoice to Thebard Limited.

Because it is GST registered Thebard Ltd can claim an input tax deduction on the deemed supply from Guildenstern Limited.

Partner in a partnership engaged as a director or board member



42. A partner in a partnership may be engaged as a director of a company or a board member of an organisation as part of the partnership's business.
43. Section 2(1) defines "unincorporated body" to include a partnership. Section 57(2)(b) provides that where an unincorporated body carries on a taxable activity, any supply of goods and services made as part of carrying on that taxable activity is deemed to be supplied by the unincorporated body. If the unincorporated body is a partnership, any supply of goods and services made as part of carrying on its taxable activity is deemed to be supplied by the partnership and not by any of the partners.
44. The engagement of the partner as a director or board member is excluded from the term "taxable activity" under section 6(3)(b) or section 6(3)(c)(iii). Section 6(5) does not apply because, although the partner may be carrying on the taxable activity of the partnership, the services are deemed to be supplied by the partnership, not the partner, under section 57(2)(b). Therefore, the partner is not required to account for GST on the supply of their services.
45. Section 6(3)(b) and section 6(3)(c)(iii) do not apply in the case of the partnership as the partnership is not engaged as a director or board member. The partnership supplies the services of one of its partners to another person as part of its taxable activity. Therefore, the partnership will be required to account for GST on the fees received for the supply of the partner's services as a director or board member. The partnership should also provide the company or organisation with a tax invoice.
46. While section 6(4) does not apply in this situation, the company or organisation will still be able to claim input tax on the payment for the director's or board member's services. This is because the partnership is deemed to supply the partner's services under section 57(2)(b) with a similar effect to section 6(4). See Example 8.

Example 8: Partner in a partnership engaged as board member of an organisation

A GST-registered legal partnership provides legal advice to the Rosencrantz Memorial Board ("the RMB"). A partner in the partnership, Gertrude, is elected on to the board of the RMB as a representative of the partnership. The RMB is GST registered.

The engagement of Gertrude as a board member of an organisation falls within section 6(3)(c)(iii)), so is excluded from the term "taxable activity". Section 6(5) does not apply as, although Gertrude may be providing the board member services, the services are deemed to be supplied by the partnership under section 57(2)(b). Therefore, Gertrude is not required to account for GST on the supply of the board member services.

The provisions of section 6(3)(c)(iii) do not apply to the partnership as it is not engaged as a board member of an organisation. Therefore, the partnership will be required to account for GST output tax on the fees it receives from the organisation.

The RMB may claim an input tax deduction on Gertrude's board member services that the partnership invoices it for, provided the requirements of the Act, such as those in section 20(2), are met.

Board members appointed by the Governor-General or the Governor-General in Council

47. Appointments made by the Governor-General are generally personal in nature. For example, board members may be appointed by the Governor-General to statutory entities. This means some of the situations described above will not arise where the Governor-General appoints a board member. For example, the following situations will not arise in the context of a Governor-General appointment:
    - a third party contracts with a board member to provide board member services to an organisation; and
    - an employee of an employer is engaged as a board member of a third-party organisation in their capacity as an employee (although an employee may be appointed as a board member and be obliged to account to their employer for any board member's fees they receive).
48. Section 6(5) does not apply to the appointment of a person as a board member by the Governor-General. This means that any activities relating to the services provided by a board member appointed by the Governor-General are always excluded from the definition of "taxable activity" (section 6(3)(c)(iia)). See Example 9.

49. Where the Governor-General appoints a board member who is a partner in a partnership and the person supplies their services in the course of carrying on the partnership's taxable activity, the services are deemed to be supplied by the partnership under section 57(2)(b). The partnership's provision of the board member's services does not fall within section 6(3)(c)(iia) because the partnership is not engaged as a board member. If the partnership is registered or liable to be registered for GST, it will be required to account for GST output tax charged under section 8 on the supply of the board member's services to the organisation.

Example 9 – Board member appointed by the Governor-General

The empowering legislation for the Elsinore Preservation Association provides that appointments to the Association must be made by the Governor-General. The Governor-General appoints Francisco and Reynaldo to the Association. Both appointees accept the appointment and undertake services for the Association for which they are paid fees.

The engagement of Francisco and Reynaldo as board members falls within section 6(3)(c)(iia), so is excluded from the term "taxable activity". Section 6(5) does not apply as that provision does not apply to appointments covered by section 6(3)(c)(iia). Accordingly, neither Francisco nor Reynaldo should charge GST on their supply of services.

The Association may not claim an input tax deduction on Francisco's and Reynaldo's board member services as there is no output tax charged on the fees for those services.

When the company or organisation may claim an input tax deduction for fees it pays

50. As seen, a person may accept an office of director or board member in different capacities. Depending on the capacity in which the director or board member accepts the office, the company or organisation may receive a tax invoice from the director or board member, the director's or board member's employer, the director's or board member's partnership, or a third party. It is not up to the company or organisation to determine the capacity in which the director or board member accepted the office.

51. Section 6(4) applies where a director of a company or board member of an organisation is also employed by a third-party employer and the director or board member must account for their fees to that employer. In this situation, section 6(4) provides that the payment to the employer is treated as consideration for a supply of services by the employer to the company or organisation paying the director or board member. If the director's or board member's employer is registered for GST, they will be able to provide a tax invoice to the company or organisation for the deemed supply of services.

52. Essentially, the company or organisation may claim an input tax deduction for the fees it pays if the:

- company or organisation is GST registered; and
- company or organisation holds a tax invoice for the directors' fees or board members' fees (or an invoice for a deemed supply by an employer under section 6(4)).

Other requirements of the Act may also need to be satisfied, depending on individual circumstances.

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Case references

Wilson & Horton v CIR (1995) 17 NZTC 12,325 (CA)

Legislative references

Goods and Services Tax Act 1985, ss 2 ("registered person", "unincorporated body"), 6, 8, 20, 51, 57

Other related public items

IS 17/06 ("Income tax – application of schedular payment rules to directors' fees", 18 July 2017)

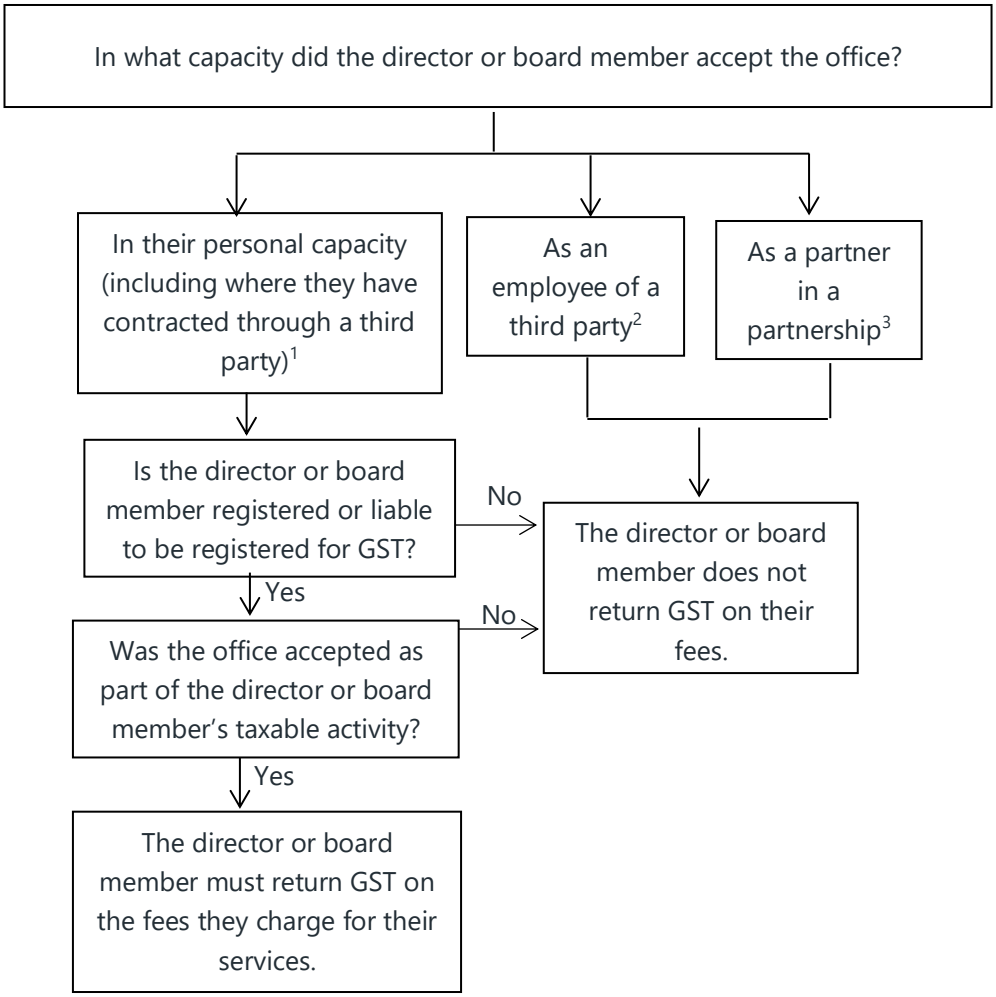
IS 19/01 ("Income tax – application of schedular payment rules to non-resident directors' fees", 28 February 2019)

GA 21/01 ("Tax on any fees paid to a member of a board, committee, panel, review group or task force", 7 December 2021)

Appendix 1 – Flow chart to determine whether a director or board member needs to return GST on their fees

This flow chart covers directors and only those board members not appointed by the Governor-General or the Governor-General in Council.

Does a director or board member need to return GST on their fees?



[1] Where the director or board member is contracted through a third party, the third party may need to return GST on the fees they receive for providing the services of the director or board member to the company or organisation. See the Commentary at [33]–[36].

[2] The employer may be required to return GST on the director's or board member's fees where the director or board member must account for their fees to their employer. See the commentary at [37]–[41].

[3] The partnership may be required to return GST on the director's or board member's fees in this situation. See the Commentary at [42]–[46].

Appendix 2 – Legislation

Goods and Services Tax Act 1985

53. The term "unincorporated body" is defined in section 2 as:

> **unincorporated body** means an unincorporated body of persons, including a partnership, a joint venture, and the trustees of a trust.

54. Section 6 provides:

> **6 Meaning of term taxable activity**
>
> (1) For the purposes of this Act, the term **taxable activity** means—
>
> (a) any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:
>
> (b) without limiting the generality of paragraph (a), the activities of any public authority or any local authority or public purpose Crown-controlled company.
>
> (2) Anything done in connection with the beginning or ending, including a premature ending, of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity.
>
> (3) Notwithstanding anything in subsections (1) and (2), for the purposes of this Act the term taxable activity shall not include, in relation to any person,—
>
> (a) being a natural person, any activity carried on essentially as a private recreational pursuit or hobby; or
>
> (aa) not being a natural person, any activity which, if it were carried on by a natural person, would be carried on essentially as a private recreational pursuit or hobby; or
>
> (b) any engagement, occupation, or employment under any contract of service or as a director of a company, subject to subsection (4); or:
>
> (c) any engagement, occupation, or employment—
>
> (i) pursuant to the Members of Parliament (Remuneration and Services) Act 2013 or the Governor-General Act 2010:
>
> (ii) as a Judge, Solicitor-General, Controller and Auditor-General, or Ombudsman:
>
> (iia) pursuant to an appointment made by the Governor-General or the Governor-General in Council and evidenced by a warrant or by an Order in Council or by a notice published in the Gazette in accordance with section 2(2) of the Official Appointments and Documents Act 1919:
>
> (iii) as a Chairman or member of any local authority or any board, council, committee, or other body, subject to subsection (4); or
>
> (d) any activity to the extent to which the activity involves the making of exempt supplies.
>
> (4) Despite subsection (3)(b) and (c)(iii), if a director, member, or other person referred to in those paragraphs is paid a fee or another amount in relation to their engagement, occupation, or employment in circumstances in which they are required to account for the payment to their employer, the payment is treated as consideration for a supply of services by the employer to the person who made the payment to the director, member, or other person.
>
> (5) For the purposes of subsection (3)(b) and (c)(iii), if a person in carrying on a taxable activity, accepts an office, any services supplied by that person as holder of that office are deemed to be supplied in the course or furtherance of that taxable activity.

55. Section 20 provides:

20 Calculation of tax payable

(1) In respect of each taxable period every registered person shall calculate the amount of tax payable by that registered person in accordance with the provisions of this section.

(2) Notwithstanding any other provision in this Act, no deduction of input tax and no deduction calculated under section 25(2)(b) or (5) shall be made in respect of a supply, unless—

(a) a tax invoice or debit note or credit note, in relation to that supply, has been provided in accordance with sections 24, 24BA, and 25 and is held by the registered person making that deduction at the time that any return in respect of that supply is furnished; or

(b) a tax invoice is not required to be issued pursuant to section 24(5) or section 24(6), or a debit note or credit note is not required to be issued pursuant to section 25; or

(c) sufficient records are maintained as required pursuant to section 24(7) where the supply is a supply of secondhand goods to which that section relates; or

(d) the supply is a supply of goods or services that is treated by section 5B as being made by the recipient and the recipient has accounted for the output tax charged in respect of the supply; or

(e) the supply is a supply of goods and services that is treated as made under section 60B to a nominated person and that person maintains sufficient records as required by section 24(7B):

provided that where a tax invoice or debit note or credit note in relation to that supply has been provided in accordance with this Act, the Commissioner may determine that no deduction for input tax in relation to that supply shall be made unless that tax invoice or debit note or credit note is retained in accordance with the provisions of section 75.

(3) Subject to this section, in calculating the amount of tax payable in respect of each taxable period, there shall be deducted from the amount of output tax of a registered person attributable to the taxable period—

(a) in the case of a registered person who is required to account for tax payable on an invoice basis pursuant to section 19, the amount of the following:

(i) input tax in relation to the supply of goods and services (not being a supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies), made to that registered person during that taxable period:

(ia) input tax in relation to the supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies, to the extent that a payment in respect of that supply has been made during that taxable period:

(ii) input tax invoiced or paid, whichever is the earlier, pursuant to section 12 during that taxable period:

(iii) any amount calculated in accordance with any one of sections 25(2)(b), 25(5), 25AA(2)(b) or 25AA(3)(b); and

(b) in the case of a registered person who is required to account for tax payable on a payments basis or a hybrid basis pursuant to section 19, the amount of the following:

(i) input tax in relation to the supply of goods and services made to that registered person, being a supply of goods and services which is deemed to take place pursuant to section 9(1) or section 9(3)(a) or section 9(3)(aa) or section 9(6), to the extent that a payment in respect of that supply has been made during the taxable period:

(ii) input tax paid pursuant to section 12 during that taxable period:

(iii) input tax in relation to the supply of goods and services made during that taxable period to that registered person, not being a supply of goods and services to which subparagraph (i) applies:

(iv) any amount calculated in accordance with any one of sections 25(2)(b), 25(5), 25AA(2)(b) or 25AA(3)(b), to the extent that a payment has been made in respect of that amount;

...

56. Section 57(2) provides:

> (2) Where an unincorporated body that carries on any taxable activity is registered pursuant to this Act,—
>
> (a) the members of that body shall not themselves be registered or liable to be registered under this Act in relation to the carrying on of that taxable activity; and
>
> (b) any supply of goods and services made in the course of carrying on that taxable activity shall be deemed for the purposes of this Act to be supplied by that body, and shall be deemed not to be made by any member of that body; and
>
> (c) any supply of goods and services to, or acquisition of goods by, any member of that body acting in the capacity as a member of that body and in the course of carrying on that taxable activity, not being a supply to which paragraph (b) applies, shall be deemed for the purposes of this Act to be supplied to or acquired by that body, and shall be deemed not to be supplied to or acquired by that member; and
>
> (d) that registration shall be in the name of the body, or where that body is the trustees of a trust, in the name of the trust; and
>
> (e) subject to subsections (3) to (3B), any change of members of that body shall have no effect for the purposes of this Act.

Notice of Withdrawal of Public Ruling BR Pub 15/10

1. This is a notice of withdrawal of a public ruling made under section 91DE of the Tax Administration Act 1994.
2. Public Ruling BR Pub 15/10 "Goods and services tax – directors' fees", applies from 30 June 2014 for an indefinite period.
3. Public Ruling BR Pub 15/10 is withdrawn on 31 March 2023. BR Pub 15/10 is being withdrawn due to the Commissioner issuing two related rulings concerning GST and board members, the need to issue a new Commentary that covers both directors' fees and board members' fees, and the desire for consistency of language within all three rulings. BR Pub 15/10 applies up to, and including, 31 March 2023.

A new replacement public ruling, BR Pub 23/01 "Goods and Services Tax – Directors' Fees" is being published with effect from 1 April 2023 for an indefinite period. This ruling refers to the Goods and Services Tax Act 1985 and to the GST treatment of directors' fees received in a range of circumstances.

Susan Price

Group Leader

Public Advice and Guidance

Tax Counsel Office

LEGISLATION AND DETERMINATIONS

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

2023 International tax disclosure exemption ITR34

Introduction

Section 61 of the Tax Administration Act 1994 ("TAA") requires taxpayers to disclose interests in foreign entities.

Section 61(1) of the TAA states that a person who has a control or income interest in a foreign company or an attributing interest in a foreign investment fund ("FIF") at any time during the income year must disclose the interest held. In the case of partnerships, disclosure needs to be made by the individual partners in the partnership. The partnership itself is not required to disclose.

Section 61(2) of the TAA allows the Commissioner of Inland Revenue to exempt any person or class of persons from this requirement if disclosure is not necessary for the administration of the international tax rules (as defined in section YA 1) contained in the Income Tax Act 2007 ("ITA").

To balance the revenue forecasting and risk assessment needs of the Commissioner with the compliance costs of taxpayers providing the information, the Commissioner has issued an international tax disclosure exemption under section 61(2) of the TAA that applies for the income year corresponding to the tax year ended 31 March 2023. This exemption may be cited as "International Tax Disclosure Exemption ITR34 "("the 2023 disclosure exemption") and the full text appears at the end of this item.

Scope of exemption

The scope of the 2023 disclosure exemption is the same as the 2022 disclosure exemption.

Application date

This exemption applies for the income year corresponding to the tax year ended 31 March 2023.

Summary

In summary, the 2023 disclosure exemption **removes** the requirement of a resident to disclose:

- An interest in a foreign company if the resident has an income interest of less than 10% in that company and either that income interest is not an attributing interest in a FIF or it falls within the $50,000 de minimis exemption (see section CQ 5(1)(d) and section DN 6(1)(d) of the ITA). The de minimis exemption does not apply to a person that has opted out of the de minimis threshold by including in the income tax return for the income year an amount of FIF income or loss.
- If the resident is not a widely-held entity, an attributing interest in a FIF that is a direct income interest of less than 10%, if the foreign entity is incorporated (in the case of a company) or otherwise tax resident in a treaty country or territory, and the fair dividend rate or comparative value method of calculation is used.
- If the resident is a widely-held entity, an attributing interest in a FIF that is a direct income interest of less than 10% (or a direct income interest in a foreign PIE equivalent) if the fair dividend rate or comparative value method is used for the interest. The resident is instead required to disclose the end-of-year New Zealand dollar market value of all such investments split by the jurisdiction in which the attributing interest in a FIF is held or listed.

The 2023 disclosure exemption also removes the requirement for a non-resident or transitional resident to disclose interests held in foreign companies and FIFs.

Commentary

Generally, residents who hold an income interest or a control interest in a foreign company, or an attributing interest in a FIF are required to disclose these interests to the Commissioner. These interests are considered in further detail below.

Attributing interest in a FIF

A resident is required to disclose an attributing interest in a FIF if FIF income or a FIF loss is calculated using one of the following calculation methods:

- attributable FIF income, deemed rate of return or cost methods; or
- fair dividend rate or comparative value methods, if the resident is a "widely-held entity"; or
- fair dividend rate or comparative value methods, if the resident is not a "widely-held entity" and either the foreign entity is incorporated or otherwise tax resident in a country or territory with which New Zealand does not have a double tax agreement in force as at 31 March 2023
- or the resident has a direct income interest of 10% or more.

For the purpose of this disclosure exemption, the term "double tax agreement" does not include tax information exchange agreements or collection agreements and is limited to the double tax agreements in force as at 31 March 2023 with the 40 countries or territories listed below.

Australia	Indonesia	Singapore
Austria	Ireland	South Africa
Belgium	Italy	Spain
Canada	Japan	Sweden
Chile	Korea	Switzerland
China	Malaysia	Taiwan
Czech Republic	Mexico	Thailand
Denmark	Netherlands	Turkey
Fiji	Norway	United Arab Emirates
Finland	Papua New Guinea	United Kingdom
France	Philippines	United States of America
Germany	Poland	Viet Nam
Hong Kong	Russian Federation	
India	Samoa	

For the purpose of this disclosure exemption, a "widely-held entity" is an entity which is a:

- portfolio investment entity (this includes a portfolio investment-linked life fund); or
- widely-held company; or
- widely-held superannuation fund; or
- widely-held group investment fund ("GIF").

