



## **Standard Practice Statement**

**SPS 16/05**

# **Disputes resolution process commenced by the Commissioner of Inland Revenue**

## **INTRODUCTION**

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

This Standard Practice Statement ("SPS") sets out the Commissioner's rights and responsibilities with a taxpayer in respect of an adjustment to an assessment when the Commissioner commences the disputes resolution process. Unless specified otherwise, all legislative references in this SPS refer to the Tax Administration Act 1994 ("TAA").

Where a taxpayer commences the disputes resolution process, the Commissioner's practice is set out in ED0188: *Disputes resolution process commenced by a taxpayer*.

The Commissioner regards this SPS as a reference guide for taxpayers and Inland Revenue officers. Where possible, Inland Revenue officers must follow the practices outlined in this SPS.

The disputes resolution process is designed to ensure that there is a full and frank communication between the parties in a structured way within strict time limits for the legislated phases of the process.

The disputes resolution process is designed to encourage an "all cards on the table" approach and the resolution of issues without the need for litigation. It aims to ensure that all the relevant evidence, facts and legal arguments are canvassed before a case proceeds to a court.

This SPS has been updated to include minor amendments to the "response period" as defined in the TAA, and also the introduction of the new communications framework contained in sections 14 to 14G. Where the legislation requires notification of something in terms of section 14C, this statement is written in terms of that notice being "in writing". The new communications framework requires that the notice be delivered by way of post, by personal delivery, by electronic means or by facsimile. The use of the term "in writing" is not intended to imply that delivery is limited to being by post. For further explanation of the new communications framework, refer to *Tax Information Bulletin* Vol.28 No.7 (August 2016).

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

## **Précis of changes to SPS 11/05**

Apart from what are general style and grammar changes, this SPS incorporates the new definition of "response period" contained in section 89AB of the Tax Administration Act 1994 ("the TAA"). It also includes changes necessary as a result of the introduction of the communications framework contained in sections 14 to 14G of the TAA. Some of the examples given in the SPS have also been updated.

### **How these changes impact on the Statement:**

There are changes to the definition of "response period" when a disputant's NOPA or SOP is received late but it is determined that exceptional circumstances exist. Where the Commissioner or the Courts accept that exceptional circumstances exist, the response period will commence from the day on which the Commissioner issues a notice in favour of the taxpayer, or the day on which a taxpayer's challenge to the Commissioner's refusal under section 89K(4) is finally judged successful by the Taxation Review Authority (or the day the Commissioner concedes). This aspect had not been covered by the previous SPS.

The new sections 14 to 14G of the TAA provide a legislative framework that facilitates information flows between the Commissioner and a person, and between two persons where the tax legislation governs that interaction. At the same time as introducing the new provisions, terminology referring to specific modes of communication was also changed to reflect the wording of the new framework. The previous SPS contained a number of references to certain informal or administrative communications that are not specifically provided for in the legislation. Where practical and appropriate, the new SPS is written to reflect wording that is consistent with the law.

For example, in various places the previous SPS used the word "inform" to describe the communication between the Commissioner and a taxpayer. However, often the law does not require such communication. This is an administrative process. The word "inform" is covered by section 14B of the TAA. As such, the new SPS uses the word "advise". This avoids any confusion as to whether this communication is a legislative requirement.

## **APPLICATION**

This SPS applies from 10 October 2016 and incorporates legislative changes to the disputes process enacted in the Taxation (Annual Rates for 2015-16, Research and Development, and Remedial Matters) Act 2016, and also the Taxation (Transformation: First Phase Simplification and Other Measures) Act 2016 which introduced the new communications framework.

It replaces SPS 11/05: *Disputes resolution process commenced by the Commissioner of Inland Revenue* dated 13 October 2011.

## **STANDARD PRACTICE**

### **Background**

1. The tax disputes resolution procedures were introduced in accordance with the recommendations of the Richardson Committee in the *Report of the Organisational Review of the Inland Revenue Department* (April 1994) and were designed to reduce the number of disputes by:
  - (a) promoting full disclosure, and
  - (b) encouraging the prompt and efficient resolution of tax disputes, and
  - (c) promoting the early identification of issues, and

- (d) improving the accuracy of decisions.
2. The disputes resolution process ensures that there is a full and frank communication between the parties in a structured way within strict time limits for the legislated phases of the process.
  3. The disputes resolution process is designed to encourage an “all cards on the table” approach and the resolution of issues without the need for litigation. It aims to ensure and encourage as far as practicable, the disclosure of all relevant facts, evidence, issues and propositions of law before a case proceeds to a court or hearing authority.
  4. In accordance with the objectives of the disputes resolution process, the Commissioner (unless a statutory exception applies under section 89C or 89N(1)(c)) must go through the disputes resolution process before the Commissioner can issue an assessment.
  5. The early resolution of a dispute is intended to be achieved through a series of steps specified in the TAA. The main elements of those steps are the issue of:
    - (a) a notice of proposed adjustment (“NOPA”): this is a notice that either the Commissioner or taxpayer issues to the other advising that an adjustment is sought in relation to the taxpayer’s assessment, the Commissioner’s assessment or other disputable decision (the prescribed form is the *Notice of proposed adjustment (IR 770)*). A NOPA is the formal document which begins the disputes process;
    - (b) a notice of response (“NOR”): this must be issued by the recipient of a NOPA if they disagree with it (the preferred form is the *Notice of response (IR 771)*);
    - (c) a disclosure notice and statement of position (“SOP”): the issue of a disclosure notice and SOP by the Commissioner triggers the requirement for the taxpayer to provide a SOP to continue the dispute. Each SOP must provide an outline of the facts, evidence, issues and propositions of law with sufficient details to support the positions taken. Each party must issue a SOP (the preferred form is the *Statement of position (IR 773)*). The SOPs are important documents because they limit the issues and propositions of law that either party can rely on if the case proceeds to court to what is included in the SOP (unless a hearing authority makes an order that allows a party to raise new issues and propositions of law under section 138G(2)).
  6. There are also two administrative phases in the disputes process: the conference and adjudication phases. If the dispute has not been already resolved after the NOR phase, the Commissioner’s practice will be to hold a conference. A conference can be a formal or informal discussion between the parties to clarify and, if possible, resolve the issues.
  7. If the dispute remains unresolved after the conference phase, the Commissioner will prepare a SOP and refer the dispute to adjudication, except in certain circumstances. One of the circumstances where the Commissioner will not refer a dispute to adjudication is where the Commissioner and the taxpayer have agreed in writing not to complete the disputes process (referred to as “opt out”, see paragraphs 162 to 185).
  8. Adjudication involves an independent review of the dispute by Inland Revenue’s Disputes Review Unit, which was formed to provide an internal but impartial review of unresolved disputes. Adjudication is the final phase in the disputes process before

the taxpayer's assessment is amended (if it is to be amended) following the exchange of the SOPs.

9. Timely progression of disputes through the disputes process may require the use of the Commissioner's information-gathering powers (particularly section 17) before and/or during the disputes process.
10. Inland Revenue has a quality assurance review process known as Critical Task Assurance ("CTA") which is designed to ensure that key pieces of work (including NOPAs and SOPs) are subject to an independent review by Legal and Technical Services ("LTS") before being issued. Given the importance of the disputes process to the Commissioner and to taxpayers, Inland Revenue officers are required to get CTA approval of disputes documents prior to issue.

## Glossary

11. The following abbreviations are used throughout this SPS:

NOPA - Notice of Proposed Adjustment

NOR - Notice of Response

SOP - Statement of Position

Disputes Process - Disputes Resolution Process

TRA – Taxation Review Authority

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**Summary of key actions and indicative administrative timeframes**

12. Set out below is a summary of the key actions and administrative timeframes where the disputes process is commenced by the Commissioner of Inland Revenue.
13. These key actions and timeframes are intended to be administrative guidelines for Inland Revenue officers. Any failure to meet these administrative timeframes will

not invalidate subsequent actions of the Commissioner or prevent the case from going through the disputes process.

Paragraph in the SPS	Key actions	Indicative timeframes
	<b>The Commissioner's NOPA</b>	
30	The Commissioner will advise the taxpayer that a NOPA will be issued.	Usually within five working days before the date that the Commissioner issues a NOPA, but this may happen earlier.
35	The Commissioner will confirm whether the taxpayer has received the Commissioner's NOPA (either by telephone or in writing).	Within 10 working days from the date that the Commissioner's NOPA is issued, where practicable.
	<b>Taxpayer's NOR</b>	
90	The taxpayer issues a NOR in response to the Commissioner's NOPA within the applicable response period.	Within two months from the date that the Commissioner's NOPA is issued, unless section 89K applies.
92	The Commissioner will confirm whether the taxpayer will issue a NOR.	Usually two weeks before the response period for the Commissioner's NOPA expires.
117	The Commissioner will forward the taxpayer's NOR to the responsible officer.	Usually within five working days after the taxpayer's NOR is received.
118	The Commissioner will acknowledge the receipt of the taxpayer's NOR.	Usually within 10 working days after the taxpayer's NOR is received.
123	The Commissioner will advise that the taxpayer's NOR is deficient, but the two-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent immediately after they become aware of the deficiency.
107	The Commissioner will consider the application of section 89K, where a taxpayer's NOR has been issued outside the applicable response period.	The Commissioner will advise the taxpayer of the outcome within one month of receipt of the disputant's "late" notice. If the application is rejected, a refusal notice will be issued.
96	The taxpayer is deemed to accept the Commissioner's NOPA, because they failed to issue a NOR within the applicable response period and section 89K does not apply in the case of a late NOR.	At the end of the two-month period starting on the date of issue of the Commissioner's NOPA.
96	The Commissioner will advise the taxpayer in writing that they are deemed to accept the Commissioner's NOPA.	Usually two weeks after the response period to the Commissioner's NOPA has expired.
119	The Commissioner will advise the taxpayer whether their NOR is being considered, has been accepted, or rejected in full or part.	Usually within one month after the taxpayer's NOR is received.