Portfolio investment entity, widely-held company, widely-held superannuation fund and widely-held GIF are all defined in section YA 1 of the ITA.

The disclosure required, by widely-held resident entities, of attributing interests in FIFs in which the resident has a direct income interest of less than 10% (or a direct income interest in a foreign PIE equivalent) and for which they use the fair dividend rate or the comparative value method of calculation is that, for each calculation method, they disclose the end-of-year New Zealand dollar market value of investments split by the jurisdiction in which the attributing interest in a FIF is held, listed, organised or managed.

In the event that the jurisdiction is not easily determined, a further option of a split by currency in which the investment is held will also be accepted as long as it is a reasonable proxy - that is at least 90-95% accurate - for the underlying jurisdiction in which the FIF is held, listed, organised or managed. Investments denominated in euros will not be able to meet this test and so euro denominated investments will need to be split into the underlying jurisdictions.

FIF interests

The types of interests that fall within the scope of section 61(1) of the TAA are:

- rights in a foreign company (a company includes any entity deemed to be a company for the purposes of the ITA (e.g. a unit trust))
- rights in a foreign superannuation scheme held by a person as a beneficiary or member, if the person acquired the interest before 1 April 2014 and treated the interest as a FIF interest in a return of income filed before 20 May 2013 and for all subsequent income years
- rights in a foreign superannuation scheme held by a person as a beneficiary or member, if the person's interest in the scheme was first acquired whilst the person was tax resident of New Zealand
- rights to benefit from a life insurance policy offered and entered into outside New Zealand
- rights in an entity specified in schedule 25, part A of the ITA.

However, interests that are exempt (under sections EX 31 to EX 43 of the ITA) from being an attributing interest in a FIF do not have to be disclosed. The following is a summary of these exemptions:

- certain interests in Australian resident companies included on the official list of the Australian Stock Exchange and required to maintain a franking account (refer to Inland Revenue's website ird.govt.nz (keyword: other exemptions))
- certain interests in Australian unit trusts that have a New Zealand RWT proxy and either a high turnover or high distributions
- interests held by a natural person in foreign superannuation schemes that are an Australian approved deposit fund, Australian exempt public sector superannuation scheme, Australian regulated superannuation fund or Australian retirement savings account
- income interests of 10% or more in controlled foreign companies ("CFCs") (although separate disclosure is required of these as interests in foreign companies – refer below)
- certain interests of 10% or more in foreign companies that are treated as resident, and subject to tax, in Australia (although separate disclosure is required of these as interests in foreign companies – refer below)
- interests in certain unlisted grey-list companies which have migrated out of New Zealand for a year which begins within 10 years of that migration, where the person has held the interests continuously since the migration and the company has retained a significant presence in New Zealand through a fixed establishment
- interests in certain unlisted grey-list companies which hold more than 50% of a New Zealand company for a year which begins within 10 years of the company first holding that 50%, where the New Zealand company has retained a significant presence in New Zealand
- certain interests in grey-list companies resulting from shares acquired under a venture investment agreement
- interests in certain grey-list companies resulting from the acquisition of shares under certain employee share schemes
- certain interests held by natural persons in FIFs located in a country where exchange controls prevent the person deriving amounts from the interests, or from disposing of the interests, in New Zealand currency or consideration readily convertible to New Zealand currency.
- certain interests in foreign superannuation schemes or life insurance policies (offered and entered into outside New Zealand) held by natural persons who acquired the interests when a non-resident or transitional resident
- beneficial interests in foreign superannuation schemes which are not FIF superannuation interests
- certain interests in pensions or annuities provided by FIFs and held by natural persons who acquired the interests when a non-resident (or in certain cases, a resident) (see Inland Revenue's guide *Overseas pensions and annuity schemes* (IR257) for more information)

De minimis

Interests of less than 10% in foreign companies which are attributing interests in a FIF held by a natural person not acting as a trustee also do not have to be disclosed if the total cost of the interests is $50,000 or less at all times during the income year. This disclosure exemption is made because no FIF income under section CQ 5 of the ITA or FIF loss under section DN 6 of the ITA arises in respect of these interests.

- This de minimis exemption does not apply to a person who has included in the income tax return for the year a FIF income or loss. Please note that a person opting out of the de minimis threshold is generally required to continue to apply the FIF rules in each subsequent tax year. Where a person has included FIF income or loss from attributing interests in FIFs where the total cost was $50,000 or less in 1 of the preceding 4 income years, they will be required to apply the FIF rules in the current year.

Format of disclosure

The forms for the disclosure of FIF interests are as follows:

- IR443 form for the deemed rate of return method
- IR447 form for the fair dividend rate method (for individuals or non-widely-held entities)
- IR448 form for the comparative value method (for individuals or non-widely-held entities)
- IR449 form for the cost method
- IR458 spreadsheet form (this spreadsheet form can be used to make electronic disclosures for all methods)
- myIR income tax return attachment form (this form can be used to make electronic disclosures for all methods)

The IR458 spreadsheet and myIR income tax return attachment forms, which are the only disclosure options for the fair dividend rate and comparative value methods for widely-held entities, must be filed online. Disclosure of FIF interests by widely-held entities using the fair dividend rate or comparative value methods may be made by country rather than by individual investment where the direct income interests are less than 10% (or are direct income interests in a foreign PIE equivalent).

If you choose the spreadsheet option you will be able to save the form as a working paper on your computer. When completed, submit the form by logging into your myIR account and uploading it as part of the electronic income tax return filing process, or by logging into your myIR account and attaching it to a web message with 'FIF disclosure' in the subject line.

Alternatively, you can complete the myIR income tax return attachment disclosure form online when preparing your income tax return electronically in myIR.

The IR443, IR447, IR448, IR449 and IR458 forms can be found at ird.govt.nz/income-tax/income-tax-for-businesses-and-organisations/types-of-business-income/foreign-investment-funds-fifs/file-a-foreign-investment-fund-disclosure. Click 'Other ways to do this' on this web page to access the IR458 spreadsheet form.

Income interest of 10% or more in a foreign company

A resident is required to disclose an income interest of 10% or more in a foreign company. This obligation to disclose applies to all foreign companies regardless of the country of residence. For this purpose, the following income interests need to be considered:

a. an income interest held directly in a foreign company

b. an income interest held indirectly through any interposed foreign company

c. an income interest held by an associated person (not being a CFC) as defined by subpart YB of the ITA.

To determine whether a resident has an income interest of 10% or more for CFCs, sections EX 14 to EX 17 of the ITA should be applied. To determine whether a resident has an income interest of 10% or more in any entity that is not a CFC, for the purposes of this exemption, sections EX 14 to EX 17 should be applied to the foreign company as if it were a CFC.

Format of disclosure

The forms for disclosure of all interests in a CFC are:

- IR458 spreadsheet form, or
- myIR income tax return attachment form

If you choose the spreadsheet option you will be able to save the form as a working paper on your computer. When completed, submit the form by logging into your myIR account and uploading it as part of the electronic income tax return filing process.

Alternatively, you can complete the myIR income tax return attachment disclosure form online when preparing your income tax return electronically in myIR.

The IR458 spreadsheet form must be accessed online at www.ird.govt.nz (keyword: IR458).

Please note that electronic filing is a mandatory requirement for CFC disclosure.

Overlap of interests

It is possible that a resident may be required to disclose an interest in a foreign company which also constitutes an attributing interest in a FIF. For example, a person with an income interest of 10% or greater in a foreign company that is not a CFC is strictly required to disclose both an interest held in a foreign company and an attributing interest in a FIF.

To meet disclosure requirements, only one form of disclosure is required for each interest. If the interest is an attributing interest in a FIF, then the appropriate disclosure for the calculation method, as discussed previously, must be made.

In all other cases, where the interest in a foreign company is not an attributing interest in a FIF, the IR458 spreadsheet form or myIR income tax return attachment form for CFCs must be filed.

Interests held by non-residents and transitional residents

Interests held by non-residents and transitional residents in foreign companies and FIFs do not need to be disclosed.

This would apply for example to an overseas company operating in New Zealand (through a branch) in respect of its interests in foreign companies and FIFs; or to a transitional resident with interests in a foreign company or an attributing interest in a FIF.

Under the international tax rules, non-residents and transitional residents are not required to calculate or attribute income under either the CFC or FIF rules. Therefore, disclosure of non-residents' or transitional residents' holdings in foreign companies or FIFs is not necessary for the administration of the international tax rules and so an exemption is made for this group.

Persons not required to comply with section 61 of the Tax Administration Act 1994

This exemption may be cited as "International Tax Disclosure Exemption ITR34".

1. Reference

This exemption is made under section 61(2) of the Tax Administration Act 1994 ("TAA"). It details interests in foreign companies and attributing interests in foreign investment funds ("FIFs") in relation to which any person is not required to comply with the requirements in section 61 of the TAA to make disclosure of their interests, for the income year ended 31 March 2023.

2. Interpretation

For the purpose of this disclosure exemption:

- to determine an income interest of 10% or more in a foreign company, sections EX 14 to EX 17 of the Income Tax Act 2007 ("ITA") apply for interests in controlled foreign companies ("CFCs"). In the case of attributing interests in FIFs, those sections are to be applied as if the FIF were a CFC, and
- "double tax agreement" means a double tax agreement in force as at 31 March 2023 in one of the 40 countries or territories as set out in the commentary.

The relevant definition of "associated persons" is contained in subpart YB of the ITA.

Otherwise, unless the context requires, expressions used have the same meaning as in section YA 1 of the ITA.

3. Exemption

i. Any person who holds an income interest of less than 10% in a foreign company, including interests held by associated persons, that is not an attributing interest in a FIF, or that is an attributing interest in a FIF in respect of which no FIF income or loss arises due to the application of the de minimis exemption in section CQ 5(1)(d) or section DN 6(1)(d) of the ITA , is not required to comply with section 61(1) of the TAA for that person's interests in the foreign company and that income year.

ii. Any person who is a portfolio investment entity, widely-held company, widely-held superannuation fund or widely-held GIF, who has an attributing interest in a FIF, other than a direct income interest of 10% or more in a foreign company that is not a foreign PIE equivalent, and uses the fair dividend rate or comparative value calculation method for that interest, is not required to comply with section 61(1) of the TAA in respect of that interest and that income year, if the person discloses the end-of-year New Zealand dollar market value of investments, in an electronic format prescribed by the Commissioner, split by the jurisdiction in which the attributing interest in a FIF is held, organised, managed or listed.

iii. Any person who is not a portfolio investment entity, widely-held company, widely-held superannuation fund or widely-held GIF, who has an attributing interest in a FIF, other than a direct income interest of 10% or more in a foreign company, and uses the fair dividend rate or comparative value calculation method is not required to comply with section 61(1) of the TAA in respect of that interest and that income year, to the extent that the FIF is incorporated or tax resident in a country or territory with which New Zealand has a double tax agreement in force at 31 March 2023.

iv. Any non-resident person or transitional resident who has an income interest or a control interest in a foreign company or an attributing interest in a FIF in the income year corresponding to the tax year ending 31 March 2023, is not required to comply with section 61(1) of the TAA in respect of that interest and that income year if either or both of the following apply:

- no attributed CFC income or loss arises in respect of that interest in that foreign company under sections CQ 2(1)(d) or DN 2(1)(d) of the ITA; and/or
- no FIF income or loss arises in respect of that interest in that FIF under sections CQ 5(1)(f) or DN 6(1)(f) of the ITA.

This exemption is made by me acting under delegated authority from the Commissioner of Inland Revenue pursuant to section 7 of the TAA.

This exemption is signed on 31 March 2023

Glen Holbrook

Technical Specialist

Determination EE 23/01: Declaration of January flood events, beginning 26 January 2023 and Cyclone Gabrielle, which crossed the North Island of New Zealand during the period of 12 February 2023 to 16 February 2023, as emergency events for the purposes of family scheme income.

Determination DET EE 23/01 declares the January flood events, beginning 26 January 2023 and Cyclone Gabrielle, which crossed the North Island of New Zealand during the period of 12 February 2023 to 16 February 2023, emergency events for the purposes of family scheme income.

This determination may be cited as Determination DET EE 23/01: *Declaration of January flood events, beginning 26 January 2023 and Cyclone Gabrielle, which crossed the North Island of New Zealand during the period of 12 February 2023 to 16 February 2023, as emergency events for the purposes of family scheme income.*

Application

This Determination applies to the January flood events and Cyclone Gabrielle.

The January flood events (January flood) were a series of fronts which crossed the upper North Island between 26 January 2023 to 3 February 2023, delivering extremely heavy rain, high winds, and widespread flooding in the following regions:

- Auckland
- Bay of Plenty
- Northland
- Waikato Region

Cyclone Gabrielle crossed the North Island of New Zealand during the period of 12 February 2023 to 16 February 2023 in the following regions or districts:

- Auckland
- Bay of Plenty
- Gisborne
- Hawke's Bay
- Northland
- Tararua
- Waikato Region

Determination

This determination is made under section 91AAS of the Tax Administration Act 1994.

Emergency Events

The January flood and Cyclone Gabrielle are declared to be emergency events for the purposes of section MB 13(2)(r)(i) of the Income Tax Act 2007.

Time period

For the purposes of section MB 13(2)(r)(ii) of the Income Tax Act 2007, the period relating to the events is set from 26 January 2023 to 31 August 2023.

Interpretation

In this determination, unless the context otherwise requires, words and terms have the same meaning as in the Income Tax Act 2007 and the Tax Administration Act 1994.

This determination was signed by me on 27 February 2023

Rob Falk

Technical Lead, Technical Standards, Legal Services

Inland Revenue

Commentary on determination

This commentary does not form part of the Determination. It is intended to provide assistance in the understanding and application of the Determination.

Section 91AAS of the Tax Administration Act 1994 provides the Commissioner the power to issue a determination declaring an event as an emergency event for the purposes of section MB 13(2)(r)(i) of the Income Tax Act 2007.

In setting this determination, the Commissioner must set a period relating to the event for the purposes of section MB 13(2)(r)(ii) of the Income Tax Act 2007 up to a maximum period of 12 months from the date of the event.

Section MB 13(1) of the Income Tax Act 2007 includes in the family scheme income (which is used in the calculation of a person's Working for Families Tax Credit entitlement) of a person the value of payments paid to the person used to replace lost or diminished income or used to meet usual living expenses.

Section MB 13(2) of the Income Tax Act 2007 excludes certain payments from being included in family scheme income under section MB 13(1). Section MB 13(2)(r)(i) excludes from family scheme income a payment made to relieve the adverse effects of an event declared an emergency event by the Commissioner by way of determination under section 91AAS of the Tax Administration Act 1994 where the payment is made in the time period set by the Commissioner in the determination.

This determination declares the January flood and Cyclone Gabrielle as emergency events and sets a time period for the purposes of section MB 13(2)(r)(ii) from 26 January 2023 to 31 August 2023.

The January flood delivered extremely heavy rain, high winds, and widespread flooding during the period of 26 January 2023 to 3 February 2023 in the following regions:

- Auckland
- Bay of Plenty
- Northland
- Waikato Region

Cyclone Gabrielle crossed the North Island of New Zealand during the period of 12 February 2023 to 16 February 2023 in the following regions or districts:

- Auckland
- Bay of Plenty
- Gisborne
- Hawke's Bay
- Northland
- Tararua
- Waikato Region.

A payment made between 26 January 2023 to 31 August 2023 (inclusive of both dates) to relieve the adverse effects of the January flood and Cyclone Gabrielle will not be included in a person's family scheme income under section MB 13(1).

National Standard Costs for Specified Livestock Determination 2023

This determination may be cited as "The National Standard Costs for Specified Livestock Determination 2023".

This determination is made in terms of section EC 23 of the Income Tax Act 2007. It shall apply to any specified livestock on hand at the end of the 2022-2023 income year where the taxpayer has elected to value that livestock under the national standard cost scheme for that income year.

For the purposes of section EC 23 of the Income Tax Act 2007 the national standard costs for specified livestock for the 2022-2023 income year are as set out in the following table.

Table

Kind of Livestock	Category of Livestock	National Standard Cost
		$
Sheep	Rising 1 year	47.50
	Rising 2 year	33.60
Dairy Cattle	Purchased bobby calves	250.30
	Rising 1 year	776.80
	Rising 2 year	418.80
Beef Cattle	Rising 1 year	495.30
	Rising 2 year	284.30
	Rising 3-year male non-breeding cattle (all breeds)	284.30
Deer	Rising 1 year	158.00
	Rising 2 year	79.80
Goats (Meat and Fibre)	Rising 1 year	39.50
	Rising 2 year	27.00
Goats (Dairy)	Rising 1 year	258.10
	Rising 2 year	49.40
Pigs	Weaners to 10 weeks of age	128.30
	Growing pigs 10 to 17 weeks of age	105.40

This determination is signed by me on the 24 day of February 2023.

Rob Falk

Technical Lead

Technical Standards, Legal Services

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 23/01: Disputes process

Introduction to this Standard Practice Statement

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

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

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

How best to use this Standard Practice Statement

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

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

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

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

Summary of changes in content from the previous items

This statement replaces:

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

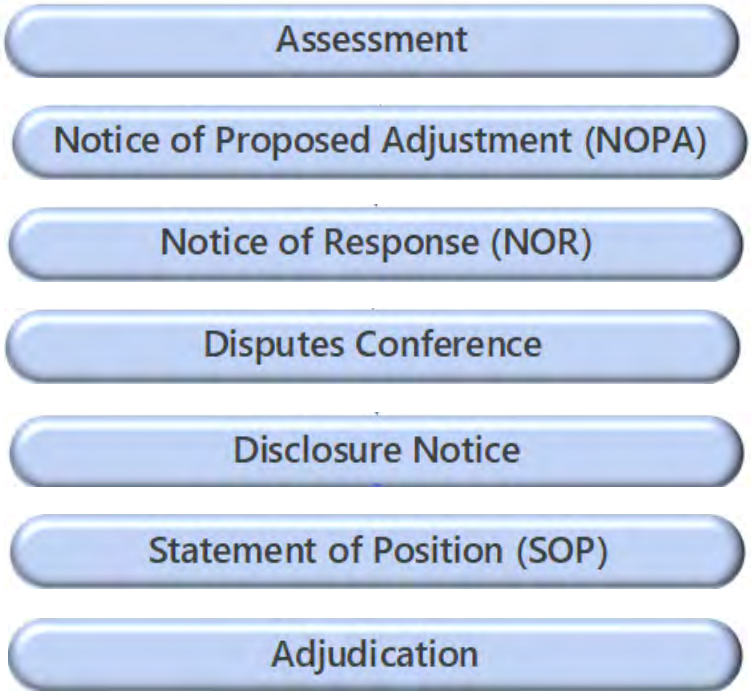
The most obvious change is that what were previously two statements have been merged into a single statement. Additionally, some stylistic and grammatical changes have been made to improve the comprehension of the statement. These have been previously discussed in this introduction under "How best to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

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

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

Structure of this statement

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



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

Background to the disputes process

Objectives of the disputes process

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

Legislative and administrative phases of the disputes process

Legislative phases

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

Administrative phases

6. As well as the legislative phases, the disputes process also has two administrative phases: the **conference** and **adjudication** phases. If the dispute has not been resolved after the NOR phase, the Commissioner's practice is to hold a conference. A conference can be one or more formal or informal meetings between the parties to clarify and, if possible, resolve the issues that are disputed.

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

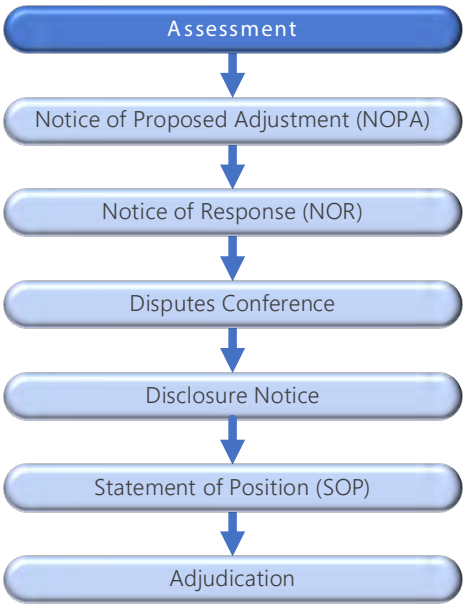
[2] Sections 89C and 89N(1)(c). See further [319].

[3] Section 138G.

7. If the dispute remains unresolved after the conference phase, the parties prepare and issue their SOPs and, in most circumstances, the dispute is referred to Inland Revenue's Tax Counsel Office (TCO) for adjudication. One circumstance where a SOP is not prepared and the dispute is not referred for adjudication is where the Commissioner and taxpayer agree in writing not to complete the disputes process (that is, they agree to opt out of the process).
8. Adjudication involves a review of the dispute by the TCO. The TCO provides an internal but impartial review of unresolved disputes. Adjudication is the final phase in the disputes process before the taxpayer's assessment is amended (if it is to be amended).
9. Inland Revenue has a quality assurance review process (separate from any TCO review), to ensure the Commissioner's dispute documents are reviewed before they are issued. Given the importance of the disputes process to the Commissioner and taxpayers, Inland Revenue officers must gain approval from a senior officer before issuing any dispute documents.