**WITHDRAWN**

120	If the taxpayer's NOR has been accepted in full, the dispute finishes and Inland Revenue will take appropriate actions (for example, issue an amended assessment).	Usually within one month after the advice of acceptance of the NOR is issued.
	<b>Conference phase</b>	
137	The Commissioner will write to the taxpayer to initiate the conference phase and to offer a facilitated conference.	The Commissioner's offer of a facilitated conference will be made in writing within one month from the date of issue of the taxpayer's NOR. The conference letter marks the start of the conference phase.
139	The taxpayer will advise Inland Revenue whether they will attend the conference meeting, and whether they will accept the conference facilitation offer.	Usually within two weeks of receipt of the conference facilitation letter. If the taxpayer does not respond within this timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer about the letter.
140	When a taxpayer agrees to attend a conference meeting, Inland Revenue will contact the taxpayer to establish a timeframe, and agree on how the meeting will be conducted.	Usually within two weeks following the taxpayer's agreement to a conference.
144	Conference meeting(s) and further information exchange between Inland Revenue and the taxpayer.	The suggested average timeframe of the conference phase is three months, subject to the facts and complexity of the dispute.
	<b>Opt out</b>	
169	The taxpayer may seek to opt out of the disputes resolution process.	Within two weeks from the end of the conference phase.
169	Inland Revenue officer will advise the taxpayer whether the request to opt out has been agreed to.	Usually within two weeks from the date of the taxpayer's request to opt out.
	<b>Disclosure notice and the Commissioner's SOP</b>	
201	The Commissioner will advise the taxpayer that a disclosure notice and the Commissioner's SOP will be issued.	Usually within two weeks before the date that the Commissioner's disclosure notice and SOP are issued.
210	The Commissioner will issue a disclosure notice and the Commissioner's SOP.	Usually within <b>three months</b> from the end of the conference phase or within <b>three months</b> from the date when the Commissioner advises that the taxpayer's opt out request has been declined.
	<b>Taxpayer's SOP</b>	
233	The taxpayer must issue a SOP within the response period for the disclosure notice.	Within two months after the date that the disclosure notice is issued, unless section 89K applies.
236	The Commissioner will confirm whether the taxpayer will issue a SOP.	Usually two weeks before the response period for the Commissioner's disclosure notice expires.



**WITHDRAWN**

237	The taxpayer's SOP is forwarded to the responsible officer.	Usually within five working days after the taxpayer's SOP is received.
238	The Commissioner will acknowledge the receipt of the taxpayer's SOP.	Usually within 10 working days after the taxpayer's SOP is received.
238	The Commissioner will advise that the taxpayer's SOP is deficient, but the two-month response period has not expired.	Inland Revenue officers will advise the taxpayer or their agent as soon as they become aware of the deficiency.
239	The Commissioner will consider the application of section 89K, where the taxpayer's SOP has been issued outside the applicable response period.	The Commissioner will advise the taxpayer of the outcome within one month of receipt of the disputant's late SOP. If the application is rejected, a refusal notice will be issued.
240	The Commissioner will advise that taxpayer is deemed to accept the Commissioner's SOP, because they failed to issue a SOP within the applicable response period and section 89K does not apply.	Usually two weeks after the response period for the disclosure notice expires.
	<b>Addendum to the Commissioner's SOP</b>	
241	The Commissioner can provide additional information via an addendum to the Commissioner's SOP under section 89M(8) within the response period for the taxpayer's SOP.	Within two months after the taxpayer's SOP is issued.
244	The Commissioner will advise the taxpayer whether additional information to the Commissioner's SOP will be provided via an addendum under section 89M(8).	Usually within two weeks after the taxpayer's SOP is received, subject to the facts and complexity of the dispute and the available response period.
246	The Commissioner will consider whether to include additional information in their SOP under section 89M(13).	Usually within one month after the date that the Commissioner's addendum is issued.
	<b>Adjudication</b>	
259	The Commissioner will prepare a cover sheet and issue a letter (including a copy of the cover sheet) to the taxpayer to seek their concurrence of the materials to be sent to the adjudicator.	Usually within one month after the date that the Commissioner's addendum (if any) is issued or within one month from the date that the response period for the taxpayer's SOP to expire.
260	The taxpayer must respond to the Commissioner's letter.	Within 10 working days after the date that the Commissioner's letter is issued.
261	The Commissioner will forward materials relevant to the dispute to the Disputes Review Unit.	Usually after the taxpayer has concurred on the materials to be sent to the Disputes Review Unit or after the 10 working days allowed for the taxpayer's response have elapsed if no response is received.
253	Adjudication of the disputes case.	Usually within three months after the date that the Disputes Review Unit receives the dispute files depending on



		the number of disputes that are before the Disputes Review Unit, any allocation delays and the technical, legal and factual complexity of those disputes.
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**ANALYSIS**

**NOTICE OF PROPOSED ADJUSTMENT (NOPA)**

**The Commissioner must issue a NOPA before making an assessment**

- 14. The Commissioner must issue a NOPA before making an assessment (including an assessment of shortfall penalties but excluding other civil penalties and interest), unless an exception to the requirement that a NOPA be issued applies under section 89C. For a detailed discussion of these exceptions see Appendix 1.
- 15. Nevertheless, even if the Commissioner, in a very unlikely event, made an assessment in breach of section 89C, the assessment would be regarded as being valid under section 114(a).
- 16. Each exception under section 89C can apply independently or together depending on the circumstances. However, the Commissioner can also choose to issue a NOPA before making an assessment notwithstanding that an exception under section 89C applies.

**A disputable decision**

- 17. Pursuant to the definition in section 3(1), a disputable decision is:
  - (a) an assessment, or
  - (b) a decision that the Commissioner makes under a tax law, except for a decision:
    - (i) to decline to issue a binding ruling, or
    - (ii) that cannot be the subject of an objection or challenge, or
    - (iii) that is left to the Commissioner’s discretion under sections 89K, 89L, 89M(8), (10) and 89N(3).
- 18. The Commissioner will generally issue a NOPA before issuing an assessment that takes into account a disputable decision.
- 19. For example, the Commissioner issues a notice of disputable decision to a taxpayer in relation to their residency status. The Commissioner will generally issue a NOPA where it is proposed to adjust any assessment to take into account that decision.

**A Taxpayer can dispute an assessment that is issued without a NOPA**

- 20. The Commissioner can issue an assessment without first issuing a NOPA under section 89C in the circumstances outlined above. Although the Commissioner must always endeavour to apply the exceptions under section 89C correctly, any assessment made in breach of section 89C will still be treated as valid under section 114(a).
- 21. Where the Commissioner issues an assessment without first issuing a NOPA, the taxpayer can dispute the assessment through the disputes process under section

89D(1). (See SPS 16/06: *Disputes resolution process commenced by a taxpayer or any replacement SPS.*)

22. However, where the Commissioner issues a NOPA to a taxpayer and they accept the proposed adjustment by written agreement or are deemed to have accepted the proposed adjustment, then section 89I(1) precludes the taxpayer from challenging the assessment.
23. However, section 89I cannot apply if the Commissioner and taxpayer have agreed on an adjustment before entering into the disputes process. The parties can dispute the amended assessment, notwithstanding the previous agreement.