Detailed discussion

Assessment



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

Assessments generally

11. If a taxpayer is required to file an income tax return, they must assess their taxable income and income tax liability (or, if applicable, the net loss), terminal tax or refund due.[4] Similar requirements apply to registered persons who are required to file a goods and services tax (GST) return. For a GST return period, the person must assess the amount of GST payable under the Goods and Services Tax Act 1985[5]
12. Taxpayers must, as appropriate, file a return to account for ancillary taxes (for example, fringe benefit tax or resident withholding tax), although they are not required to assess those taxes. The Commissioner may issue an assessment for ancillary taxes.

[4] Section 92(1).

[5] Section 92B(1).

13. The assessment date for an income tax or GST assessment made by a taxpayer is the date Inland Revenue receives the taxpayer's tax return.[6]

14. When the taxpayer's assessment is received, the Commissioner's practice is to note and enter the date of receipt into Inland Revenue's computer system. This practice means a clear record of the date an assessment is made always exists.

Default assessments

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

Qualifying taxpayers who can have an assessment corrected without a NOPA

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

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

Ability to shorten the disputes process at the NOPA phase

18. The Commissioner and a taxpayer may be involved in a dispute that relates to an earlier dispute for which the Commissioner has issued a challenge notice, or an amended assessment (as appropriate) and court proceedings have been commenced. In this circumstance, where the taxpayer issues a further NOPA in respect of a period not covered by the earlier dispute, the current disputes process can be shortened in one of two ways. The process can be shortened where the adjustment being considered:[11]

    - relates to a matter for which the material facts and relevant law are identical to another assessment for the taxpayer (for another period) that is the subject of court proceedings; or
    - seeks to correct a tax position taken by the taxpayer (or an associated person) as a consequence or result of an incorrect tax position being taken by another taxpayer, which is or was the subject of court proceedings.

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

19. If the Commissioner agrees that either of the above conditions is met, then a challenge notice is issued in relation to the current dispute, enabling the taxpayer to file a challenge in a hearing authority. Where a taxpayer considers that using this process may be an option, it is recommended they discuss this with Inland Revenue

20. Where the adjustment being considered relates to a period other than the one already being disputed, taxpayers should contact the Inland Revenue staff who are involved in the existing dispute. Where the parties agree that this process could apply, a NOPA should be able to be issued, cross-referencing the original dispute documents.

Where prosecution action is being considered during the disputes process

21. Prosecution is one-way Inland Revenue protects the integrity of the tax and social policy systems for which the Commissioner is statutorily responsible. It is an enforcement activity, usually of last resort, against those who refuse to comply with their tax or social policy obligations or who abuse entitlements. The sanction of criminal conviction and punishment assures compliant taxpayers, who indirectly bear the burden of others' non-compliance, that the Commissioner will take enforcement action against non-compliers.

6 Section 92(2) and for GST s 92B(2).

7 Section 92(6) and for GST s 92B(3).

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

9 Section 22D(3).

10 SPS 20/03 *Request to Amend Assessments* (Standard Practice Statement, Wellington, Inland Revenue, June 2020).

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

22. Everyone who is charged with an offence (including offences under the Inland Revenue Acts) is entitled to a fair trial.[12]
23. The Commissioner has the power, that Inland Revenue officers can exercise, to compel a person to provide information. The use of these powers could result in a breach of the taxpayer's right to a fair trial, especially when the taxpayer is required to disclose to the Commissioner what will be their defence to the criminal proceedings.
24. The disputes process also contains provisions that compel a taxpayer to disclose their case with respect to an alleged tax liability. For example, a NOPA requires a taxpayer to set out the facts and the law relied on and to include copies of relevant documents. Where the tax in dispute is also the subject of a criminal prosecution, the compulsory nature of the disputes process may result in a breach of the taxpayer's right to a fair trial.
25. Therefore, the Commissioner recognises that care must be taken in using both the information-gathering powers and the disputes process so as not to compromise the taxpayer's fair trial rights.
26. The Commissioner's general approach is that once prosecution is contemplated, the taxpayer is advised of that position before they are next required to issue a disputes document to commence or continue the disputes process; for example, by issuing a NOPA in response to an assessment.
27. Specifically, the taxpayer will be advised of the following matters, as relevant:
    - The Commissioner is contemplating taking prosecution action against them.
    - The taxpayer can voluntarily choose to continue with the disputes process. Alternatively, to preserve their fair trial rights (and not be forced to provide potentially incriminating evidence to the Commissioner in a legislatively required disputes document), the taxpayer can choose not to proceed with the disputes process. However, if the taxpayer chooses to voluntarily continue and issue a disputes document (such as a NOPA, NOR or SOP), the information in that document (or one that is subsequently provided by them) could be used against them in any criminal proceedings. Therefore, it is important that, before voluntarily choosing to continue with the disputes process, the taxpayer considers obtaining legal advice. If the taxpayer decides to continue with the disputes process, they can, at any time, change their mind and choose not to proceed.
28. The Commissioner considers that preserving the taxpayer's rights in current or potential criminal proceedings can be an exceptional circumstance under s 89K (late filing of disputes documents). Further, the Commissioner accepts it is not reasonably practicable for the taxpayer to provide a disputes document until the question of prosecution has been resolved.
29. As a result, the taxpayer can choose to not provide the relevant disputes document until after receiving a letter from the Commissioner advising (as appropriate) that:
    - criminal proceedings have been concluded;
    - criminal proceedings are no longer being contemplated;
    - if the taxpayer intends to rely on the exceptional circumstance and provide a disputes document after the question of prosecution is resolved, they should notify the Commissioner within the applicable response period of their intention;
    - if the taxpayer decides to provide a disputes document despite the exceptional circumstance, they can still use the exceptional circumstance to delay the provision of a subsequent document;
    - if the dispute has reached the conference phase it is possible to agree to pause the dispute, pending resolution of the question of prosecution, but the impact of the time bar provisions in the Act need to be considered.
30. If pausing the disputes process means it is likely the process will be unable to be completed before the expiry of the time bar, the Commissioner will (as applicable):
    - ask the taxpayer to agree to an extension of the time bar;[13]
    - file an application in the High Court for an extension of the time bar;[14] and
    - if SOPs have been issued by the taxpayer and the Commissioner, and the TCO has determined it has insufficient time to reach a decision at the Adjudication phase, issue the assessment or challenge notice (as appropriate).[15]

[12] Section 25 of the New Zealand Bill of Rights Act 1990.

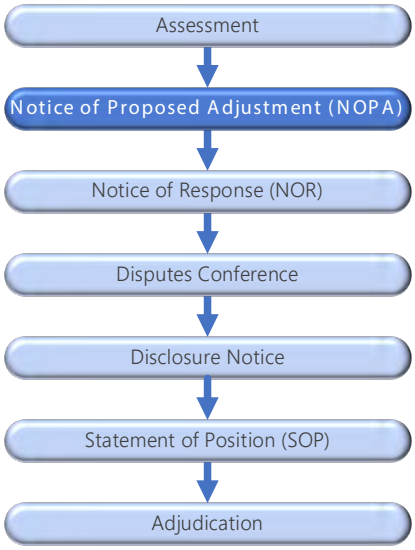
[13] Section 108B.

[14] Section 89N(3) or s 89L(1B).

[15] Section 89P.

This is discussed in more detail in Commissioners Statement CS 20/04: *The Disputes Resolution Process and Fair Trial Rights*.

Notice of proposed adjustment (NOPA)



31. This section about the notice of proposed adjustment (NOPA) phase discusses:
    - when the Commissioner must issue a NOPA;
    - when a taxpayer can issue a NOPA;
    - timeframe available to a taxpayer to issue a NOPA (the response period);
    - contents of a NOPA;
    - receipt of a taxpayer's NOPA;
    - deficiencies in the contents of a taxpayer's NOPA;
    - length of the Commissioner's NOPA; and
    - proposing additional adjustments or an increased liability to tax.

When Commissioner must issue a NOPA

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

When the Commissioner can issue a NOPA

34. In most circumstances an investigation into a taxpayer's tax affairs will have been completed before the disputes process starts. However, to ensure all facts have been ascertained and a sustainable position taken in the NOPA and to assist in the timely progression of disputes through the process, the Commissioner may be required to use the Commissioner's information-gathering powers (particularly, s 17B).
35. If the Commissioner decides to issue a NOPA, the responsible Inland Revenue officer will endeavour to advise the taxpayer of this fact at least five working days before the date the NOPA will be issued. This is to give the taxpayer time to consider their position and seek further advice. The NOPA is also quality checked for accuracy and completeness before being issued.
36. A NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties as part of the disputes process. The taxpayer is given the opportunity to agree to the Commissioner making an adjustment before issuing a NOPA. However, the taxpayer is not precluded from subsequently issuing a NOPA in respect of any amended assessment the Commissioner issues to reflect an agreed adjustment.

37. A NOPA forms a basis for ensuring the Commissioner does not issue an assessment without some formal and structured dialogue with the taxpayer in respect of the grounds on which the Commissioner proposes to issue an assessment or amended assessment.[16]

38. The Commissioner can issue one NOPA for multiple issues, tax types and periods.[17] Alternatively, the Commissioner can issue multiple NOPAs for the same issue and period, consistent with the obligation to correctly make an assessment within the four-year statutory period. However, the Commissioner endeavours to keep together issues relating to the same period and tax type in the dispute.

39. If the parties agree on some proposed adjustments and dispute others for the same tax period and type, the Commissioner cannot issue or amend an assessment that reflects only those adjustments that have been agreed to until all remaining disputed issues are resolved between the parties or adjudicated by the TCO. That is, the Commissioner cannot issue a "partial" or "interim" assessment, if the Commissioner is not satisfied the total assessment is correct.

40. However, where the statutory time bar is about to fall due, the Commissioner can issue an assessment to reflect both the agreed and disputed adjustment, provided the requirements of s 89N are met. For further discussion, see [275] under "Statutory time bar and exceptions to the time bar".

41. Where practicable, Inland Revenue officers contact the taxpayer or their tax agent within 10 working days after the NOPA is issued to check the taxpayer has received it.

42. As stated at [32], unless one of the 19 statutory exceptions applies, the Commissioner cannot make an assessment without first issuing a NOPA to a taxpayer.[18] Although the Commissioner will ensure an assessment is made in accordance with this statutory requirement, if, on a rare occasion, an assessment was made that breached this requirement, it will still be considered valid.[19]

43. If the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can issue a NOPA to the Commissioner.[20] However, where the Commissioner issues a NOPA to a taxpayer and the taxpayer accepts the proposed adjustment by written agreement or is deemed to have accepted the proposed adjustment (by virtue of not responding with a notice of response (NOR) within the response period), then the taxpayer cannot further challenge the assessment.[21]

Limitations on the Commissioner issuing a NOPA

44. The Commissioner cannot issue a NOPA:[22]
    - if the proposed adjustment is the subject of challenge proceedings; or
    - after the statutory time bar has expired.

45. The time bar that arises under ss 108 and 108A prevents the Commissioner from issuing an assessment that increases the amount assessed.[23] The Commissioner can still issue an assessment that decreases the amount of the initial assessment subject to the limitation on refunding overpaid tax under s RM 2(1) of the Income Tax Act 2007 and s 45(1) of the Good and Services Tax Act 1985.

46. However, the Commissioner is not subject to the statutory time bar if the Commissioner considers the taxpayer has:
    - provided a fraudulent or wilfully misleading tax return;[24]
    - omitted income for which a tax return must be provided that is of a particular nature or source;25 or
    - knowingly or fraudulently failed to make a full and true disclosure of the material facts necessary to determine their GST payable.26

16 *McIlraith v CIR* (2007) 23 NZTC 21,456 (HC).
17 Section 89B(1).
18 Section 89C.
19 Section 114(a).
20 Section 89D(1).
21 Sections 89I(1) and 89K.
22 Section 89B(4).
23 Provided the return is filed.
24 Section 108(2)(a).
25 Section 108(2)(b).
26 Section 108A(3).

47. The time bar and the exceptions to it are further discussed at [275] under "Statutory time bar and exceptions to the time bar".

When a taxpayer can issue a NOPA

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

49. *A taxpayer can issue a NOPA to the Commissioner where the Commissioner:*[28]

- issues an assessment without a NOPA;
- issues a default assessment without a NOPA;
- issues a deemed assessment of reportable income;
- makes a disputable decision; or
- issues an assessment reflecting the taxpayer's tax return.

Where the Commissioner issues an assessment without a NOPA

50. Where the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can dispute the assessment by issuing a NOPA in respect of any of the matters relevant to making the assessment.[29] This could include preliminary decisions that are necessary to make the assessment.[30]

51. Where the Commissioner and taxpayer agree on an adjustment **before** the Commissioner issues a NOPA or makes an assessment, the taxpayer may dispute the Commissioner's proposed adjustment in the NOPA, despite this previous agreement. However, if the agreed adjustment occurs after the issuing of a NOPA and the agreed adjustment was one proposed in the NOPA, then the taxpayer cannot dispute that agreed adjustment.[31]

52. It is the Commissioner's view that a taxpayer cannot make what they purport to be a voluntary disclosure on a matter that they then dispute. This is because the Commissioner considers that a voluntary disclosure can disclose only a tax position the taxpayer believes to be correct. If a taxpayer wishes to dispute a position they agreed to in a voluntary disclosure, then the Commissioner will treat the matter as though the voluntary disclosure had not been made and consider whether the imposition of shortfall penalties is appropriate. For further information, see "SPS 19/02: Voluntary disclosures".[32]

Where the Commissioner issues a default assessment without a NOPA

53. If a taxpayer has not filed a tax return, the Commissioner can make a default assessment without first issuing a NOPA to the taxpayer.[33] A default assessment involves the Commissioner estimating the taxpayer's tax liability for a particular income year. Similar rules apply in relation to GST.[34]

54. A taxpayer who intends to dispute a default assessment through the disputes process must:[35]

- issue a NOPA to the Commissioner in respect of the default assessment within the applicable response period; generally, this will be within the four-month period that starts on the date the Commissioner issues the default assessment;[36] and
- provide a tax return for the period to which the default assessment relates, notwithstanding that the tax return cannot include the taxpayer's assessment.[37]

27 Section 89AB.

28 Sections 89D and 89DA.

29 Section 89D(1).

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

31 Section 89I.

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

33 Section 106(1).

34 Section 89D(2C).

35 Section 89D(1) and (2).

36 Section 89D(1).

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

55. The legislative requirement to provide a tax return in respect of a default assessment made by the Commissioner when issuing a NOPA is an additional requirement of this part of the disputes process. This ensures the taxpayer has provided the necessary statutory information before they dispute the default assessment.
56. These legislative requirements also mean a taxpayer cannot commence a dispute or challenge proceedings in a hearing authority by simply filing the tax return to which the default assessment relates. The taxpayer must also issue a NOPA.
57. If the Commissioner agrees with the taxpayer's tax return and NOPA, the Commissioner will amend the default assessment by exercising the discretion provided under s 113 (subject to the statutory time bar and other relevant limitations on the exercise of that discretion).
58. However, if the Commissioner disagrees with the taxpayer's tax return and NOPA, the Commissioner cannot be compelled to amend the default assessment; instead, the Commissioner must issue a NOR to the taxpayer within the relevant response period to continue the disputes process. If the Commissioner does not issue a NOR within the response period, the Commissioner will be deemed to accept the taxpayer's NOPA.[38]

Where the Commissioner issues a deemed assessment of reportable income

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

Where the Commissioner makes a disputable decision

63. A taxpayer can issue a NOPA in respect of a disputable decision that is not an assessment.[44]
64. A disputable decision is defined as including "a decision of the Commissioner under a tax law".[45] 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.
65. However, some decisions the Commissioner makes are specifically excluded from being disputable decisions[46] Although a taxpayer is unable to dispute these decisions specifically, if the Commissioner subsequently issues an assessment that includes that disputable decision, a taxpayer can challenge the correctness of the assessment in the usual way.[47] Additionally, a decision the Commissioner makes that is not a disputable decision may be amenable to judicial review.
66. If a taxpayer wishes (and is permitted) to challenge a disputable decision, the taxpayer must issue the NOPA to the Commissioner within the applicable response period. Generally, this will be within the four-month period that starts on

38 Section 89H(2).
39 Sections 22G and 22H.
40 Section 22G(4).
41 Section 22I(1)(a).
42 Section 22(1)(b).
43 Section 89AB(3)(a).
44 Section 89D(3).
45 Section 3.
46 These are mostly found in s 138E.
47 *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

the date the Commissioner issues the notice of disputable decision or notice revoking or varying a disputable decision that is not an assessment.

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

68. However, it is only by issuing a NOPA that a taxpayer can dispute a disputable decision through the disputes process. Disputable decisions are discussed further at [288].

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

69. A taxpayer can issue to the Commissioner a NOPA in respect of the taxpayer's own tax assessment.[48]

70. The taxpayer's NOPA must be issued within the applicable response period. Generally, this will be within the four-month period that starts on the date that the Commissioner receives the assessment made by the taxpayer, unless the Commissioner accepts a late NOPA.

71. The date that the Commissioner receives the taxpayer's assessment, or their NOPA is determined by the wording of s 14F. For instance, a communication to the Commissioner by post is treated as having been received at the time the communication would have been delivered in the ordinary course of the post. If the communication is by electronic means, then it is treated as received at the time it was received electronically by the Commissioner.[49]

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

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

73. The taxpayer must issue their NOPA within the applicable "response period".[51] Generally, this will be within the four-month period that starts on the date the assessment is issued, unless the Commissioner accepts a late NOPA.[52] The date of issue is the date the notice of assessment is sent. It is the date that the notice either physically leaves Inland Revenue (for delivery to the post office, external mailbox or courier for instance) or the date the notice of assessment appears in the taxpayer's myIR account. Generally, this will be determined by the date on the notice, which, it is assumed, will be the same date the notice was actually sent. However, this is a rebuttable presumption. If the taxpayer is able to rebut this presumption, that would be relevant in determining whether an exceptional circumstance exists.

74. It is the Commissioner's view that where a due date exists for a response in the disputes process, then the response must be received by the recipient by that due date[53] This is illustrated in Example 1. Taxpayer responses received after the due date are further discussed at [298] under "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".

> **Example 1: Response must be received by the recipient by the due date**
> After filing its 2021 IR3 income tax return, P&B Plate Limited receives the resulting notice of assessment from the Commissioner on Tuesday, 22 March 2022. The notice of assessment is dated Friday, 18 March 2022. If P&B Plate Limited wishes to propose an adjustment to this assessment, the calculation of the response period for the issue of its NOPA starts on the date of issue of the assessment – Friday, 18 March 2022. Therefore, the NOPA must be received by the Commissioner on or before Wednesday, 18 May 2022; two months after the assessment's date of issue.

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

48 Section 89DA(1).

49 Section 214 of the Contract and Commercial Law Act 2017.

50 Section 89DA(1B)(b).

51 Section 89AB.

52 Section 89K(1).

53 Sections 14 and 14B to 14G.

54 Section 89K(1).

Contents of a NOPA

76. A NOPA is the document that starts the disputes process, so it is intended to identify the points of contention and explain the legal or technical aspects of the issuer's position in relation to the proposed adjustment in an understandable manner. This ensures all relevant information is made available to the parties in the dispute.

77. With two exceptions, the content requirements for a NOPA are identical for both the Commissioner and taxpayers.[55] All NOPAs must:

- contain sufficient detail of all the following requirements to identify the issues arising between the parties;
- be in the prescribed form;
- identify the adjustment or adjustments proposed to be made to the assessment;
- provide a statement of the facts and the law in sufficient detail to advise the grounds for the proposed adjustment or adjustments, and the Commissioner has the added requirement of concisely stating this information; and
- state how the law applies to the facts.

78. Taxpayers have an added requirement – to include copies of the documents they are aware of at the time the NOPA is issued that are significantly relevant to the issues arising in the dispute.

Be in the prescribed form

79. The NOPA should be in the prescribed form, Notice of proposed adjustment (IR 770), which is available from Inland Revenue's website (www.ird.govt.nz). However, a NOPA will not be treated as being invalid just because it contains minor differences from the prescribed form, so long as the form used still has the same effect and is not misleading.[56] This is further discussed at [102] under "Deficiencies in the contents of a taxpayer's NOPA".

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

80. The NOPA must include, in respect of each proposed adjustment, the monetary amount or impact of the adjustment, and the tax year or period to which the proposed adjustment relates.

81. In addition, as well as indicating whether use-of-money interest will apply to the proposed adjustment, a NOPA issued by the Commissioner will also consider whether shortfall penalties apply, where appropriate; that is, where sufficient evidence is held to support the imposition of the penalties, and this can be justified (by reference to relevant guidelines). For further discussion on the imposition of shortfall penalties, see [296] under "Shortfall penalties".

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

82. The NOPA must state the facts and law in sufficient detail to advise the recipient of the grounds being relied on by the disputant. The term "sufficient detail" means the document must contain adequate analysis of the law and facts relevant to the dispute. It should also state how the law applies to the facts. This is further discussed at [87] under "State how the law applies to the facts".