**When the Commissioner can issue a NOPA**

24. Section 89B specifies when the Commissioner can issue a NOPA.
25. Under section 89B(1) the Commissioner can issue one NOPA for multiple issues, tax types and periods. Alternatively, the Commissioner can issue multiple NOPAs for the same issue and period, consistent with the obligation to correctly make an assessment within the four-year statutory time period.
26. An investigation will have been substantially completed, the facts ascertained, and the proposed adjustment identified and discussed with the taxpayer before a formal NOPA is issued. The Commissioner may actively use her powers to require production of documents in order to ensure that a sustainable position can be taken in the NOPA. The NOPA will also have been quality checked by Legal and Technical Services.
27. A NOPA is not an assessment. It is an initiating action that allows open and full communication between the parties. If possible, the taxpayer will be given the opportunity to settle a dispute by entering into an agreed adjustment with Inland Revenue before the Commissioner issues a NOPA.
28. However, the Commissioner or taxpayer is not precluded from issuing a NOPA in respect of any amended assessment that the Commissioner has previously issued to reflect the agreed adjustment.
29. A NOPA forms a basis for ensuring that the Commissioner does not issue an assessment without some formal and structured dialogue with the taxpayer in respect of the grounds upon which the Commissioner will issue any assessment or amended assessment (*McIlraith v CIR* (2007) 23 NZTC 21,456).
30. Once an investigation has commenced, the intended approach must be discussed with the taxpayer. If the Commissioner decides to issue a NOPA, the responsible officer will endeavour to advise the taxpayer at least five working days before the date that the NOPA is issued. This is to allow the taxpayer time to consider their position and/or seek advice. However, the taxpayer can also be advised earlier.
31. The Commissioner will endeavour to ensure that any issues relating to the same period and tax type are kept together in the dispute.
32. The Commissioner can also exercise certain statutory powers (for example, issuing a section 17 notice) after a dispute has commenced and will continue to investigate the facts that relate to the dispute.
33. If the parties agree upon some and dispute other proposed adjustments for the same tax period and type, the Commissioner cannot issue an assessment that reflects any agreed adjustment already accepted under section 89J(1) until all the remaining

disputed issues are resolved (even if the Commissioner does not pursue the disputed issue further) or determined by the Disputes Review Unit. That is, the Commissioner will not issue a "partial" or "interim" assessment under section 89J(1) if the Commissioner is not satisfied that the assessment is correct.

34. However, where the statutory time bar is about to fall due, the Commissioner can issue an assessment to reflect both the agreed and disputed adjustment, provided that the requirements of section 89N are met. (See paragraphs 88 to 89 for further discussion.)
35. Where it is practicable, Inland Revenue officers will contact the taxpayer or their tax agent within 10 working days after the NOPA is issued to ensure that it has been received. Inland Revenue officers making written contact should comply with sections 14 to 14G.

### **Exceptions to the statutory time bar**

#### *Time bar waivers*

36. If it is contemplated that the disputes process cannot be completed before the statutory time bar period for amending an assessment commences, the parties can agree in writing pursuant to section 108B(1)(a) to waive the time bar by up to 12 months to enable the full disputes process to be applied.
37. The taxpayer can also give written notice to the Commissioner and waive the time bar for a further six months after the end of the 12-month period under section 108B(1)(b) to allow sufficient time for the dispute to progress through the adjudication process. This notice must be given to the Commissioner within the initial 12-month period.
38. 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.
39. The statutory time bar waiver only applies to those issues that the parties have identified and understood before the initial statutory time bar. Other issues not so identified will still be subject to the original statutory time bar, unless section 108(2) or 108A(3) applies. (See paragraph 44.)

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

40. If a NOPA has been issued and the disputes process cannot be completed before the statutory time bar period expires, the Commissioner can apply to the High Court for more time to complete the process. (See the discussion regarding section 89N(3) in paragraphs 28 to 39 of Appendix 1 of this SPS.)
41. However, where the Disputes Review Unit has insufficient time (that is, before the statutory time bar arises or further time allowed under section 108B(1) to fully consider a matter submitted to it expires) the matter will be returned to the responsible officer to decide whether to issue an assessment or amended assessment or to accept the taxpayer's position. Section 89N(2)(b) allows the Commissioner to amend an assessment at any time after the Commissioner has considered the taxpayer's SOP in relation to the particular period. (See paragraphs 218 to 220 for further discussion.)

#### *Exceptions under section 89N*

42. When a NOPA has been issued, the Commissioner will follow the disputes process unless an exception under section 89N applies. The application of section 89N is

discussed in detail in Appendix 1. The Commissioner must obtain and document administrative approval for any departure from the full disputes process.

**Limitations on the Commissioner issuing a NOPA**

43. Under section 89B(4), the Commissioner cannot issue a NOPA:
  - (a) if the proposed adjustment is the subject of challenge proceedings, or
  - (b) after the statutory time bar has expired.
44. The time bar that arises under sections 108 and 108A prevents the Commissioner from issuing an assessment that increases the amount assessed. The Commissioner can still issue an assessment that decreases the amount of the initial assessment subject to the limitation on refunding overpaid tax under sections RM 2(1) of the Income Tax Act 2007 ("ITA 2007") and 45(1) of the Goods and Services Tax Act 1985.
45. However, the Commissioner is not subject to the statutory time bar that arises under sections 108 and 108A, if the Commissioner considers that the taxpayer has:
  - (a) provided a fraudulent or wilfully misleading tax return (section 108(2)(a)), or
  - (b) omitted income for which a tax return must be provided that is of a particular nature or source (section 108(2)(b)), or
  - (c) knowingly or fraudulently failed to make a full and true disclosure of the material facts necessary to determine their GST payable (section 108A(3)).
46. Furthermore, the Commissioner is not subject to the statutory time bar that arises under section 108 if a taxpayer has a remaining tax credit to which section LA 6(1) of the ITA 2007 applies and the Commissioner seeks to amend an assessment or determination to give effect to section LA 6(3) of the ITA 2007 (section 108(3B)).
47. When considering whether the exception under section 108(2)(b) applies, the Commissioner will disregard omissions of relatively small amounts of income by applying the principle of *de minimis non curat lex* (*Babington v C of IR* [1957] NZLR 861).
48. The Commissioner accepts that the time bar ensures finality in relation to assessments, is a key protection for most taxpayers and the exclusions from its protection must be only invoked where there is an adequate basis in fact and law to support their operation. Section 89B(4)(b) requires that the Commissioner initially decides whether an exception to the time bar applies, for example, whether a tax return is fraudulent or wilfully misleading, before determining whether a NOPA can be issued under section 89B(1).
49. Any opinion that the Commissioner forms regarding the application of the exceptions to the time bar must be honestly held and reasonably justifiable on the basis of the evidence available and the relevant law. The decision must be clearly documented and include reference to the grounds and reasoning on which it is based.
50. Any decision to examine a particular period (which would otherwise be time barred) on the basis that section 108(2)(a)–(b) or section 108A(3) may apply, is not, in itself, a disputable decision. Nor is any decision that is made under section 108A, in itself, a disputable decision.

51. Any NOPA where the CIR is proposing an adjustment on the basis that the exception to the time bar in either section 108(2)(a)–(b) or section 108A(3) applies will set out the reasons why the CIR does not consider that the time bar applies.
52. The Commissioner is generally limited to a four-year period within which a taxpayer's assessment can be increased following an investigation or in certain other circumstances. In respect of a dispute, the assessment is amended (if necessary) after the disputes process is completed. The Commissioner will endeavour to undertake the various steps involved in the process within the four-year period.
53. Section 89B(4)(a) applies to individual proposed adjustments. Where the proposed adjustment is the subject of court proceedings, the Commissioner cannot issue a NOPA in respect of those proposed adjustments. However, the Commissioner can issue a separate NOPA to the taxpayer in relation to the same tax period provided it relates to a different adjustment.
54. For example, a taxpayer challenges the deductibility of feasibility expenditure in the 2009 tax year pursuant to section 138B. The Commissioner can also issue a NOPA to the same taxpayer in relation to the tax treatment of a bad debt in the same tax year.

#### **Contents of the Commissioner's NOPA**

55. A NOPA is the document that commences the disputes process. It is intended to identify the points of contention and explain the legal or technical aspects of the issuer's position in relation to the proposed adjustment in a formal and understandable manner. This will ensure that information relevant to the dispute is quickly made available to the parties. Section 89F(1) and (2) specifies the content requirements for any NOPA that the Commissioner may issue.
56. Under section 89F(1)(b), the NOPA must be in the prescribed form (*Notice of proposed adjustment (IR 770)*). Any NOPA that the Commissioner issues must identify in sufficient detail the adjustment proposed and explain concisely the facts and law that relate to the adjustment and how the law applies to the facts. When preparing a NOPA the Commissioner will endeavour to avoid repeating facts, arguments or using unnecessary detail.
57. Section 89F(2)(b) requires that the NOPA states the key facts and law concisely and in sufficient detail. The Commissioner must ensure that the document is relatively brief and simple to enable the parties to quickly progress the dispute without incurring substantial expenses or excessive preparation time but also detailed enough to explain all the issues relevant to the dispute. The Commissioner's NOPAs should be concise, accurate, coherent and logically presented. In preparing a NOPA Inland Revenue officers should avoid unnecessarily using legalistic language.
58. The Commissioner should identify (but not reproduce in full) the relevant legislation and legal principles derived from leading cases. These references should be in sufficient detail to clarify the grounds for the proposed adjustment. However, lengthy quotations from cases should be avoided.
59. The Commissioner has a statutory obligation to advise a taxpayer adequately, but it is recognised that the matters relevant to the dispute will be set out in greater detail at the SOP phase if the dispute is not resolved.
60. Therefore, what is included in a NOPA or NOR is not conclusive as between the parties because they can introduce further grounds or information or adjust the quantum of the proposed adjustments later in the disputes process (*CIR v Zentrum*