83. The document should be relatively brief and simple, so the parties can quickly progress the dispute without incurring substantial expenses or excessive preparation time. However, it must also be detailed enough to explain all the issues relevant to the dispute. NOPAs should be accurate, coherent and logically presented.

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

85. The Commissioner has the added legislative requirement that this information should be stated concisely. In doing so, Inland Revenue officers should avoid the unnecessary use of legalistic language.

86. Although candid and complete exchanges of information are implicit in the spirit and intent of the disputes process, the Commissioner's practice is to ensure their NOPA is, within those limits, as brief as practicable. For further discussion about the length of NOPAs the Commissioner issues, see [106] under "Length of the Commissioner's NOPA".

[55] Section 89F(1)–(3).

[56] Section 52 of the Legislation Act 2019.

State how the law applies to the facts

Facts

87. To provide a concise statement of the facts, the NOPA should focus on the material factual matters relevant to the legal issues. This includes, for each proposed adjustment, the facts relevant to proving all arguments made in support of the adjustment. This should also include facts that point to an inconsistency with arguments that have been raised previously by either party.
88. The NOPA should briefly state all the material facts. However, where the parties both know the background to the disputed issues, a summary of the facts in the NOPA will suffice. Where possible, the NOPA should refer to and/or append any documents that have previously set out the facts that are relied on.
89. Fully disclosing the background and facts at the NOPA phase helps to resolve the dispute earlier. However, these should be concisely stated, without irrelevant detail or repetition.
90. Although every attempt should be made to concisely state the facts, the Commissioner accepts that the explanation of the material facts in the NOPA should be relative to the complexity of the issues.

The law

91. The NOPA should state the law by including an outline of the relevant legislative provisions and principles derived from relevant cases that support the proposed adjustment. It is sufficient that the NOPA explains the nature of the legal arguments without providing lengthy quotations from the legislation or case law.
92. It is important the NOPA includes enough analysis of the applicable legal principles or tests to inform the recipient of the rationale underpinning the proposed adjustment. If possible, these should be supported by case authorities with full citations. However, it is not necessary to describe large numbers of precedent cases on the same issue or include extracts from each.
93. The NOPA must apply the legal arguments to the facts that support the proposed adjustment in a way that means the argument is not a statement that appears out of context. The application of the law to the facts should be stated concisely and logically support the proposed adjustment.
94. The NOPA must outline all relevant materials and arguments (including alternative arguments) being relied on. If more than one argument supports the same or a similar outcome, the NOPA must include all the arguments the disputant is relying on.
95. For each proposition of law, it is recommended that the NOPA makes a clear link to an outline of the supporting facts.

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

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

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

Receipt of a taxpayer's NOPA

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

100. After receiving the NOPA, that responsible officer will determine and record the:

- date on which the NOPA was received by the Commissioner, whether the NOPA has been received within the applicable response period and the date by which the Commissioner's response must be issued; and
- NOPA's salient features, including any deficiencies in its content.

101. Within 10 working days of receipt, Inland Revenue will advise the taxpayer (or their tax agent), by telephone or in writing, that it has received the NOPA. When the dispute document is received late, the taxpayer will also be advised of the applicable timeframe for the acceptance (or not) of the late document. They will also be informed of the effect of the Commissioner not meeting the one-month timeframe for the issue of the refusal notice. This is further discussed at [312] under "Disputant may challenge the Commissioner's refusal to accept a late disputes document".

Deficiencies in the contents of a taxpayer's NOPA

102. Although, ideally, a NOPA should be in the prescribed form, as long as the document the taxpayer uses is clearly identified as a NOPA, it specifies the adjustments proposed, and it contains the required information in sufficient detail so the objective of the prescribed form is achieved, the Commissioner will accept it.

103. If the Commissioner receives a NOPA that has insufficient detail, the practice is to advise the taxpayer and give them an opportunity to include the required information. If this occurs on the last day of the response period, the Commissioner will consider any resubmitted NOPA received after the response period ends as able to be accepted, because an exceptional circumstance has arisen or the taxpayer can prove a demonstrable intention to enter into or continue the disputes process. For further discussion, see [298] under "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".

104. The Commissioner does not have the power to determine the validity of a taxpayer's NOPA. This can be determined only by the courts in challenge proceedings.[57] The fact the Commissioner believes it to be invalid will form part of the Commissioner's response in the NOR and later in the SOP, if the disputes process progresses into that phase.

105. As previously discussed, the Commissioner cannot treat a tax return provided by the taxpayer as a NOPA because it will not satisfy these statutory requirements.

Length of the Commissioner's NOPA

106. Although the length of a Commissioner's NOPA will necessarily vary from case to case, it should generally not exceed 30 pages. The 30-page limit excludes any discussion on shortfall penalties (if included in the same Commissioner's NOPA as the substantive issues), the last page of instructions on what to do next, and schedules that show complicated calculations and diagrams. The application of the 30-page limit is subject to two further restrictions:

- For disputes involving less than $5,000 of tax (excluding evasion and tax avoidance issues), the Commissioner's NOPA should generally not exceed five pages.
- Where the dispute concerns only one issue (for example, the imposition of shortfall penalties), the Commissioner's NOPA should generally not exceed 10 pages.

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

108. The Commissioner strives to keep NOPAs as short as possible, but this is balanced with the need to achieve the objective of issuing the NOPA (that is, sufficiently communicating to the recipient the proposed adjustments and the reasons for them).

Proposing additional adjustments or an increased liability to tax

109. What is included in a NOPA (or NOR) is not necessarily conclusive as between the parties because they can introduce further grounds or information or adjust the amount of the proposed adjustments later in the disputes process.[58] Wherever practicable, all adjustments proposed should be included in one NOPA.

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

[58] *CIR v Zentrum Holdings Ltd* (2006) 22 NZTC 19,912 (CA).

110. However, if either party wishes to propose another adjustment after a NOPA has been issued and, in the case of the:
    - Commissioner that adjustment increases the taxpayer's tax liability; or
    - taxpayer the proposed adjustment decreases their tax liability, then

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

111. Where a taxpayer wishes to propose an adjustment that increases their liability, they may do so at any time. However, the Commissioner will treat this as a voluntary disclosure. How to make a voluntary disclosure and how the Commissioner treats them are dealt with in standard practice statement SPS 19/02: *Voluntary disclosures*.[59]

112. If the Commissioner does not agree with the adjustment the taxpayer proposes in their NOPA, the Commissioner must issue a NOR within the response period. However, if in addition, the Commissioner wishes to propose an additional adjustment that increases the taxpayer's liability, the Commissioner must issue a NOPA in relation to that new proposed adjustment. The Commissioner cannot include the proposed adjustment in relation to the assessable income by simply including that proposal in the Commissioner's NOR. This is illustrated in Example 2:

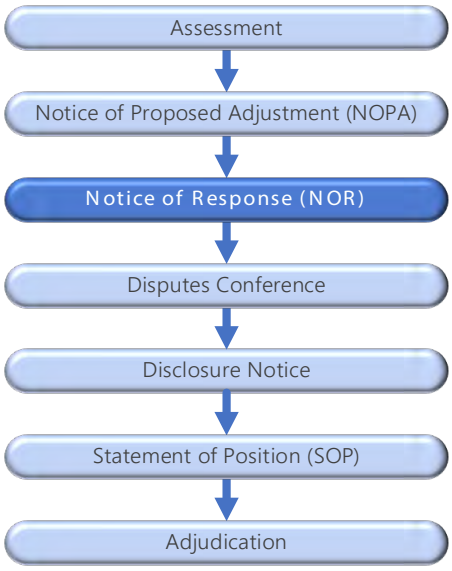
Example 2: The Commissioner issues a NOR in response to a taxpayer NOPA

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

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

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

Notice of response (NOR)



113. This section about the notice of response (NOR) phase discusses:
    - NORs generally;
    - timeframe available to issue a NOR (the response period);
    - contents of a NOR;
    - taxpayer's rejection of a NOR; and
    - timeframe to complete the disputes process.

NORs generally

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

115. A NOR must be issued within the applicable response period; that is, within two months starting on the date the NOPA was issued. The date of issue of a NOPA is the date it is sent. It is the date the notice is physically sent to the recipient (for delivery to the post office, external mailbox or courier, for instance) or emailed, posted in myIR or otherwise sent to the recipient. Generally, this will be determined by the date on the NOPA, which, it is assumed, will be the same date the notice is actually sent. However, this is rebuttable presumption. If the taxpayer is able to rebut this presumption this would be relevant in determining whether an exceptional circumstance exists.

116. The Commissioner interprets "within the applicable response period" to mean the party receiving the NOR must receive it within this period. For example, if a taxpayer issued a NOPA to the Commissioner on 9 April 2021, the Commissioner must have advised the taxpayer of its rejection by issuing a NOR to the taxpayer and the taxpayer must have received that NOR on or before 8 June 2021.

117. Although a NOR has no prescribed form, it is the Commissioner's view that, given the wording of the statutory requirement (to issue a response "notice"), a NOR must be provided in writing. Taxpayers may wish to use Notice of Response (IR 771).

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

119. When Inland Revenue receives a NOR, the date it was received is recorded and attempts to advise the taxpayer or their agent that the NOR has been received. When the dispute document is received late, the taxpayer is also advised of

[60] Section 89G(1).

the applicable timeframe for the acceptance (or not) of the late document. They are also informed of the effect of the Commissioner not meeting the one-month timeframe for the issue of the refusal notice. This is further discussed at [312] under "Disputant may challenge the Commissioner's refusal to accept a late disputes document".

120. If a taxpayer has not responded to a NOPA issued by the Commissioner, Inland Revenue will make reasonable efforts to contact the taxpayer or their tax agent two weeks before the response period expires to ascertain whether the taxpayer will issue a NOR. Such contact will be by telephone, letter, email or myIR.

121. The Commissioner must issue the NOR to the taxpayer or a representative authorised to act on their behalf in relation to the disputes process.[61] In respect of the latter, it is a question of fact whether the recipient is authorised to receive the NOR on the taxpayer's behalf. The taxpayer's NOPA must stipulate the name of the person or agent they have nominated to receive any NOR the Commissioner issues.[62]

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

Timeframe available to issue a NOR (the response period)

123. As stated at [115] the recipient of a NOPA (whether the Commissioner or taxpayer) must issue a NOR within the applicable "response period",[63] if they wish to continue with the disputes process. Generally, this will be within the two-month period that starts on the date the NOPA is issued and ends on the date the recipient receives the NOR. In the case of a taxpayer's NOR, the exception to this period is where the Commissioner accepts a late NOR.[64]

124. The Commissioner may accept a taxpayer's late dispute documents (a NOPA, NOR or statements of position (SOP)) only where:

- an exceptional circumstance exists; or
- the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.

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

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

Deemed acceptance by the Commissioner

126. If the Commissioner issues a NOR outside the two-month response period (or fails to issue a NOR), the Commissioner is generally deemed to have accepted the adjustment proposed in the taxpayer's NOPA. This finishes the dispute, and the Commissioner must usually issue an assessment or amended assessment to the taxpayer. However, the Commissioner can apply to the High Court for an order that a NOR can be issued outside the two-month response period.[66] This applies if the Commissioner considers that an exceptional circumstance applies or has prevented the Commissioner from issuing a NOR to the taxpayer within the response period. This is further discussed at [316] under "Exception to the response period for a Commissioner's NOR".

127. Where the Commissioner accepts or is deemed to have accepted a taxpayer's proposed adjustment, then the relevant assessment or amended assessment is issued to the taxpayer. However, the Commissioner does not have to issue this assessment, if they consider that, in relation to the adjustment, the taxpayer:

- was fraudulent; and/or
- willfully misled the Commissioner.[67]

61 Section 14F(5)(a) and (b).

62 *CIR v Thompson* (2007) 23 NZTC 21,375.

63 Section 89AB.

64 Section 89K(1).

65 Section 89H.

66 Section 89L(1).

67 Section 89J(2).

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

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

Deemed acceptance by a taxpayer

129. If a taxpayer issues a NOR outside this response period (and s 89K does not apply), they are deemed to have accepted the adjustment the Commissioner proposed. This will often finish the dispute, and the Commissioner will issue the appropriate assessment to the taxpayer.

130. It is the Commissioner's view that where a due date exists for a response in the disputes process, then the recipient must receive the response by that due date. Taxpayer responses received after the due date are further discussed at [298] under "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".

131. The Commissioner can accept a taxpayer's late dispute documents (a NOPA, NOR or SOP) only where an exceptional circumstance exists[68] or the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.

Contents of a NOR

132. A NOR is the document that responds to a NOPA. It identifies those matters the recipient of the NOPA rejects as being incorrect and explains the legal or technical aspects of the recipient's position in relation to those rejected matters.

133. As stated at [109] and [114], if either party wishes to propose another adjustment after a NOPA has been issued and in the case of the:

- Commissioner that adjustment increases the taxpayer's tax liability, or
- taxpayer the proposed adjustment decreases their tax liability after a NOPA has been issued,

this can be done only by including the proposed adjustment in a further NOPA; it cannot be done simply by including it in a subsequent disputes document such as a NOR or a SOP. Any additional NOPA must be received within the response period.

134. The information a NOR must contain is specified in s 89G(2). **The content requirements for a NOR are identical for the Commissioner and the taxpayer.** In the spirit of openness, any previously undisclosed relevant document should be included.

135. All NORs must state concisely:

- the facts or legal arguments in the NOPA that the issuer of the NOR considers are wrong;
- why the issuer considers those facts and arguments to be wrong;
- any facts and legal arguments the issuer is relying on;
- how the legal arguments apply to the facts; and
- the quantitative adjustment to any figures proposed in the NOPA that results from the facts and legal arguments the issuer is relying on.

Facts and legal arguments

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

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

[68] Section 89K.

Quantitative adjustments

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

Deficiencies in the contents of a taxpayer's NOR

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

Taxpayer's NOR does not strictly meet the statutory requirements

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

Taxpayer's NOR has insufficient detail

141. If the Commissioner receives a NOR that has insufficient detail, the Commissioner's practice is to advise the taxpayer of the deficiency in the NOR and give them an opportunity to include the required information within the remaining response period.

142. If the taxpayer does not have enough time within the response period to rectify the deficiency, the Commissioner will allow them a limited period to rectify the deficiency. The Commissioner will expect the taxpayer to respond as soon as reasonably practical in the circumstances and should not use the potential of receiving this limited extension to delay issuing their NOR.

Commissioner cannot determine the validity of a taxpayer's NOR

143. Despite the comment at [140], the Commissioner does not have the power to determine the validity of a taxpayer's NOR.[69] Only the courts in challenge proceedings can determine validity.

144. Even where the Commissioner believes a taxpayer's NOR is invalid (because, for instance, the taxpayer has not included sufficient detail), the Commissioner will accept the NOR. The fact the Commissioner believes it to be invalid will form part of the Commissioner's SOP.

Taxpayer's rejection of a NOR

145. If a taxpayer wishes to reject a Commissioner's NOR and continue with the disputes process, they must notify the Commissioner of this fact within the applicable response period; that is, within two months, starting on the date the NOR was issued. Otherwise, the taxpayer is deemed to have accepted the NOR and the dispute finishes.[70] The response period for a NOR was discussed at [123].

146. The Inland Revenue officer responsible for administering the dispute will make reasonable efforts to contact the taxpayer (or their agent) two weeks before the response period for the Commissioner's NOR expires to determine whether the taxpayer will reject the NOR. Contact will be made by telephone, email or myIR or in writing.

147. There is no prescribed document for rejecting a NOR issued by the Commissioner, and the taxpayer does not have to expressly reject each matter set out in the Commissioner's NOR. Where appropriate, simply rejecting the Commissioner's NOR in total will suffice. Despite there being no prescribed document, it is the Commissioner's practice to ask the taxpayer to notify the Commissioner in writing of their rejection of the Commissioner's NOR. This document is referred to the responsible Inland Revenue officer within five working days after Inland Revenue has received it and acknowledged as received within 10 working days.

148. If the taxpayer has not rejected the Commissioner's NOR within the response period (that is, deemed acceptance has occurred), the Commissioner will make reasonable efforts to advise the taxpayer (and/or their agent) of this within two weeks after the response period to the Commissioner's NOR has expired.

Timeframe to complete the disputes process

149. Where the dispute remains unresolved, the responsible officer, where practicable, should negotiate a timeframe with the taxpayer so the dispute can be progressed in a timely and efficient way.

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

[70] Section 89H(3).

150. Although not statutorily required, both parties agreeing to a timeframe is critical for demonstrating they are committed to progressing the dispute in a timely manner. The Commissioner will manage delays in the progress of a dispute.

151. If the negotiated timeframe cannot be achieved, the Commissioner enters into a continuing discussion with the taxpayer to:

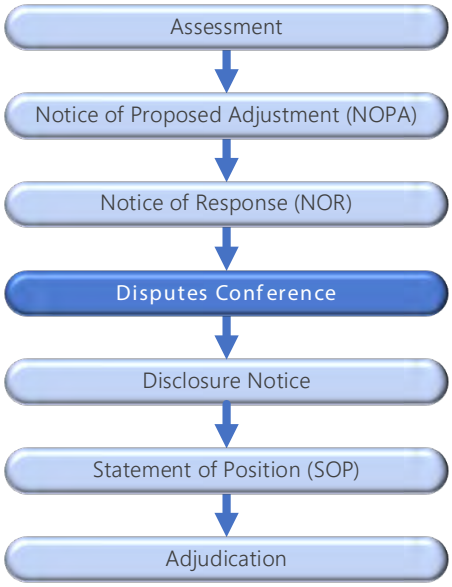
- arrange a new timeframe; or
- advise them when the disclosure notice and SOP will be issued.

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

152. In addition to the above administrative practice, the Commissioner is bound by s 89P. Section 89P provides that where the taxpayer initiated the dispute by issuing a NOPA,[71] the Commissioner must issue a challenge notice or amended assessment to the taxpayer within four years of the issue of the taxpayer's NOPA. If the Commissioner fails to meet the four-year timeframe, then the Commissioner is deemed to have accepted the adjustments proposed in the taxpayer's NOPA.[72]

153. The Commissioner is also bound by s 89N(2). Under that provision, if a NOPA has been issued and the parties cannot agree on the proposed adjustment, the Commissioner cannot amend an assessment without completing the disputes process unless one of the exceptions in s 89N applies. These exceptions are further discussed at [319] under "Commissioner's ability to amend an assessment without completing the disputes process".

Disputes Conference



154. The conference phase is an administrative (rather than a legislative) process that aims to clarify and, if possible, resolve the dispute.

155. This section about the conference phase discusses:

- objective of the conference phase;
- starting and progressing through the conference phase;
- ending the conference phase;
- opting out of the rest of the disputes process;
- progressing disputes through the disputes process where the dispute affects multiple taxpayers.

Objective of the conference phase

156. The conference phase of the disputes process allows the taxpayer, taxpayer's representatives and Inland Revenue officers directly involved in the dispute to exchange material information, if this has not already been done. Importantly, it is

[71] Issued after 29 August 2011. This being the date of enactment of the Taxation (Tax Administration and Remedial Matters) Act 2011.

[72] Section 89H(4).

also an opportunity for all parties to attempt to resolve the differences in their understanding of facts, the law and legal arguments.

157. The word "resolve" in this context is not limited to a final resolution of the dispute. Although resolution is a possibility, it is not the only objective of the conference phase. The parties may resolve part of the dispute by agreeing on some facts and clarifying some legal arguments, while agreeing to disagree on other matters, which become the focus in the later phases of the disputes process. The conference phase may assist to clarify and narrow those matters that remain in dispute.

158. Because the conference phase is an administrative process, it does not have legislative timeframes. Despite this neither party should use this phase to delay completion of the disputes process.

159. The conference phase can involve more than one meeting between the parties. For example, the parties may need further information or to consider further submissions made at an initial meeting.

Starting and progressing through the conference phase

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

161. The taxpayer is expected to respond within two weeks from the date of the conference facilitation letter (see further from [166]).

Facilitation of conference meetings

162. Meetings are a feature of the conference phase. Inland Revenue will offer the services of a facilitator to promote and encourage structured discussion between its officers and the taxpayer. Although a facilitator is recommended, a taxpayer is under no obligation to agree to this service being provided. Despite being under no obligation, Inland Revenue will always offer facilitation to taxpayers. (For more information about facilitated meetings, see from [175], and about unfacilitated meetings from [185].)

163. The meeting facilitator will be a senior Inland Revenue officer who has not been involved in the dispute and has not given advice on the dispute. The facilitator is independent of the investigation and dispute to date. However, they will have sufficient technical knowledge to understand the issues and legal arguments and lead the meeting.

164. The facilitator is not responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end where the parties to the dispute cannot agree on when to end the conference phase. In particular, it is not the facilitator's role to resolve the dispute. If the possibility of resolution arises, it is the responsibility of the taxpayer and Inland Revenue officers directly involved in the dispute to conclude matters.