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

61. The Commissioner must always endeavour to issue a NOPA that has sufficient details, is of a high standard and has been considered by Legal and Technical Services. The Commissioner must endeavour to advise the taxpayer during the conference phase of any new grounds, information or reduction in quantum that will be introduced in the SOP.
62. If the Commissioner decides to increase the quantum of any proposed adjustment after the NOPA is issued the Commissioner must issue a new NOPA to the taxpayer.
63. Although candid and complete exchanges of information are implicit in the spirit and intent of the disputes process, the Commissioner's practice will be to ensure that the NOPA is, within those limits, as brief as practicable.
64. The content of any NOPA that the Commissioner issues must satisfy all the requirements specified in section 89F(2)(a) to (c).

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

65. The Commissioner must consider in respect of each proposed adjustment:
  - (a) the income amount or impact of the adjustment, and
  - (b) the tax year or period to which the proposed adjustment relates, and
  - (c) whether use-of-money interest will apply.
66. The Commissioner will also consider whether shortfall penalties and/or other appropriate penalties of lesser percentages apply. That is, where sufficient evidence is held to support the imposition of the penalties and this can be justified (by reference to any relevant guidelines.)

*Shortfall penalties*

67. Shortfall penalties are separate items of adjustment that must be explained and supported in the same manner as the underlying tax shortfall. Section 94A(2) also requires that shortfall penalties must be assessed the same way as the underlying tax. Even though assessments of shortfall penalties relate to the underlying tax they are not subject to the time bars that arise under section 108 or 108A.
68. Where there is sufficient evidence to suggest that shortfall penalties should be imposed, the relevant Inland Revenue officer must ensure that the shortfall penalties are proposed in the same NOPA as the substantive issues. However, the officer can dispense with this practice if any of the following exceptions apply:
  - (a) The evidence supporting the imposition of shortfall penalties does not become available until after the Commissioner has issued the NOPA on the substantive issues. In such circumstances, a separate NOPA may be issued in respect of the shortfall penalties at a later stage.
  - (b) Before entering into the disputes process, a taxpayer has accepted the proposed adjustment in relation to the substantive issues, but not accepted the imposition of the shortfall penalties. In this circumstance, the Commissioner may still issue a NOPA to the taxpayer for the proposed penalties.

- (c) The taxpayer makes a voluntary disclosure of the substantive issues to the Commissioner and the only disputed issue relates to the imposition of the shortfall penalties.
  - (d) Prosecution action is being considered and shortfall penalties also apply because the taxpayer has committed one of the culpable acts (for example, evasion), in most instances the Commissioner must first complete any prosecution action against the taxpayer before the shortfall penalties can be imposed.
69. Pursuant to section 149(5), if shortfall penalties have been imposed the Commissioner cannot subsequently prosecute the taxpayer for taking the incorrect tax position unless the shortfall penalties are imposed under section 141ED. Therefore, the Commissioner may omit proposing shortfall penalties in a NOPA if prosecution is being considered as an option. The Commissioner must issue a new NOPA in respect of any shortfall penalties that are to be imposed after the prosecution.
70. Furthermore, the Commissioner cannot propose shortfall penalties at the SOP phase if they were not previously proposed in a Commissioner's NOPA.

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

*Facts*

71. To provide a concise statement of facts, the Commissioner must focus on the material factual matters relevant to the legal issues. This includes, for each proposed adjustment, the facts relevant to proving all arguments made in support of the adjustment including any facts that are inconsistent with any arguments that the taxpayer has previously raised.
72. The Commissioner should endeavour to state all the material facts in brief, so as to avoid irrelevant detail or repetition. For example, where the parties both know the background to the disputed issues, a summary of the facts in the NOPA will suffice. Where possible, the Commissioner will refer to and/or append any documents that have previously set out the facts on which the Commissioner relies.
73. Although the Commissioner will make every attempt to be concise in the NOPA, the Commissioner considers that the explanation of the material facts should be relative to the complexity of the issues.

*Law*

74. Under section 89F(2)(b) the Commissioner must state the law concisely by including an outline of the relevant legislative provisions and principles derived from leading cases that affect the proposed adjustment.
75. It is sufficient that the Commissioner explains the nature of the legal arguments without providing lengthy quotations from the relevant case law.