Format of conference meetings

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

Taxpayer should respond within two weeks

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

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

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

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

Preparation for the meeting

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

Exchange of information

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

Timeframe

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

Meeting agenda

172. An agenda is useful for both parties at any meeting. The Commissioner recommends that the agenda divides the meeting into two parts. The first part of the meeting involves an exchange of material information and discussion of contentious facts and issues relating to the dispute. Also discussed will be any procedural matters such as the timeframe for completing the disputes process, the adjudication process, time bar waivers and the possibility of opting out of the disputes process.

173. The second part of the meeting involves discussing the possible resolution of the dispute. Any communication made and any materials provided for the purpose of this discussion are treated as being on a "without prejudice" basis.

174. Where no agenda has been agreed and it is a facilitated meeting, it is up to the facilitator to guide the taxpayer and Inland Revenue officers in discussing the matters noted at [172].

Role of the facilitator

175. During facilitated conference meetings, the facilitator will:

- use the agreed agenda and explain the objectives of the meeting;
- remind the parties of any rules they have agreed to in relation to the meeting;
- clarify who the parties are at the meeting and the capacity they are attending in (for instance, whether they are authorised tax advisors or have authority to resolve the dispute at the meeting);
- ask whether the parties agree to record the meeting using audio or video technology;[73]
- promote constructive discussion of contentious tax issues and, where possible, encourage both parties to explore the issues and resolve the dispute;
- encourage the parties to present evidence in support of the facts as they perceive them (this can be done at a later time if the evidence cannot be provided at the time of an initial meeting);
- encourage the parties to reach agreement on all of the facts of the disputed adjustments;
- encourage the parties, if agreement cannot be reached, to establish common ground and attempt to address matters where they agree to disagree; and
- ensure agreements are recorded in writing and later sent to the taxpayer to verify and sign off as being correct by a specified date.

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

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

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

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

178. Where the parties agree to end the conference phase and the facilitator considers the objectives of the conference phase have been achieved, the facilitator can clearly signal the end of the conference phase to the parties.
179. The parties may agree on the timeframe for completing the disputes process and submitting the dispute to the next step in the disputes process – the statement of position (SOP) phase. This could, for instance, include the timeframe for taxpayers to meet outstanding information requests or Inland Revenue officers undertaking to provide copies of information relevant to the dispute.
180. The agreed timeframe will also factor in time bar waivers (if given by the taxpayer) and the time required for any court challenge relating to documents claimed to be protected by professional legal privilege and tax advice documents claimed to be protected by non-disclosure rights. Further, the facilitator will ask the taxpayer whether a time bar waiver will be given if the time bar applicable to the assessment in dispute is imminent. See further at [283] under "Time bar waivers".
181. The facilitator will indicate clearly whether communications made and/or documents prepared for the purpose of negotiating potential settlement or resolution of the dispute will be treated as being on a without prejudice basis.
182. The facilitator will ask the taxpayer to consider whether the opt-out process applies and advise the taxpayer of their right to seek the Commissioner's agreement to opt out within the required timeframe.[74]
183. Any agreement made at this phase between the parties must be recorded in writing and signed at the meeting by both parties or on a later date if either party requires time to verify the correctness of the agreement.
184. At all times, the Inland Revenue officers directly involved in the dispute, and not the facilitator, remain the taxpayer's first point of contact during the dispute.

Unfacilitated meetings

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

Ending the conference phase

187. The conference phase does not necessarily end because the final meeting has been held. It may be, for instance, that one or both parties require additional time to consider matters raised during the meeting. Care should be taken that progress through the conference phase is not delayed unduly.

Facilitated meetings

188. If the facilitated meeting has not ended the conference phase or the disputes process, then after the meeting the facilitator will follow up on any matters agreed during the meeting; for instance, any agreed timeframe for the exchange of information. Although the facilitator will follow up any agreed matters, they cannot enforce any agreement made between the parties directly involved in the dispute. They will also consider whether a further meeting might be beneficial.
189. The facilitator may suggest the conference phase has come to an end where:
    - the taxpayer and Inland Revenue officers have exchanged all the material information relevant to the dispute, have fully discussed the issues and have not resolved the dispute;
    - there is no agreement and the parties' reasons for continuing the conference phase are considered to be insufficient.

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

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

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

Unfacilitated meetings

192. In the case of unfacilitated meetings, an Inland Revenue officer performs the role of a facilitator. They may suggest to the taxpayer that the conference phase has ended after all the material information relating to the dispute has been exchanged and all the contentious facts and issues have been discussed. The parties should then agree in writing on the date on which the conference phase has ended.

193. If the parties cannot agree when to end the conference phase, then a senior Inland Revenue officer who is unconnected with the case will be responsible for making the decision about ending the conference phase. They will make this decision after considering the parties' reasons and concerns.

Ending the conference phase

194. The conference phase may have ended with the taxpayer and Commissioner resolving the issues between them. Where a taxpayer has agreed with all the Commissioner's proposed adjustments, then the Commissioner issues the required assessments. Where the Commissioner agrees with all the taxpayer's proposed adjustments, this will bring the dispute to an end and the Commissioner will issue any required assessments. As stated in [39], where some of the proposed adjustments remain in dispute, the Commissioner cannot issue a partial assessment.

195. When a dispute remains unresolved after the conference phase, then the:

- Commissioner and taxpayer may agree to the taxpayer opting out of the rest of the disputes process and the matters being resolved with a hearing authority; or
- dispute process continues.

Opting out of the rest of the disputes process

196. The Commissioner and a taxpayer can enter into an agreement to not complete the disputes process if they are satisfied a hearing authority can more efficiently resolve the dispute. This is known as "opting out".[75]

197. The Commissioner will not agree to the taxpayer opting out of the rest of the disputes process unless a conference meeting has taken place. Once the meeting has been held and the parties cannot resolve the dispute after discussing all the facts and issues, the Commissioner will agree to a taxpayer opting out when certain conditions are met. These conditions are discussed at [323], under "Taxpayer requirements when wanting to opt out of the disputes process after the conference phase".

Issuing an assessment where the Commissioner has agreed to opt out

198. Where the Commissioner issued the NOPA and commenced the disputes process and has subsequently agreed to the taxpayer's request to opt out, the Commissioner will make and issue an amended assessment to the taxpayer that reflects those matters still in dispute.

199. Where the taxpayer issued the NOPA and commenced the disputes process and an opt-out is agreed to, the Commissioner will make and issue an amended assessment that reflects those matters that are no longer in dispute.[76] An amended assessment would not be made for matters still in dispute.

200. Where an opt-out has been agreed to and the Commissioner is not required to make and issue an amended assessment (for instance, in relation to a disputable decision) the Commissioner must issue a challenge notice.[77]

201. In making an amended assessment, the Commissioner is not bound by the facts, evidence, legal arguments and application of law to the facts as stated in the NOPA and NOR.[78] The Commissioner can consider information and arguments raised

[75] Section 89N(1)(c)(viii).

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

[77] Section 89P(1).

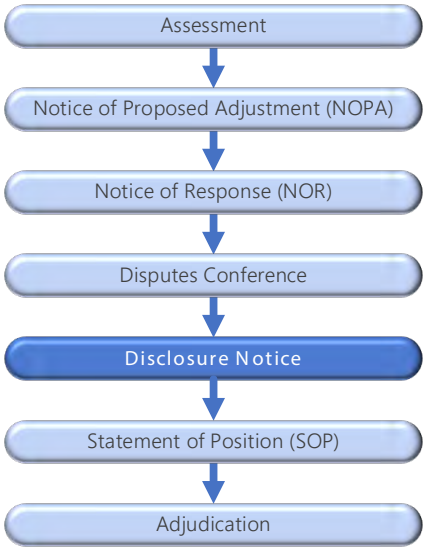
[78] For information about the requirement to issue a NOPA when adding any new adjustments to a dispute, see [109] under "Proposing additional adjustments or an increased liability to tax".

during the conference phase.[79] The Commissioner's administrative practice is that grounds of assessment that have not previously been referred to in the Commissioner's NOPA and taxpayer's NOR will not be relied on unless the new grounds have been notified to the taxpayer and discussed with them during the conference phase. The Commissioner will also send the taxpayer, at or near the time of the assessment, a brief letter confirming the grounds of assessment.

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

202. Sometimes it is necessary for Inland Revenue to deal with multiple taxpayers who are affected by the same disputed matter. The Commissioner's approach to the different situations that arise where multiple taxpayers are all affected by the same disputed matter is outlined at [335] under "Progressing disputes through the disputes process where the dispute affects multiple taxpayers".

Disclosure Notice



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

204. This section discusses the:

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

Purpose of a disclosure notice

205. The Commissioner must issue a disclosure notice unless:[80]

- the disputes process does not have to be completed because any of the exceptions under s 89N(1)(c) applies;[81]
- the disputes process does not have to be completed because the High Court has made an order that the dispute resolution process can be truncated pursuant to an application made by the Commissioner;[82] or
- the taxpayer has already been issued with a notice of disputable decision that includes or takes account of the adjustment proposed in the notice of proposed adjustment (NOPA).[83]

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

80 Section 89M(1).

81 The application of s 89N(1)(c) of the TAA is further discussed at [319], under "Commissioner's ability to amend an assessment without completing the disputes process".

82 Section 89N(3).

83 Section 89M(2).

206. A disclosure notice refers the taxpayer to the issues and propositions of law exclusion rule.[84] The effect of this rule is to limit both parties to only those issues and propositions of law raised in their respective statements of position (SOPs). This rule is further discussed at [233]. The issue of a disclosure notice will trigger the evidence exclusion rule and the start of the response period for the issue of the taxpayer's SOP. The evidence exclusion rule refers to documentary evidence on which a disputant intends to rely.[85]
207. Where the Commissioner initiated the dispute by issuing a NOPA, the Commissioner's SOP will accompany the disclosure notice.
208. If the taxpayer initiated the dispute by issuing a NOPA, the Commissioner will issue a disclosure notice to the taxpayer (where the Commissioner has not agreed to an opt-out). The taxpayer's SOP must be issued to the Commissioner within the allowed two-month response period after the issue of a disclosure notice to the taxpayer.[86] The Commissioner must then issue a SOP in response within the appropriate response period.
209. As has already been stated in relation to other dispute documents, the date of issue is the date the document (the disclosure notice in this instance) is sent. It is the date the notice is physically sent to the recipient (for delivery to the post office, external mailbox or courier, for instance) or is emailed or otherwise sent to the recipient. Generally, this will be determined by the date on the disclosure notice, which, it is assumed, will be that same date that the notice is actually sent. However, this is a rebuttable presumption. If the taxpayer is able to rebut this presumption, this would be relevant in determining whether an exceptional circumstance exists. Where a due date exists for a response in the disputes process, then the response must be received by the recipient by that due date.
210. The Commissioner will usually advise the taxpayer two weeks before a disclosure notice is issued that it is about to be issued. The Commissioner will also contact the taxpayer shortly after the disclosure notice is issued (together with the Commissioner's SOP where the Commissioner has initiated the disputes process) to ascertain whether the taxpayer has received the notice.

Issue of a disclosure notice

211. This section covers:
    - timeframe for issuing a disclosure notice; and
    - when the Commissioner issues a SOP with the disclosure notice.

Timeframe for issuing the notice

212. Because there is no statutory timeframe for issuing a disclosure notice, the Commissioner can issue a disclosure notice at any time on or after the date that either party issues their NOPA.
213. The Commissioner's usual practice is to issue a disclosure notice following the conference phase and in accordance with the timeframe agreed with the taxpayer.
214. Where a disclosure notice is issued before the conference phase (for example, when the facts are clear, the taxpayer agrees with the disputed issues and both parties agree a conference meeting is not required), the reasons will be documented and explained to the taxpayer.

When the Commissioner issues a SOP with the disclosure notice

215. Where a dispute the Commissioner started remains unresolved after the conference phase, then, although it is not a legislative requirement, it is the Commissioner's administrative practice, to the extent that it is possible, to issue a SOP along with the disclosure notice within three months from the:
    - end of the conference phase;[87] or
    - date when the Commissioner declined the taxpayer's request to opt out.
216. Although rare, even with good planning and the best endeavours of the Inland Revenue officers involved, the disclosure notice and the Commissioner's SOP may not always be issued within this three-month timeframe. For instance, this might occur when the:

84 Set out in s 138G.

85 Section 89M(6B).

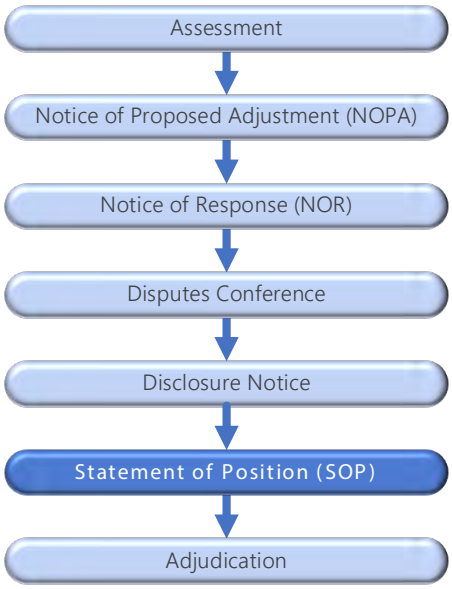
86 Section 89AB(5).

87 This three-month timeframe excludes statutory holidays.

- facts, issues and law are complex;
- case involves an important issue of precedent and/or Inland Revenue's legal services or external advisors are involved in advising on the Commissioner's SOP; or
- Commissioner is waiting for information to be provided under a request using a statutory power. When there is such a request the Commissioner will defer issuing a disclosure notice so any information the taxpayer or a third party provides can be included in the Commissioner's SOP.

217. If it is considered the three-month timeframe should be extended, then approval will first be obtained from a senior Inland Revenue officer. The taxpayer will then be advised of the estimated date for issue of the Commissioner's disclosure notice and SOP. Where the estimated date cannot be met, Inland Revenue will use its best endeavours to keep the taxpayer informed of the progress made in the completion of the Commissioner's SOP.

Statement of position (SOP)



218. This section about the statement of position (SOP) phase discusses:
    - timeframes available to issue a SOP (the response periods);
    - contents of a SOP;
    - deficiencies in the contents of a taxpayer's SOP;
    - including additional information (including an addendum to the Commissioner's SOP).

Timeframes available to issue a SOP (the response periods)

219. Where the Commissioner has initiated the dispute by issuing a notice of proposed adjustment (a NOPA), the Commissioner's SOP will usually accompany the disclosure notice. If the taxpayer wishes to continue with the disputes process, then the taxpayer must issue their SOP within the two-month response period.

220. If the taxpayer initiated the dispute by issuing a NOPA, then the taxpayer needs to issue a SOP to the Commissioner if they wish to continue the dispute. The taxpayer's SOP needs to be issued within the response period (that is, within two months, starting on the date the Commissioner issues the disclosure notice to them). If the Commissioner wishes to continue the dispute process, then the Commissioner's SOP must be issued to the taxpayer within the same two-month response period. What constitutes the date of issue and receipt of a disputes document is discussed at [73] and [74].

221. The Commissioner cannot consider a document the taxpayer purports to issue as a SOP before the Commissioner has issued the disclosure notice, because the document would have been issued before the response period starts. If this occurs, Inland Revenue will advise the taxpayer of this fact, and they will be asked to resubmit the SOP once the response period has started.[88]

[88] Section 89M(5).

222. If the Commissioner is required to issue a SOP in response to the taxpayer's SOP, then the Commissioner must meet this same two-month response period. Unless the High Court gives an order allowing more time[89] failure to issue a SOP within the two-month response period will result in the Commissioner being deemed to have accepted the taxpayer's position as put forward in the taxpayer's SOP.

223. A taxpayer can also apply to the High Court for more time to reply to a Commissioner's SOP. To be successful, a taxpayer must apply within their response period and show that they had not previously discussed the issue in dispute with the Commissioner, so it is unreasonable to reply to the Commissioner's SOP within the legislative response period.[90]

224. The Commissioner will make a reasonable effort to contact the taxpayer or their agent two weeks before the response period expires to determine whether the taxpayer will issue a SOP in response to the disclosure notice. Such contact can be made by telephone, electronically (by email or myIR) or in writing.

225. Where a taxpayer's SOP is issued outside the applicable response period, the taxpayer can apply for the consideration of whether exceptional circumstances exist or that they had a demonstrable intention to continue the dispute. This is discussed at [298] under "Dispute documents (NOPAs, NORs or SOPs) a taxpayer has issued outside the applicable response period".

226. When the dispute may become subject to the statutory time bar, the parties can agree to a time bar waiver.[91] Time bars are further discussed at [275] under "Statutory time bar and exceptions to the time bar".

227. If the parties cannot agree to a time bar waiver, then the Commissioner can complete the disputes process only if they have considered the taxpayer's SOP[92] or one of the statutory exceptions applies.[93] This is further discussed at [319] under "Commissioner's ability to amend an assessment without completing the disputes process".

228. On receipt by the Commissioner, the taxpayer's SOP will be referred to the responsible officer who will then ascertain and record:

- the date on which the SOP was issued;
- whether the SOP was issued within the relevant response period; and
- the SOP's salient features, including any deficiencies in its content when compared with the statutorily requirements of s 89M(6).

229. Where practicable, the Commissioner will acknowledge receipt of the taxpayer's SOP within 10 working days after it is received. The responsible officer will also advise the taxpayer or their agent of any deficiencies in the SOP's content as soon as they become aware of the deficiency. The taxpayer will be further advised that those deficiencies must be rectified before the response period expires and whether the Commissioner intends to provide any additional information to the taxpayer.

230. Where the dispute document is received late, the taxpayer will be advised of the one-month timeframe for the acceptance (or not) of the late document. They will also be informed of the effect of the Commissioner not meeting the one-month timeframe. This is further discussed at [312] under "Disputant may challenge the Commissioner's refusal to accept a late disputes document".

Contents of a SOP

231. A SOP must:

- be issued in the prescribed form (Statement of position (IR 773); and
- include sufficient detail to fairly advise the recipient of an outline of the facts, evidence and issues and specify the propositions of law on which the party issuing the SOP wishes to rely.[94]

232. As stated at [109], if either party wishes to propose another adjustment or the Commissioner wishes to propose a fresh or increased liability after a NOPA has been issued, this can be done only by including the proposed adjustment in a further NOPA; it cannot be done simply by including it in a subsequent disputes document (a SOP in this instance).

89 Section 89N(3).

90 Section 89M(11).

91 Section 108B(1).

92 Section 89N(2)(b).

93 Section 89N(1).

94 Section 89M(4) and (6).

Issues and propositions of law exclusion rule

233. The issues and propositions of law exclusion rule generally confine the taxpayer and Commissioner to arguing in any subsequent challenge proceedings only those issues and propositions of laws that were disclosed in their respective SOPs.[95]

234. The only exception to this rule is where a court order is obtained to the effect that either the applicant could not, with due diligence at the time the SOP was delivered, have discerned those propositions of law or issues, or the hearing authority considers that the raising of those propositions of law or issues is necessary to avoid manifest injustice to either party.[96]

235. A mistaken description of facts, evidence, issues or propositions of law and submissions made in a SOP can later be amended, if the parties agree to include additional information in the SOPs.[97]

Minimum content requirements

236. The minimum content requirement for a SOP is that it contains sufficient detail to fairly advise the recipient by giving an outline of the relevant facts, evidence and issues, as well as specifying the propositions of law on which they intend to rely. It is the Commissioner's view that, in this context, an "outline" that consists of a frank and complete discussion of the relevant facts, evidence, issues and propositions of law is implicit in the spirit and intent of the disputes process. In very complex cases, a full explanation of the relevant evidence and summary of less relevant evidence could be provided.

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

238. Only documentary evidence needs to be listed in the SOP, not potential witnesses.[98] Identities of witnesses will continue to be protected without undermining the effect of the issues and propositions of law exclusion rule.

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

240. Submissions made in the NOPA can be concisely stated but must provide sufficient detail to inform the other party of the disputed issues. However, at the SOP phase, full and detailed submissions should be made. This recognises that the issues are unresolved at this phase and are likely to proceed to the Tax Counsel Office (TCO) for adjudication and, potentially, to a court for resolution. This is especially so given the limitations imposed by the previously discussed issues and propositions of law exclusion rule (at [233]).

Deficiencies in the contents of a taxpayer's SOP

241. Where a taxpayer's SOP does not meet the statutory requirements, it is generally the practice of the Commissioner to accept the SOP so long as the document is clearly identified as a SOP and provides sufficient detail to fairly inform the Commissioner of the issues and propositions of law that are being relied on, so the objective of the legislation is achieved.

242. If the Commissioner receives a SOP that does not use the prescribed form or is otherwise deficient, it is the Commissioner's practice is to advise the taxpayer of these deficiencies and ask them if they wish to amend their SOP.

243. The Commissioner does not have the power to determine the validity of a taxpayer's SOP. Only the courts in challenge proceedings can determine validity. Where the Commissioner believes a taxpayer's SOP is invalid, the Commissioner will accept the SOP as validly constituted. The fact the Commissioner believes the SOP is deficient will form part of the Commissioner's SOP or additional response, as appropriate.

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

244. When the taxpayer has provided their SOP, then within the response period a taxpayer has to provide their SOP, the Commissioner can provide the taxpayer with additional information in response to the taxpayer's SOP.[99] This additional information needs to be provided in the same format as the Commissioner's SOP and forms part of that SOP.[100]

95 Section 138G(1).

96 Section 138G(2).

97 Section 89M(13).

98 Section 89M(6B).

99 Section 89M(8)(a).

100 Section 89M(8)(b) and (9).

245. In addition, both the taxpayer and the Commissioner can agree for the other party to include additional information in their SOP. This may be done at any time, including when the dispute has already progressed to the adjudication phase.[101]

246. Before agreeing to a taxpayer including additional information, the Commissioner will consider the taxpayer's prior conduct and whether they could have provided the information earlier by applying due diligence.

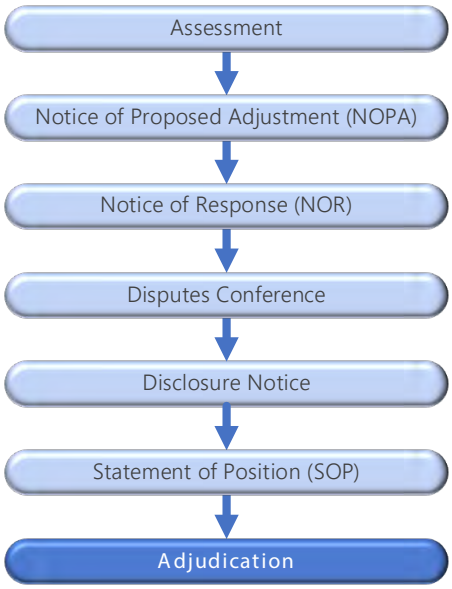
247. The Commissioner will usually also consider the materiality and relevance of the additional information and its ability to help resolve the dispute and may decide to take it into account in coming to an assessment. In this circumstance, both parties will be expected to cooperate in resolving the relevance and accuracy of any such material.

248. If the Commissioner declines to agree to a taxpayer including additional information in their SOP, the reasons must be documented with detailed reference to the taxpayer's conduct, the level of cooperation before the request was made, and why the information was not provided earlier. Although the responsible officer will advise the taxpayer or their tax agent of the reasons their request was declined, a senior Inland Revenue Officer will make the decision to decline.

249. The Commissioner may agree that a taxpayer is able to add further information to their SOP. That agreement will always be made subject to the taxpayer agreeing that the Commissioner can include a response to the taxpayer's additional information, within an agreed timeframe. This is known as an addendum to the Commissioner's SOP.

250. Any additional information the parties agree can be provided is deemed to form part of the providing party's SOP.[102] Because this additional information forms part of the provider's SOP, the issues and propositions of law exclusion rule at [233] applies to it.

Adjudication



251. This section about the adjudication phase discusses:

- role of the Tax Counsel Office (the TCO);
- what happens before the dispute is sent for adjudication;
- adjudication decision.

Role of the Tax Counsel Office

252. The adjudication phase is the final phase of the disputes process. The phase is an administrative (rather than legislative) and involves an independent review of the dispute by the TCO.

253. The TCO's role is to review those disputes that remain unresolved at the end of the conference, disclosure and statement of position (SOP) phases (or when there has been no agreement to truncate the disputes process). The TCO's mandate is to:

- act in an impartial and independent manner;
- take a fresh look at the application of law to the facts of a dispute; and
- provide a comprehensive and technically accurate decision.

[101] Section 89M(13) and (14).

[102] Section 89M(14).

254. Generally, the TCO will make a decision within 10 weeks of the case being referred to it. The length of time taken to complete the adjudication depends on the number of disputes before the TCO at any one time, any allocation delays, and the technical, legal and factual complexity of those disputes.

255. Judicial comments have been made indicating that, as a matter of law, it is not strictly necessary for Inland Revenue officers to send all disputes to the TCO for review and Inland Revenue officers are not necessarily bound by TCO decisions.[103] Notwithstanding these comments, it is the Commissioner's policy and practice to follow the decision of the TCO, even where that decision finds against the Commissioner.

256. Further, if the parties have not agreed on all the issues at the end of the conference, disclosure and SOP phases or have not agreed to truncate the disputes process, it is the Commissioner's policy and practice that all disputes are sent to the TCO for review. This is so irrespective of the complexity or type of issues or amount of tax involved.

257. The only times disputes are not sent to the TCO are when:

- the Commissioner has considered the taxpayer's SOP and referred the dispute to the TCO for its preliminary consideration and the TCO has determined it has insufficient time to reach a decision in respect of the dispute before a statutory time bar prevents the Commissioner from subsequently increasing the assessment (for further discussion see [275] under "Statutory time bar and exceptions to the time bar");
- any of the legislative exceptions specified in s 89N(1)(c) applies (for further discussion see [319] under "Commissioner's ability to amend an assessment without completing the disputes process"); or
- the High Court has made an order that the disputes process can be truncated pursuant to an application by the Commissioner.[104]

258. Any decision not to send the dispute to the TCO must be made by a senior Inland Revenue officer. In those rare instances where the dispute does not progress to the TCO for adjudication, the responsible Inland Revenue officer will consider the facts and legal arguments in the taxpayer's SOP before deciding whether to amend the assessment.

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

260. Where the TCO has insufficient time before the statutory time bar arises to fully consider a matter submitted to it, the matter will be returned to the responsible officer to decide whether to issue an assessment or amended assessment (as appropriate), issue a challenge notice or accept the taxpayer's position. Sections 89N and 113 allow the Commissioner to amend an assessment at any time after the Commissioner has considered the taxpayer's SOP in relation to the particular period.

261. If the dispute is to be referred to the TCO, the Commissioner should not issue an assessment, amended assessment or challenge notice before the adjudication process is completed unless a time bar is imminent.

What happens before the dispute is sent for adjudication

262. Before the dispute is referred to the TCO, the responsible officer prepares a cover sheet that records the documents to be sent to the TCO. These documents will include (as appropriate) copies of all notices of proposed adjustment (NOPAs), notices of response (NORs), notices rejecting the NOR, conference notes (and any recordings of discussions held during the conference), both parties' SOPs, as well as any other relevant additional information (such as time bar waivers) and evidence (including expert opinions), and a schedule of all evidence held.

263. The responsible Inland Revenue officer will issue a letter together with a copy of the cover sheet to the taxpayer before sending the submissions, notes and evidence to the TCO. It is expected that this will happen usually within one month after the SOP in reply (whether it be from the Commissioner or taxpayer) is received or the appropriate response period expires (whichever is the latter).

264. The purpose of this letter is to seek the taxpayer's agreement on the material to be sent to the TCO; that is, agreement on what documentary evidence has been disclosed at the SOP phase. This letter will allow no more than 10 working days for a response from the taxpayer.

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

[104] Section 89N(3).

265. Once the taxpayer has agreed (or the taxpayer has failed to respond within the timeframe) the material is sent to the TCO. The TCO may then contact the parties if further information is required.

266. Where the dispute has covered several issues, the cover sheet will outline any issues the parties are agreed on as well as the issues still in dispute. The TCO will consider only the disputed issues and not those issues that have been agreed on.

267. Although the TCO is not strictly limited to considering the issues and propositions of law set out in the parties' SOPs, it would be inappropriate to direct an assessment on grounds other than those set out in the SOPs.

268. Generally, the TCO will consider only the material the parties have submitted. It does not usually seek out or consider further information unless it considers it relevant. When additional information is supplied, the TCO may consider it despite the parties not agreeing that the provider of that information could include it in their SOP.

Adjudication decision

269. Once a conclusion is reached, the TCO will prepare an adjudication report and advise the taxpayer and responsible Inland Revenue officer of the decision. The responsible officer will implement the TCO's recommendations, including issuing any notices of assessment to the taxpayer where this is required. The adjudication report is admissible in a court as evidence in support of the act of assessment.

270. If the TCO decides against the Commissioner, then the:

- Commissioner's practice is not to challenge that decision;
- dispute comes to an end; and
- Commissioner issues any necessary assessment to the taxpayer to reflect the decision.

271. If the TCO decides against the taxpayer, the taxpayer may file challenge proceedings in the Taxation Review Authority or High Court as long as they do so within the applicable two-month response period, and they meet any of the following conditions:

- The Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed and the Commissioner rejected within the applicable response period and the Commissioner has later issued an amended assessment to the taxpayer.[105]
- The Commissioner or taxpayer has issued an assessment that was the subject of an adjustment that the taxpayer proposed, and the Commissioner rejected within the applicable response period by an NOR; and the Commissioner then issued a challenge notice to the taxpayer.[106]
- The Commissioner or taxpayer has issued an assessment that is the subject of an adjustment notified to the Commissioner where the Commissioner has issued a challenge notice[107] and the adjustment:
  - relates to a matter for which the material facts and relevant law are identical to another assessment for the taxpayer (for another period) which is the subject of court proceedings; or
  - seeks to correct a tax position taken by the taxpayer (or an associated person) as a consequence or result of an incorrect tax position taken by another taxpayer, which is or was the subject of court proceedings.
- The Commissioner has issued a disputable decision (that is not an assessment) that was the subject of an adjustment the taxpayer proposed and the Commissioner rejected within the applicable response period.[108]

272. To challenge an assessment, a taxpayer must file proceedings with the Taxation Review Authority or High Court within the two-month response period that starts on the date the Commissioner issues:

- an amended assessment;[109]
- a challenge notice;[110] or
- the written disputable decision rejecting the taxpayer's proposed adjustment.[111]

105 Section 138B(2).

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

107 Section 138B(4).

108 Section 138C.

109 Section 138B(2).

110 Section 138B(3) or (4).

111 Section 138C.

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

Other matters that may arise during a dispute

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

Statutory time bar and exceptions to the time bar

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

276. In respect of a dispute, the assessment will be amended (if necessary) after the disputes process is completed. The Commissioner will endeavour to complete the disputes process within four years.

277. This four-year statutory time bar does not apply to the same extent to limit the Commissioner's ability to issue an assessment that decreases the amount of the initial assessment and issue a refund of a taxpayer's overpaid tax[112] or when dealing with certain tax credits.[113]

278. When increasing a taxpayer's liability, the Commissioner is not subject to the statutory time bar if the Commissioner considers the taxpayer has:[114]
    - provided a fraudulent or wilfully misleading tax return;
    - omitted income for which a tax return must be provided that is of a particular nature or source; or
    - knowingly or fraudulently failed to make a full and true disclosure of the material facts necessary to determine their GST liability.

279. When considering whether these exceptions apply, the Commissioner disregards omissions of relatively small amounts of income.[115]

280. The time bar ensures finality in relation to assessments and is a key protection for most taxpayers. Therefore, any exclusions from the time bar's protection must occur only where an adequate basis exists in fact and law to support this action. The Commissioner must decide whether any of the above exceptions to the time bar apply before determining whether a NOPA can be issued.

281. Any opinion that the Commissioner forms about the application of the exceptions to the time bar must be honestly held and reasonably justifiable on the basis of the evidence available and the relevant law. The decision must be clearly documented and include reference to the grounds and reasoning on which it is based.

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

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

[113] Section LA 6 of the Income Tax Act 2007.

[114] Sections 108(2) and 108A(3).

[115] *Babington v CIR* [1957] NZLR 861.

Time bar waivers

283. If it is contemplated that the disputes process cannot be completed before the statutory time bar period for amending an assessment starts, the parties can agree in writing[116] to waive the time bar for an initial 12 months to enable the full disputes process to be applied. A statutory time bar waiver must be agreed in writing on the prescribed form (Notice of Waiver of Time Bar (IR 775)) and delivered to the Commissioner before the relevant four-year period expires.

284. The taxpayer can then agree to waive the time bar for a further six months after the end of that 12-month period.[117] This notice must be given, in writing, to the Commissioner within the initial 12-month period.

285. The statutory time bar waiver applies only to those years and issues the parties have identified and understood before the initial statutory time bar occurring. Issues not identified at that time remain subject to the original statutory time bar unless any of the statutory exclusions from the time bar apply to them. (The exclusions are discussed from [278])

Exceptions under s 89N

286. As stated at [153], when a NOPA has been issued, the Commissioner follows the disputes process unless an exception under s 89N applies. The application of s 89N is discussed at [319] under "Commissioner's ability to amend an assessment without completing the disputes process".

287. The responsible staff member must obtain and document all administrative approvals for departing from the full disputes process.

Disputable decisions

288. As discussed at [63], a taxpayer can issue a NOPA in respect of a "disputable decision" that is not an assessment.

289. The term disputable decision is widely defined and includes not only an assessment but also a decision of the Commissioner under a tax law.[118] For the purposes of the definition of disputable decision, the word "decision" is also defined to include "the making, giving, or exercising of a discretion, judgment, direction, opinion, approval, consent, or determination by the Commissioner".[119]

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

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

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

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

116 Section 108B(1)(a).
117 Section 108B(1)(b).
118 Section 3(1).
119 Section 3(1).
120 Part 5A.
121 Section 138E.
122 Section 6I.
123 Section 7AA.
124 Section 7AAB.
125 Section 138E(1)(e)(iv).
126 *Vinelight Nominees Ltd v CIR (No 2)* (2005) 22 NZTC 19,519 (HC).

293. Similarly, a decision the Commissioner makes to increase an assessment is not of itself, and in the absence of an assessment, a disputable decision. Any challenge to the correctness of the decision must also be brought in the context of a challenge to the assessment itself.[127]

294. As stated at [290], the definition of disputable decision excludes a decision to issue a Commissioner's NOPA, a disclosure notice or a Commissioner's SOP or a challenge notice. However, a taxpayer may challenge the Commissioner's refusal to accept a late NOPA, NOR or SOP in the Taxation Review Authority within two months from the date of the refusal notice.[128] In this circumstance, the Commissioner's refusal notice is treated as a notice of disputable decision and subject to direct challenge to the Taxation Review Authority, without the taxpayer needing to start an additional dispute with a NOPA.

295. The following example illustrates what is and is not a disputable decision:

- On request, a view is provided to a taxpayer stating that, as a natural person, the Commissioner believes they are a New Zealand resident for taxation purposes (per s YD 1 of the Income Tax Act 2007). This is **not** a disputable decision, because the Commissioner is simply providing a view of the law based on facts the taxpayer supplied. Nothing in s YD 1 allows the Commissioner to determine a taxpayer's residency status. Therefore, it is a decision "about" a tax law rather than being one made "under" a tax law.
- Were the Commissioner to subsequently make a further decision "under" a tax law that incorporated this previously expressed view, this would be a disputable decision and the taxpayer could dispute the Commissioner's decision (including the fact the Commissioner believes they are resident).

Shortfall penalties

296. Shortfall penalties are treated separately to the underlying adjustments on which they have been imposed. In a NOPA, the Commissioner must explain and support their imposition in the same manner as the underlying tax shortfall, and they must be assessed in the same way as the underlying tax.[129] Even though assessments of shortfall penalties relate to the underlying tax, they are not subject to the time bars. (Time bars are discussed from [275].)

297. Where sufficient evidence exists to suggest shortfall penalties should be imposed, it is the Commissioner's practice to propose the shortfall penalties in the same NOPA as the substantive issues (together with any other available alternative penalties that could be imposed). However, shortfall penalties are not proposed in the same NOPA as the substantive issues in four circumstances:

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

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

298. The response period starts on the date the originating document is sent to the recipient. Generally, this will be determined by the date on the document, which, it is assumed, will be that same date the document is actually sent. However, this is a rebuttable presumption. If the taxpayer is able to rebut this presumption this would be relevant in determining whether an exceptional circumstance exists ("exceptional circumstances" are discussed at [301]). Where a due date exists for a

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

128 Section 89K(6).

129 Section 94A(2).

130 Unless the shortfall penalties are imposed under s 141ED (penalty for unpaid amounts of employer's withholding payments).

131 Section 149(5).

response in the disputes process, then it is the Commissioner's view that the responding document must be received by the recipient by that due date.

299. The Commissioner's view is that where a response has a due date in the disputes process, then the recipient must receive the response by that due date.[132]

300. The Commissioner cannot accept a dispute document that a taxpayer issues outside the applicable response period, unless that lateness has arisen:[133]

- because of an exceptional circumstance; or
- the taxpayer can prove a demonstrable intention to enter into or continue the disputes process.

Exceptional circumstances

301. Although s 89K defines exceptional circumstances very narrowly, case law provides some guidance about when the courts would hold that an exceptional circumstance arises:[134]

- A taxpayer's misunderstanding or erroneous calculation of the applicable response period will usually not be regarded as an event or circumstance beyond the taxpayer's control, so is **not an exceptional circumstance**.
- An agent's failure to advise their client they have received a notice of assessment or other relevant documents that has caused the taxpayer to respond outside the applicable response period will **not generally be considered an exceptional circumstance.**
- If the taxpayer has relied on misleading information the Commissioner has given them that causes the taxpayer to respond outside the applicable response period, **an exceptional circumstance can arise**.
- As discussed at [28], **an exceptional circumstance can arise** when the Commissioner is taking or considering taking prosecution action against a taxpayer and that taxpayer, to protect their fair trial rights, chooses not to proceed with the disputes process until either the Commissioner makes a final decision not to undertake prosecution action or the prosecution action is completed.

302. Further examples of situations considered exceptional circumstances beyond a taxpayer's control are in *Tax Information Bulletin Vol 8, No 3 (August 1996).*[135]

303. An exceptional circumstance may also arise where the lateness was minimal or results from one or more statutory holidays falling in the response period. Generally, the Commissioner will accept that a dispute document received within two days of the end of the response period as being received in time where the lateness is minimal. For example, the response period ends on a Saturday and the taxpayer provides a NOR on the following Tuesday. In this circumstance, the Commissioner would treat the response period as ending on the Monday[136] and then accept that the lateness of the NOR (one day) was minimal. If the response period ended on Friday and the taxpayer provided the NOR on the following Monday, the Commissioner would also accept that the lateness is minimal.

304. This general acceptance of two days should not be viewed as an extension of the response period in all circumstances. Besides the degree of lateness, the Commissioner, when exercising this discretion, will objectively consider the:

- real event, circumstance or reason for the taxpayer not issuing a dispute document within the applicable response period; and
- taxpayer's compliance history in relation to the tax types under consideration (for example, the taxpayer may have a history of paying tax late or filing late tax returns or dispute documents).

305. For example, a taxpayer issues a NOPA to the Commissioner two days after the applicable response period has expired. The taxpayer does not provide a legitimate reason for the lateness. The taxpayer also has a history of filing late dispute documents within the minimal allowable lateness period (that is, up to two days outside the applicable response period) and has been previously advised on the calculation of the response period. Although the degree of lateness was minimal each time, the Commissioner would not exercise the discretion in this circumstance.

132 Sections 14 and 14B to 14G.

133 Section 89K(1)(a).

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

135 The item in the *Tax Information Bulletin has no title but is about the new disputes resolution process that came into effect in October 1996.*

136 On the basis of s 55 of the Legislation Act 2019.

306. The Commissioner will consider whether exceptional circumstances exist after receiving a taxpayer's written request to do so. The responsible officer will advise the taxpayer of the receipt of their request and of the Commissioner's responsibility to deal with the request within one month. This and other matters are further discussed at [312], under "Disputant may challenge Commissioner's refusal to accept a late disputes document".

Demonstrable intention

307. The Commissioner can also treat a late NOPA, NOR or SOP as being received within the response period where the Commissioner considers the taxpayer had a demonstrable intention to enter or continue the disputes process at the time the taxpayer failed to act within the applicable response period.[137]

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

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

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

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

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

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

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

312. The Commissioner can accept a disputant's late NOPA, NOR or SOP by providing written advice to this effect to the taxpayer. It is incumbent on the taxpayer to issue their late dispute document to the Commissioner as soon as reasonably practicable after becoming aware of their failure to meet the applicable response period.[139] Where the Commissioner does not accept that documents were received in time, the Commissioner must notify the taxpayer of the Commissioner's decision within one month from when the late document was issued to the Commissioner. This is known as a **refusal notice.**[140]

313. Where the Commissioner omits to issue a refusal notice or issues a refusal notice outside the one-month timeframe, the Commissioner is deemed to have issued a refusal notice on a date one month from the date that the taxpayer issued the late document.[141]

314. The taxpayer may challenge the Commissioner's refusal notice by filing proceedings directly with the Taxation Review Authority within two months from the date of the refusal notice (irrespective of whether the refusal notice was actually issued by the Commissioner or deemed to have been issued). This is on the basis that the refusal notice is treated as a notice of disputable decision.[142]

137 Section 89K.

138 *Gisborne Mills Ltd v CIR* (1989) 13 TRNZ 405.

139 Section 89K(1)(b).

140 Section 89K(4).

141 Section 89K(5).

142 Section 89K(6).

315. Where the Commissioner or Taxation Review Authority determines that exceptional circumstances existed, the response period is deemed to commence on the day of the decision finding favour with the taxpayer's request for exceptional circumstances.[143]

Exception to the response period for a Commissioner's NOR

316. As previously stated, the Commissioner can apply to the High Court for an order that a Commissioner's NOR can be issued outside the two-month response period if an exceptional circumstance has occurred or has prevented the Commissioner from issuing a NOR to the taxpayer within the response period.[144] The Commissioner will apply this requirement for exceptional circumstances consistently with the similar requirement relating to taxpayers in s 89K(1)(a) (see the discussion from [301]).

317. What constitutes an **exceptional circumstance** is illustrated in Example 3.

> **Example 3: An exceptional circumstance**
>
> An earthquake damaged an Inland Revenue office during the applicable response period for a taxpayer's NOPA. The taxpayer's NOPA although delivered, could not be subsequently accessed. The Inland Revenue officer could not access the NOPA within the applicable response period. The absence of information has prevented the Commissioner from forming a view on the subject matter in dispute. The Commissioner can apply for a High Court order for further time to issue a NOR.

318. Example 4 illustrates what is **not an exceptional circumstance.**

> **Example 4: What is not an exceptional circumstance**
>
> The Inland Revenue officer to whom a taxpayer's NOPA was assigned is absent on annual leave at the end of the response period. The Inland Revenue officer does not arrange for another officer to prepare and issue a NOR to the taxpayer within the response period. In this circumstance, the Commissioner does not consider that an exceptional circumstance prevented the Inland Revenue officer from rejecting the adjustment within the response period, and the Commissioner will be deemed to have accepted the taxpayer's proposed adjustments.

Commissioner's ability to amend an assessment without completing the disputes process

319. When the Commissioner and the taxpayer cannot agree on the proposed adjustment, the Commissioner cannot amend an assessment without completing the disputes process, unless one of the statutory exceptions applies.[145] These exceptions are that:

- in the course of the dispute, the Commissioner considers the taxpayer has committed an offence under an Inland Revenue Act that has had the effect of delaying the completion of the disputes process;[146]
- a taxpayer involved in a dispute, or person associated with them, may take steps to shift, relocate or dispose of the taxpayer's assets to avoid or delay the collection of tax, making the issue of an assessment urgent;[147]
- 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;[148]
- the taxpayer fails to comply with a statutory requirement for information relating to the dispute;[149]
- the parties agree (recording their agreement in a document) the dispute would be resolved more efficiently by the court or Taxation Review Authority without completing the disputes process;[150]

143 Section 89AC.
144 Section 89L(1).
145 Contained in s 89N.
146 Section 89N(1)(c)(i).
147 Section 89N(1)(c)(ii) and (iii).
148 Section 89N(1)(c)(iv).
149 Section 89N(1)(c)(vi).
150 Section 89N(1)(c)(viii).

- the parties agree (recording their agreement in a document) to suspend the disputes process pending the outcome of a test case;[151] and
- the Commissioner or taxpayer accepts the proposed adjustment.[152]

320. The Commissioner's view is that the parties should try to resolve the dispute as early as possible and this should be a focus throughout all stages of the disputes process. If this is not possible and any of the above exceptions applies, the Commissioner can amend an assessment or issue a challenge notice without completing the disputes process.[153] Where this occurs, the disputes process will conclude, and the dispute will not go through the adjudication phase.

321. Where the above exceptions do not apply, the Commissioner may issue an amended assessment or challenge notice where the Commissioner:

- or taxpayer accepts the NOPA, NOR, or SOP issued by the other party; or
- has considered a SOP the taxpayer issued.[154]
- The Commissioner may also apply to the High Court for an order to allow more time to complete or dispense with the disputes process.[155] Whether the Commissioner has adequately considered a SOP will depend on what constitutes a reasonable length of time and level of analysis for that SOP given the circumstance of the case (for example, the length of the SOP and the complexity of the legal issues. For further information see [259]).

322. Where an assessment is amended or a challenge notice issued, the taxpayer can challenge the Commissioner's assessment by filing proceedings in the Taxation Review Authority or High Court within the applicable response period; that is, within two months starting on the date the notice of assessment or the challenge notice is issued.

Taxpayer requirements when wanting to opt out of the disputes process after the conference phase

323. The Commissioner and a taxpayer can enter into an agreement not to complete the disputes process, if they are satisfied the dispute can be more efficiently resolved by a hearing authority. This is known as opting out.[156] The Commissioner will not agree to the taxpayer opting out unless a conference meeting has occurred.

324. Where the taxpayer has participated meaningfully during the conference phase and signed a declaration that all material information has been provided, the Commissioner will agree to the taxpayer's preference to opt out of the disputes process if the:

- total amount of tax in dispute is $75,000 or less, except where the dispute is part of a wider dispute (see from [325]);
- dispute turns on issues of fact only (for example, facts that are to be determined by reference to expert opinions or valuations) (see from [328]);
- dispute concerns facts and issues waiting to be resolved by a court in another case (see from [330]); or
- dispute concerns facts and issues similar to those considered by the TCO if similar issues have been considered in a previous dispute (see from [333]).

Threshold of $75,000 or less

325. The Commissioner will agree to a taxpayer opting out of the disputes process if the total amount of core tax in dispute is $75,000 or less. In this regard, the "core tax in dispute" refers to the tax on all of the proposed tax adjustments for all periods or years in dispute. This $75,000 or less threshold does not apply if the dispute is part of a wider dispute that involves several taxpayers.[157]

326. The $75,000 or less threshold excludes:

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

151 Section 89N(1)(c)(ix).

152 Section 89N(2)(b).

153 Section 89P.

154 Section 89N(2)(a) and (b).

155 Section 89N(3).

156 Section 89N(1)(c)(viii).

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

327. In some disputes, adjustments may be proposed in respect of more than one tax type or more than one return period or income year. The $75,000 or less threshold applies to the total amount of tax in the **same** dispute. The threshold will consider:
    - the proposed adjustments in the parties' NOPA;
    - any variation of the amount of tax in dispute due to the partial acceptance of the parties' NOPA; and
    - any variation of the net total amount of tax in dispute as agreed between the parties during the conference phase.

Dispute turns on issues of fact only

328. The Commissioner will agree to a taxpayer's request to opt out if the dispute turns on issues of fact or evidence only. The issues of fact requirement may apply where the disputed facts are to be determined by reference to expert opinions or valuations.
329. Disputes on tax avoidance issues will not meet the issues of fact requirement. In these disputes, case law requires consideration of issues such as whether the arrangement has used a specific provision in a way that cannot have been within Parliament's contemplation when it enacted the provision. This involves analysing mixed questions of law and fact.

Dispute concerns facts and issues waiting for court resolution of another case

330. The opt-out process is available if the facts and issues relating to the dispute are similar to those waiting for resolution by a court.
331. A taxpayer may become aware of a current court case that concerns facts and issues they consider to be similar to their dispute. The Commissioner will consider this position when deciding whether to accept the taxpayer's request. In considering the request, while Inland Revenue will advise the taxpayer of its views as to the similarity of the cases, it will not comment on the merit of the current court case or the plaintiff's tax affairs due to the secrecy provisions in s 18.
332. A taxpayer may not be aware at the time of issuing the NOPA or during the conference phase of the existence of similar cases that are subject to court proceedings. The taxpayer may still request to opt out of the disputes process without this previous knowledge.

Dispute concerns facts and issues similar to those the TCO considered in a separate dispute

333. The opt-out process is available if the facts and issues relating to the dispute are similar to those the TCO has already considered. A taxpayer may ask to opt out of the disputes process because a previous adjudication decision was in favour of the Commissioner and they consider it unlikely the Commissioner's view will change. In considering the taxpayer's request, Inland Revenue will advise the taxpayer of its views as to any similarity but will consider the confidentiality provisions of the Act.[158]
334. In some cases, a taxpayer may not be aware of similar disputes the TCO has considered when the taxpayer issues the NOPA or participates at a conference meeting (perhaps because they are not aware of the appropriate Technical Decision Summary[159] published by the TCO). Inland Revenue officers may be aware of other similar disputes, and may choose to advise the taxpayer that, should the taxpayer ask to opt out, Inland Revenue would be likely to agree. However, Inland Revenue must consider the confidentiality provisions of the Act when considering the extent of any information that can be shared with the taxpayer.

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

335. Sometimes it is necessary for Inland Revenue to deal with many taxpayers who are all affected by the same disputed matter. Given Inland Revenue's limited resources and bearing in mind taxpayer compliance costs it may not be appropriate for all the cases to proceed through the full dispute process.
336. This can arise, for instance, where:
    - the taxpayers are all investors in a particular scheme;
    - the taxpayers have entered into similar arrangements and have the same promoter;

[158] Section 18.

[159] Technical Decision Summaries provide an anonymised summary of a decided adjudication.

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

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

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

338. Where several cases on the same issue are under dispute and at least one has been referred to the TCO, which has still to reach a conclusion on the matter, it may be possible for other affected taxpayers and the Commissioner to merely agree, subject to statutory time bar issues, to place their case on hold while the TCO undertakes its analysis on the case(s) already referred to it.

339. However, care needs to be taken to ensure the time bar will not be breached and consideration will be given to obtaining a time bar waiver. As the taxpayer needs to agree to providing a time bar waiver, they still have the choice to progress the dispute through the full disputes process.

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

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

341. It is the Commissioner's policy that a finding for the taxpayer in a previous dispute will generally lead to the other disputes being withdrawn, particularly if the disputes are in respect of the same transaction. However, in some rare situations further consideration of the issue is required at a national level before the Commissioner will apply the conclusions reached in a particular adjudication report more broadly to other taxpayers.

Where the TCO has looked at an issue several times and consistently taken a view supporting the Commissioner

342. Where the TCO has looked at an issue several times and consistently taken a view supporting the Commissioner, agreement between the parties to opt out is an available option.

343. In these circumstances, the Commissioner will indicate to the taxpayer that the dispute could be suitable for them to opt out of the process. However, taxpayers still have the choice to progress through the full disputes process. The ability to opt out of the disputes process is discussed more generally from [323].

Circumstances under which the Commissioner may issue an assessment without first issuing a NOPA

344. The general rule is that the Commissioner must issue a NOPA before making an assessment unless one of 19 statutory exceptions to the general rule applies. These exceptions can apply independently or together, depending on the circumstances.

345. When using any of these exceptions to make an assessment that has the effect of increasing a taxpayer's tax liability, the Commissioner will consider whether shortfall penalties will apply. Where the Commissioner intends to apply a shortfall penalty, the Commissioner must issue a NOPA in respect of that penalty.

346. The 19 exceptions are as follows.

Exception 1: The assessment corresponds with a tax return provided by a taxpayer[160]

347. Generally, a taxpayer makes and files a tax return that includes an assessment. If the taxpayer's assessment is supported by the information in the tax return and the Commissioner agrees with the taxpayer's return and assessment, then the Commissioner does not need to commence the disputes process.

[160] Section 89C(a).

Exception 2: A simple or obvious mistake or oversight in a taxpayer's return[161]

348. Examples of a simple mistake or oversight are:[162]
    - mathematical errors;
    - transposition errors (for example, an error in transposing numbers from one box to another in a tax return);
    - double counting (for example, inadvertently including in the taxpayer's income the same item twice); and
    - not claiming or incorrectly calculating a credit to which the taxpayer is entitled.
349. Whether an error amounts to a simple or obvious mistake or oversight is determined on a case-by-case basis and has no dollar limit. The Commissioner may consider whether this exception applies irrespective of whether the taxpayer has asked the Commissioner to make the amendment under s 113.

Exception 3: An agreement exists to amend a previous tax position taken by a taxpayer[163]

350. At any time, the Commissioner or taxpayer may propose an adjustment with which the other party agrees. While the agreement between the parties can be oral, it is the Commissioner's preference that such agreement is recorded in writing.
351. However, if the parties agree on only one adjustment and dispute others in respect of the same assessment, the Commissioner cannot issue an assessment until the disputes process has been completed. The Commissioner cannot make a partial assessment.

Exception 4: The assessment reflects an agreement reached between the Commissioner and a taxpayer[164]

352. The same procedures apply as for exception 3. However, the agreement the parties reach does not have to relate to a tax position the taxpayer has previously taken.
353. For example, where, under s 6A, the Commissioner settles a tax case or a dispute, the Commissioner will usually enter an individual settlement deed with the taxpayer to confirm the settlement. The Commissioner will then give effect to that settlement deed by issuing an assessment to the taxpayer using this exception.

Exception 5: The assessment is being made on material facts and relevant law that are identical to those for an assessment for the taxpayer for another period that is the subject of court proceedings[165]

354. The Commissioner can issue an assessment to the taxpayer in relation to a period in circumstances where the facts and law being relied on are identical to those in another period that is already before the court proceedings. The Commissioner does not have to follow the disputes process for the same issue because the matter is already before the court to resolve; a dual process towards resolution does not need to be adopted.
355. However, a taxpayer who has been issued with an assessment in relation to another period under this exception can dispute that assessment by challenging the assessment by starting proceedings in a hearing authority.[166]

Exception 6: The Commissioner has reasonable grounds to believe a notice may cause the taxpayer (or an associated person) to leave New Zealand or take steps to move or hide the taxpayer's assets, making it harder for the Commissioner to collect tax from the taxpayer[167]

356. This exception is intended to protect the revenue. It does not require the taxpayer to have physical possession of the assets.
357. Use of this exception needs to be supported by evidence of the "reasonable grounds" relied on. For example, these reasonable grounds could be supported by the taxpayer's correspondence with third parties, an application to emigrate overseas or statements made by the taxpayer (for instance, transcripts of interviews with the taxpayer). These reasonable grounds do not have to be absolute proof but must be reasonable in the circumstances.

161 Section 89C(b).
162 *Case V17* (2002) 20 NZTC 10,192, TRA No 002/01.
163 Section 89C(c).
164 Section 89C(d).
165 Section 89C(db).
166 Section 138B(3) and (4).
167 Section 89C(e).

Exception 7: The Commissioner has reasonable grounds to believe the taxpayer has been involved in fraudulent activity[168]

358. A taxpayer will have been involved in a fraudulent activity if they have engaged or participated in any fraudulent activity that would have tax consequences for them. If the taxpayer has not been convicted of an offence relating to a fraudulent activity, this exception can still apply provided the Commissioner believes on reasonable grounds that the taxpayer has been involved in fraudulent activity.

359. If the Commissioner wishes to use this exception, it needs to be supported by sufficient evidence of the "reasonable grounds" relied on (as with exception 6). These reasonable grounds do not have to be absolute proof of fraudulent activity but must be reasonable in the circumstances.

Exception 8: The assessment corrects a tax position taken by a taxpayer that, in the Commissioner's opinion, is vexatious or frivolous[169]

360. If the Commissioner wishes to apply this exception, it needs to be supported by evidence showing:

- the action or inaction giving rise to the tax positions previously taken; and
- why that action is considered to be vexatious or frivolous and any shortfall penalties or prosecution consideration.

361. A tax position taken as result of a vexatious or frivolous act will generally be one that is:

- clearly lacking in substance (for example, where the taxpayer continues to take the same position that has previously been resolved in the Commissioner's favour); or
- motivated by the sole purpose of delay.

Exception 9: The assessment is being made because of a direction or determination of a court or the Taxation Review Authority[170]

362. A direction or determination includes any court or Taxation Review Authority decision that affects the taxpayer in relation to a specific tax period. It also includes a court decision on a "test case" that applies to the taxpayer irrespective of whether they were a party to the test case.

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

Exception 10: The taxpayer has not provided a tax return and a "default assessment" is made[171]

364. Where a taxpayer fails to provide a tax return, the Commissioner can make an assessment or amended assessment under s 106. This is commonly known as a "default assessment".

365. Where a taxpayer wishes to dispute a default assessment, the taxpayer must, within the applicable response period:[172]

- provide a tax return for the period to which the default assessment relates (notwithstanding that the tax return will not include the taxpayer's assessment); and
- issue a NOPA to the Commissioner in respect of the default assessment.

366. The requirement to provide a tax return in respect of a default assessment before issuing a NOPA is an additional requirement of the disputes process. This ensures the taxpayer has provided the information required by the tax law (that is, the tax return) before they are entitled to dispute the assessment. This was discussed at [56] to [62].

Exception 11: The taxpayer has failed to make or account for tax deductions[173]

367. This exception is intended to address a taxpayer's failure to withhold, deduct or account to the Commissioner for an amount of tax, including PAYE, schedular payments to non-resident contractors, and resident withholding tax.

168 Section 89C(eb).

169 Section 89C(f).

170 Section 89C(g).

171 Section 89C(h).

172 Four months from the date the default assessment is issued.

173 Section 89C(i).

368. The Commissioner may not apply this exception if a dispute involves statutory interpretation (for example, whether a particular item attracts liability for resident withholding tax, meaning the taxpayer was required to withhold or deduct resident withholding tax) and/or shortfall penalties are to be imposed.

Exception 12: The taxpayer has already provided a NOPA[174]

369. If a taxpayer proposes an adjustment in a NOPA[175] with which the Commissioner agrees, then an assessment can be issued.

Exception 13: The assessment corrects a tax position taken by the taxpayer or an associated person as a consequence of an incorrect tax position taken by another taxpayer[176]

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

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

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

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

Exception 15: The assessment is as a result of amending a qualifying individual account for incorrect or missing information[178]

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

Exception 16: The Commissioner is making an amendment before finalising the account of a qualifying individual[179]

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

Exception 17: The assessment of certain penalties[180]

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

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

174 Section 89C(j).

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

176 Section 89C(k).

177 Section 89C(ka).

178 Section 89C(l).

179 Section 89C(lbaa).

180 Section 89C(lba).

181 See s 3(1) ("CRS applied standard") and s 142H

182 Section 142I.

Exception 18: The assessment will extinguish all or part of a tax loss[183]

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

Exception 19: The assessment includes a calculation of Working for Families tax credits[184]

377. Where the Commissioner is giving effect to a Working for Families tax credit (also known as WfFTC) entitlement, the Commissioner is not required to issue a NOPA.

This Standard Practice Statement is signed on 24 February 2023.

Rob Falk
Technical Lead, Technical Standards - Legal Services

[183] Sections 89C(lb) and 177C(5).

[184] Section 89C(m).

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Legislation Act 2019, ss 52, 55

New Zealand Bill of Rights Act 1990, s 25

Tax Administration Act 1994, ss 3 ("CRS applied standard", "decision", "disputable decision", "reportable income") 6A, 6I, 7AA, 7AAB, 14, 14B to 14G, 17B, 18, 22D, 22G to 22I, 89AB, 89AC, 89B to 89D, 89DA, 89F to 89P, Part 5A, ss 92, 92B, 94A, 106, 108, 108A, 108B, 113, 114, Part 8, Part 8A (ss 138B, 138C, 138E, 138G), ss 141ED, 149, 177C, Part 11B

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OPERATIONAL STATEMENT

Operational statements set out the Commissioner of Inland Revenue's view of the law in respect of the matter discussed and deal with practical issues arising out of the administration of the Inland Revenue Acts.

OP 23/01: Commissioner's operational position on professional directors and board members incorrectly registered for GST

The Commissioner has released three Public Rulings concerning the GST treatment of fees paid to directors and board members:

- **BR Pub 23/01 "Goods and Services Tax – Directors' Fees";**
- **BR Pub 23/02 "Goods and Services Tax – Fees of Board Members not appointed by the Governor-General or Governor-General in Council"; and**
- **BR Pub 23/03 "Goods and Services Tax – Fees of Board Members appointed by the Governor-General or Governor-General in Council".**

This Operational Position gives guidance on how these rulings will be applied.

In the Commentary to public ruling BR Pub 23/01 "Goods and Services Tax – Directors' Fees" the Commissioner has expanded on the view taken in the previous equivalent ruling (BR Pub 15/10 "Goods and Services Tax – directors' fees") and concluded that a person who provides only directorship services is not eligible to be registered for GST. (A similar treatment applies to board members covered by public ruling BR Pub 23/02 "Goods and Services Tax – Fees of Board Members not appointed by the Governor-General or Governor-General in Council".) While this treatment of professional directors and board members is not a change in the Commissioner's view it is the first time that this view has been published in respect of this issue.

The Commissioner is aware that some professional directors[1] are registered for GST, having incorrectly taken the view that they are carrying on a taxable activity. The Commissioner will not require these taxpayers to *retrospectively* deregister. However, those professional directors who are not carrying on a taxable activity must deregister with effect from 30 June 2023, or such other date as may be determined by the Commissioner.

On deregistration a taxpayer may be required to return GST on the market value of any goods and services that they retain that had formed part of their taxable activity (s 5(3) of the Goods and Services Tax Act 1985).

Professional directors who may be affected by BR Pub 23/01 "Goods and Services Tax – Directors' Fees" will likely come within one of the following categories:

1. Professional directors who are registered but should never have been registered. This group includes people who never had a separate taxable activity (consulting activity, law practice, accounting practice etc) but notwithstanding this were registered for GST.
2. Professional directors who are registered and were appropriately registered at that time because they carried on a separate taxable activity aside from their directorships but who have subsequently ceased to carry on that other activity and whose only "taxable supplies" are from their directorship fees and so should now be deregistered.
3. Professional directors who are registered and were appropriately registered at that time because they carried on a separate taxable activity under which they included their directorship income, and who still carry on that separate taxable activity. This group can continue to remain registered for GST and continue to operate on that basis. However, if the turnover of their "non-directorship income" falls below the registration threshold they may choose to deregister consistent with category 2 above.

This operational position does not apply to professional directors who are registered and were appropriately registered at that time because they carried on a taxable activity separate to their directorships (for example, as an accountant), and who still carry on a separate taxable activity (whether above or below the registration threshold) and wish to remain registered for GST.

[1] References in this Operational Position to professional directors should also be treated as applying to board members in an equivalent position under BR Pub 23/02.

Any professional director who should be deregistered because of the Commissioner's interpretation (or who wishes to deregister based on category 3 above) should utilise the "cancel your GST registration" process in myIR or complete an IR315 business cessation form.

Any professional director who wishes to discuss their situation with Inland Revenue should send a web message through myIR by first selecting "GST" as the subject from the drop-down menu, and then referencing BR Pub 23/01 to enable analytics to identify these messages. Please outline in the web message the circumstances you would like to discuss.

TECHNICAL DECISION SUMMARIES

Technical decision summaries (TDS) are summaries of technical decisions made by the Tax Counsel Office. As this is a summary of the original technical decision, it may not contain all the facts or assumptions relevant to that decision. A TDS is made available for information only and is not advice, guidance or a "Commissioner's official opinion" (as defined in s 3(1) of the Tax Administration Act 1994). **You cannot rely on this document as setting out the Commissioner's position more generally or in relation to your own circumstances or tax affairs**. It is not binding and provides you with no protection (including from underpaid tax, penalty or interest).

Whether settlement payments were taxable employment income

Technical decision summary - Adjudication

Decision date | Rā o te Whakatau: 30 June 2022

Issue date | Rā Tuku: 22 February 2023

Subjects | Kaupapa

Income tax: Settlement payment; whether employment income or payment for hurt and humiliation and therefore non-taxable; whether Record of Settlement is a sham.

Abbreviations | Whakapotonga

The abbreviations used in this document include:

CCS	Customer and Compliance Services, Inland Revenue
Commissioner	Commissioner of Inland Revenue
TCO	Tax Counsel Office, Inland Revenue

Taxation laws | Ture tāke

Section CE 1 and s CE 10 of the Income Tax Act 2007.

Facts | Meka

1. The dispute concerned the receipt by the Taxpayer from their former employer (**Employer**) of payments (**Settlement Payments**) under a settlement agreement between the Taxpayer and the Employer (**Record of Settlement**). The Employer withheld PAYE from the payments.
2. The Record of Settlement described the payments as salary and wages and that they were to be made over time, and the taxpayer's termination date was not until the payments ended.
3. The Taxpayer considered the Settlement Payments were in the nature of compensation for humiliation, loss of dignity, and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000 (ERA 2000) - referred to in this report as hurt and humiliation payments. The Taxpayer relied on the Commissioner's Public Ruling BR Pub 06/05 Assessability of Payments under the Employment Relations Act for Humiliation, Loss of Dignity, and Injury to Feelings (Inland Revenue, June 2006) (BR Pub 06/05) to argue the personal grievance document is the correct starting point for determining whether a payment is a hurt and humiliation payment.
4. Customer and Compliance Services, Inland Revenue (CCS) considered the payments were amounts derived in connection with employment or exit inducements and argued the Record of Settlement is the correct starting point for determining the true nature of the Settlement Payments.

5. The Taxpayer also argued the Settlement Payments could not have been ordinary salary or resignation payments because they had resigned before the payments were made. CCS argued the Taxpayer's termination date was as stated in the Record of Settlement.
6. The Taxpayer also argued the Record of Settlement was a sham to the extent it described the Settlement Payments as ordinary salary or resignation payments and is fraudulent and illegal. CCS disputed this.

Issues | Take

7. To establish whether the Settlement Payments were non-taxable capital receipts or taxable employment income for the Taxpayer, the following issues were considered:
    - Were the Settlement Payments in the nature of payment(s) for hurt and humiliation under s 123(1)(c)(i) of the ERA 2000?
    - Was the Record of Settlement a "sham" so far as it purports to describe amounts paid under s 123(1)(c)(i) of the ERA 2000 as regular salary and resignation payments, and in connection with this:
        - Was the Taxpayer nevertheless entitled to rely on sham because they were induced to enter into the Record of Settlement by duress, misrepresentation, or contractual mistake?
        - Was the Record of Settlement fraudulent (illegal)?
        - If the Taxpayer can assert sham (or if the Settlement Payments are in whole or in part in the nature of hurt and humiliation payments) has the Taxpayer proved the quantum of the Settlement Payments that can be apportioned to hurt and humiliation?
8. There was also a preliminary issue on the onus and standard of proof.

Decisions | Whakatau

9. TCO decided:
    - The Settlement Payments were not in the nature of payments for hurt and humiliation under s 123(1)(c)(i) of the ERA 2000.
    - The Record of Settlement was not a sham to the extent it describes the Settlement Payments as ordinary salary or resignation payments.
        - If an authority or court found that the Record of Settlement is in part a sham, it is in any event considered that the Taxpayer could not assert sham on the basis that they are not bound by the Record of Settlement for reasons of duress, mistake, or misrepresentation.
        - The Record of Settlement was not fraudulent (illegal).
        - If an authority or court found that the Settlement Payments were in the nature of hurt and humiliation payments or the Record of Settlement was in part a sham, it is considered that a court or authority would seek to apportion the Settlement Payments having regard to the evidence available with the onus of proof resting with the Taxpayer to prove the quantum of any apportionment.

Reasons for decisions | Pūnga o ngā whakatau

Preliminary Issue | Take tōmua: Onus and standard of proof

10. The onus of proof in civil proceedings[1] is on the taxpayer, except for shortfall penalties for evasion or similar act, or obstruction.[2] The taxpayer must prove that an assessment is wrong, why it is wrong, and by how much it is wrong.[3]

[1] Challenge proceedings (ie, the proceedings that would follow if this dispute proceeds to the Taxation Review Authority or a court) are civil proceedings.

[2] Section 149A(2) of the Tax Administration Act 1994 (TAA).

[3] *Buckley & Young Ltd v CIR (1978) 3 NZTC 61,271 (CA); Beckham v CIR (2008) 23 NZTC 22,066 (CA).*

11. The standard of proof in civil proceedings is the balance of probabilities.[4] This standard is met if it is proved that a matter is more probable than not. TCO applied a similar standard to considering the issues in this report, given the Taxpayer's ability to challenge any subsequent assessments that are made in civil proceedings.

Issue 1 | Take tuatahi: Nature of the Settlement Payments

12. The Taxpayer contended that:
    - the main document for determining the nature of the Settlement Payments was the personal grievance, not the Record of Settlement. The nature of the payments was determined by considering whether the Taxpayer had a genuine personal grievance for hurt and humiliation. This was consistent with IR's Public Ruling BR Pub 06/05,
    - the evidence showed that the Taxpayer did have a genuine personal grievance against the Employer. As well as the personal grievance document and negotiations correspondence, the Taxpayer supplied medical evidence to support their claim, and
    - based on the evidence, the Settlement Payments were genuine payments for hurt and humiliation under s 123(1)(c)(i) of the ERA 2000. It did not matter that they were not described as such in the Record of Settlement. The payments could not have genuinely been for the matters described in the Record of Settlement because the Taxpayer had resigned at the beginning of the period for which they were paid.
13. CCS argued that:
    - the nature of the Settlement Payments was determined by looking at the relevant settlement agreement – in this case the Record of Settlement, and
    - based on the Record of Settlement, the Settlement Payments were income from employment for the Taxpayer under ss CE 1 or CE 10 of the ITA 2007.
14. TCO considered the Commissioner's Public Ruling BR Pub 06/05 states that it applies to "payments that are genuinely and entirely for compensation for" hurt and humiliation. The parties did not dispute that BR Pub 06/05 correctly states how the tax laws apply to hurt and humiliation payments, i.e., they are capital (non-taxable) receipts. The Commentary on the Ruling states that hurt and humiliation payments stem from a personal grievance. There was originally a personal grievance in this case.
15. However, the Commentary on BR Pub 06/05 must be read in context. It is well established by case law that the tax consequences of transactions flow from the "true" (i.e., "genuine") legal nature of the arrangements the parties have entered into. This "true" legal nature is ascertained by analysing the contractual arrangements the parties actually entered into and carried out, rather than by reference to the broad economic substance of the arrangements.
16. Settlement agreements did not operate as variations to employment contracts. Instead, they replaced the legal rights and obligations the parties had with respect to one another under the relevant employment contract with new rights and obligations. The Record of Settlement therefore replaced the legal rights and obligations the Employer and Taxpayer previously had with respect to one another under the Taxpayer's employment contract with a new set of legal rights and obligations. As such, the Record of Settlement was the correct starting point for determining the true (or genuine) nature of the Settlement Payments.
17. The case law provides that a contract (in this case the Record of Settlement) should be interpreted objectively, both by reference to its text and to any relevant extrinsic evidence (i.e., evidence outside the text of the contract). The relevant enquiry is what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean[5].
18. An objective interpretation of the Record of Settlement leads to the conclusion that the Settlement Payments were not "payments that are genuinely and entirely for compensation for" hurt and humiliation, but instead were payments for employment services or an inducement for the Taxpayer to leave their employment. This was because the Taxpayer reached a negotiated settlement, and as part of that process, they agreed to give up their personal grievance hurt and humiliation claim in exchange for no admission of liability on the part of the Employer and no payment of compensation "for" hurt and humiliation. Although TCO did not doubt that the Taxpayer truly believed they had a genuine claim for hurt

4 Section 149A(1) of the TAA; *Yew v CIR (1984) 6 NZTC 61,710 (CA); Birkdale Service Station Ltd v CIR (1999) 19 NZTC 15,493 (HC); Case X16 (2005) 22 NZTC 12,216; Case Y3 (2007) 23 NZTC 13,028.*

5 *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98 at 114 to 115. See also Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5, and Bathurst Resources Ltd v L&M Coal Holdings Ltd [2021] NZSC 85*

and humiliation, the Taxpayer chose to settle their claim rather than to prove it in the ERA or Employment Court. It was not open to the Taxpayer to prove their claim by providing further evidence of the personal grievance in this dispute.

19. In relation to the Taxpayer's argument that they had resigned and so could not have received income from employment, whether or not the parties described the arrangements they made as "garden leave" in the Record of Settlement or while negotiating, based on an objective interpretation of the Record of Settlement the Taxpayer was in fact on "garden leave" between reaching the settlement and their contractually agreed termination date. The "nomenclature used" (i.e., name given to the arrangement) by the parties was not decisive – what was important was that they were not required to attend work for a period before the legally agreed termination date.

20. To conclude, based on an objective analysis of the Record of Settlement, the "true" (or "genuine") legal nature of the Settlement Payments was as they were described in the Record of Settlement.

Issue 2 | Take tuarua: Whether there is a sham

21. CCS argued that the Record of Settlement was not a "sham" so far as it purported to describe amounts paid under s 123(1)(c)(i) of the ERA 2000 as regular salary and resignation payments because:

- An objective assessment of the Record of Settlement and surrounding evidence (the personal grievance, negotiation settlement correspondence and lawyer's notes) showed that the legal rights and obligations created by the parties were as they had been recorded in the Record of Settlement. Although the Taxpayer had requested a payment under s 123(1)(c)(i) of the ERA 2000, the Employer was on record as not being prepared to make such a payment. The Taxpayer had ultimately signed (and so accepted the written terms of) the Record of Settlement,
- The evidence provided by the Taxpayer did not prove that it was the subjective intention of the parties to create a document that did not reflect the true legal rights and obligations existing between the parties so as to deceive a third party. The statement made by the Employer (that the Employer is a Crown Entity and as such it must comply with the Crown Entities Act 2004 and guidance from the Auditor-General, and is subject to public scrutiny; and because of this the Employer was not prepared to make payments outside of its contractual parameters) should be taken at face value, and
- There was no evidence to suggest that the Taxpayer, as a party to the Record of Settlement, was deceived or induced to execute the Record of Settlement by fraud, mistake, misrepresentation, or duress. The Taxpayer had their own legal representation and a mediator was involved which provided further transparency to the process.

22. The Taxpayer argued that the Record of Settlement is a "sham" so far as it purported to describe amounts paid under s 123(1)(c)(i) of the ERA 2000 as regular salary and resignation payments because:

- An objective assessment of the Record of Settlement and surrounding evidence (the above, plus medical evidence) showed that the legal rights and obligations created by the parties were not as they were recorded in the Record of Settlement. The evidence showed the Taxpayer had a genuine personal grievance, and it is the personal grievance that is the true basis of any claim for a settlement payment. The Settlement Payments were due under s 123(1)(c)(i) whether or not the Employer accepted liability – it is irrelevant that the Employer stated it was not "prepared" to make payments under that section. Further the Taxpayer had resigned from the Employer before the period for which the Settlement Payments were ostensibly made had commenced, and therefore the Settlement Payments were not even remotely connected with employment services provided to the Employer,
- The Employer (and lawyers) did have a subjective intention to deceive a third party - the Employer did not want to describe the payments as for hurt and humiliation because that would require disclosure of the payments to the Crown and the Auditor General. This was also why the Employer refused to describe any of the Settlement Payments as a contribution to the Taxpayer's legal and medical costs, and
- The Taxpayer was not a party to the "sham" because they were not present during the settlement negotiations (and nor was the mediator). Alternatively, (if the Taxpayer was a party to the "sham") the Taxpayer was pressured to sign the Employer's preferred form of document. No written evidence existed to this effect because it was self-evident that the Employer and lawyers would not create written evidence of this nature. There was no evidence to show the Taxpayer was well represented and the Taxpayer's lawyer did not in fact act in the Taxpayer's best interests. The mediator was involved only at the very end of the negotiations and their involvement did not add transparency to the process.

23. TCO reviewed case law and other material and concluded that the following points apply when considering whether a document is a sham:
    - A sham is a document designed to lead third parties to view acts or documents as representing what the parties have agreed when the acts or documents do not show their true agreement.[6]
    - For a document to be a sham, all of the parties to the document must have a common intention that the document is not to create the legal rights and obligations which it gives the appearance of creating.[7] There is no clear authority in New Zealand as to whether a party to a document who goes along with another's wishes has the required intention.
    - A sham transaction may disguise either a real transaction or no transaction at all. Where real payments are made the alleged sham will (if proved) disguise a real transaction.[8]
    - In determining whether a document is a sham a court is not restricted to examining the document and may examine extrinsic evidence. A party refuting an allegation of sham must produce credible evidence that the document is not a sham.[9] Evidence of the parties' subjective intentions and subsequent conduct may be examined.[10] Account may be taken of all of the surrounding circumstances and the documents may be looked at as a whole.
    - Where the parties intend a document to take effect, and it does take effect according to its tenor, the transaction is not a sham.[11]
    - A document may be "brushed aside" only if, and then only to the extent that, it is a sham. Part of a document may be a sham.[12]
    - Sham is a serious allegation. Where a party alleges that a document is a sham, they must point to clear evidence that the document does not genuinely reflect the parties' intentions.[13] If they can do so, the evidentiary onus shifts temporarily to the other party to prove that the document does genuinely reflect the parties' intentions. However, in tax cases, the onus of proof remains with the taxpayer to show on the balance of probabilities that the Commissioner's assessment is wrong, and by how much it is wrong.
24. TCO considered that the Record of Settlement was not, in part, a sham. The Taxpayer asserted that the Employer's subjective intention was to make payments to them of compensation for hurt and humiliation but instead they entered into the Record of Settlement which stated the payments would be made as salary paid for discretionary leave and in lieu of notice, plus accrued holiday entitlements. It was considered, however, that the Employer's subjective intention was in fact to make the payments to the Taxpayer as salary and accrued holiday entitlements – i.e., exactly as they were recorded in the Record of Settlement. The Employer could not, based on the State Services Commissioner's guidance, make the payments as anything else. The purpose of the State Services Commissioner's guidance was to prevent Crown Entities from entering into non-disclosure agreements (NDAs) that they could not comply with because of their obligations to report payments of compensation for hurt and humiliation to the Auditor-General (rather than to disguise the payments and deceive the Auditor-General, as the Taxpayer suggested).
25. If an authority or court found that the Record of Settlement was in part a sham, it was considered that the Taxpayer could not assert sham on the basis that they were not bound by the Record of Settlement for reasons of duress, mistake, or misrepresentation, for the following reasons:
    - In terms of duress, although the Taxpayer was not present at the negotiations with the Employer and its lawyers, and was concerned about damage to their professional reputation, the Taxpayer was advised by lawyers and the settlement was a negotiated one. It did not appear that the Taxpayer's will was overborne by the Employer. Further, the Taxpayer did not bring an action (e.g., in the Employment Relations Authority or Employment Court) on the basis that they had signed the Record of Settlement under duress. A delay of about 30 weeks in bringing an action

6 *Snook v London & West Riding Investment Ltd [1967] 1 All ER 518 (CA). See also Ben Nevis Forestry Ventures Ltd & Ors v CIR [2008] NZSC 115, (2009) 24 NZTC 23,188.*

7 *Bateman Television v Coleridge Finance [1969] NZLR 794 (CA).*

8 *Richard Walter Pty Ltd v FCT 96 ATC 4,550 (FCA).*

9 Abid

10 *Clayton v Clayton [2015] NZCA 30. The Supreme Court agreed with the Court of Appeal: see Clayton v Clayton (2016) 4 NZTR 26-002.*

11 *Paintin and Nottingham Ltd v Miller Gale and Winter [1971] NZLR 164 (CA).*

12 *Re Securitibank Ltd (No 2) [1978] 2 NZLR 136 (CA). See also Glenharrow v CIR (2005) 22 NZTC 19,319 (HC) and Henwood v CIR (1995) 17 NZTC 12,271 (CA).*

13 *Fraunschiel v FCT (1989) 20 ATR 955 (FCA). See also Ben Nevis Forestry Ventures Ltd & Ors v CIR [2008] NZSC 115, (2009) 24 NZTC 23,188.*

(by which time the employer had performed its part of the contract by making the settlement payments) was considered too long in a similar case.[14]

- In terms of contractual mistake, although relief is available under the Contract and Commercial Law Act 2017 (**CCLA 2017**) for a unilateral mistake that is known to the other party to the contract, or for a common or mutual mistake, relief is denied where the correct position becomes known to the party who is seeking relief before they enter into the contract (s 26 of the CCLA 2017) or where the relevant mistake is a mistake in interpreting the contract in respect of which relief is sought (s 25 of the CCLA 2017). If the Taxpayer was mistaken as to the Termination Date after the discussions between their lawyer and their Employer's lawyers, they became aware of their mistake prior to entering into the Record of Settlement. If they received and/or read the Record of Settlement, they made a mistake in interpreting the agreement in respect of which they would be seeking relief (i.e., the Record of Settlement). In terms of a mistake as to the tax treatment - there was no evidence that the Taxpayer considered the tax treatment of the Settlement Payments prior to entering into the Record of Settlement. A failure to consider a matter is not a "mistake" for the purpose of the CCLA 2017, which requires a mistaken belief of fact or law to be held by a party prior to entering into a contract. If the Taxpayer did consider the tax treatment of the Settlement Payments prior to entering into the Record of Settlement, they would have become aware of their mistake prior to entering into the Record of Settlement (as the Settlement Payments were stated to be paid after deduction of tax) or otherwise made a mistake in interpreting the Record of Settlement (again, as the Settlement Payments were stated to be paid after deduction of tax). Therefore, relief for the mistake was excluded by s 26 or s 25 of the CCLA 2017.
- In terms of misrepresentation, a representation must induce a party to enter into a contract if relief is to be granted under the CCLA 2017. A representation will not induce a contract if a reasonable person would not take the meaning from it that was taken by the party to the contract; if the person making the representation did not, viewed reasonably, intend the party who seeks to rely on it to do so; or if the party seeking to rely on the representation becomes aware of its untruth before entering into the contract. Based on the facts of this dispute it was considered that the Taxpayer was not entitled to claim relief for misrepresentation (either by cancelling the contract or by way of damages) under Subpart 3 of the CCLA 2017. Even if the Taxpayer had been entitled to relief for misrepresentation under Subpart 3 of the CCLA 2017, s 149(1)(ab) of the ERA 2000 prevented the Taxpayer from cancelling the Record of Settlement under s 37 of the CCLA.

26. The Record of Settlement was not fraudulent (illegal). The purpose of the State Services Commissioner's guidance was to prevent Crown Entities from entering into non-disclosure agreements that they could not comply with because of their obligations to report payments of compensation for hurt and humiliation to the Auditor-General (rather than to direct Crown Entities to disguise the payments and deceive the Auditor-General, as the Taxpayer suggested).

27. If an authority or court finds that the payments were in the nature of hurt and humiliation payments or the Record of Settlement was in part a sham, it was considered that a court or authority would seek to apportion the Settlement Payments having regard to the evidence available, including the Record of Settlement, evidence of the Taxpayer's entitlements under the Employer's CEA, the amount shown as requested by the Taxpayer in the pre-contractual negotiations correspondence, and the other extrinsic evidence. However, ultimately the onus of proof would rest with the Taxpayer to prove the quantum of any apportionment.

[14] *Sawyer v Vice Chancellor of Victoria University of Wellington [2018] NZEmpC 71.*