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

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



77. The Commissioner must outline all relevant materials and arguments (including alternative arguments) on which the Commissioner intends to rely. If more than one argument supports the same or a similar outcome, the NOPA must include all the arguments.
78. The issues and propositions of law exclusion rule under section 138G(1) does not apply to the issues and propositions of law that are raised in the Commissioner's NOPA. That is, the Commissioner is not restricted to raising the same issues and propositions of law that are specified in the NOPA at the SOP phase or in challenge proceedings that the taxpayer has commenced where a disclosure notice has not been issued.

### **Size and length of Commissioner's NOPAs**

#### *General guidelines*

79. The length of a Commissioner's NOPA will necessarily vary from case to case. The **maximum length** of a Commissioner's NOPA is administratively capped at 30 pages. The 30-page limit excludes any discussion on shortfall penalties (if included in the same Commissioner's NOPA as the substantive issues), the last page of instructions on "What to do next", and schedules that show complicated calculations and diagrams. The application of the 30-page limit is subject to the following further restrictions:
  - (a) For disputes involving less than \$5,000 of tax (excluding evasion and tax avoidance issues), the Commissioner's NOPA should not exceed five pages.
  - (b) Where the dispute concerns one issue only (for example, the imposition of shortfall penalties), the Commissioner's NOPA should not exceed 10 pages.
80. A longer Commissioner's NOPA may be appropriate, where the dispute concerns multiple issues or the issue is very complex and involves a substantial amount of tax.
81. The Commissioner will strive to keep NOPAs as short as possible, but this will be balanced with the need to achieve the objective of issuing the NOPA (ie, sufficiently communicating to the recipient the proposed adjustments and the reasons for them). Inland Revenue officers are required to get approval before a Commissioner's NOPA can exceed the 30-page limit.
82. Wherever practicable, all adjustments proposed for a particular taxpayer should be included in one NOPA. However, where new issues arise during the disputes process, the Commissioner is not precluded from commencing separate disputes for these new issues. If the parties are still in dispute after the conference phase, the proposed adjustments in multiple NOPAs may, subject to the taxpayer's agreement, be combined into one SOP. Combining multiple issues into one dispute has the benefit of reducing compliance costs and should reduce the time taken in the disputes process.

### **Timeframes to complete the disputes process**

83. If the Commissioner has commenced the disputes process by issuing a NOPA and the dispute remains unresolved, where practicable, the responsible officer must negotiate a timeframe with the taxpayer to ensure that the dispute is progressed in a timely and efficient way.
84. Although not statutorily required, agreeing to a timeframe is a critical administrative requirement that requires both parties to be ready to progress the dispute in a timely manner. The parties should endeavour to meet the agreed timeframe. Where there

are delays in the progress of the dispute the responsible officer will manage the delay including any relationship with internal advisers and liaise with the taxpayer.

85. If the negotiated timeframe cannot be achieved, the responsible officer will enter into a continuing discussion with the taxpayer to either arrange a new timeframe or otherwise keep them advised of when the disclosure notice and SOP will be issued. This is consistent with the purpose of the disputes process which is to promote the prompt and efficient resolution of disputes. Therefore, the failure to negotiate or adhere to an agreed timeframe will not prevent a case from progressing through the disputes process in a timely manner.
86. In addition to the above administrative practice, the Commissioner is bound by section 89N(2). Under that provision, if a NOPA has been issued and the parties cannot agree on the proposed adjustment, the Commissioner cannot amend an assessment without completing the disputes process unless any of the exceptions in section 89N apply. These exceptions are as follows:
- 1) In the course of the dispute, the Commissioner considers that the taxpayer has committed an offence under an Inland Revenue Act that has had the effect of delaying the completion of the disputes process (section 89N(1)(c)(i)).
  - 2) A taxpayer involved in a dispute, or person associated to them, may take steps to shift, relocate or dispose of the taxpayer's assets to avoid or delay the collection of tax, making the issue of an assessment urgent (section 89N(1)(c)(ii) and (iii)).
  - 3) The taxpayer involved in a dispute or a person associated with them involved in another dispute involving similar issues has begun judicial review proceedings in relation to the dispute (section 89N(1)(c)(iv) and (v)).
  - 4) The taxpayer fails to comply with a statutory requirement for information relating to the dispute (section 89N(1)(c)(vi)).
  - 5) The parties agree in writing that the dispute should be resolved by the court or TRA without completing the disputes process (section 89N(1)(c)(viii)).
  - 6) The parties agree in writing to suspend the disputes process pending the outcome of a test case (section 89N(1)(c)(ix)).
  - 7) The Commissioner applies to the High Court for an order to allow more time to complete or dispense with the disputes process (section 89N(3)).
87. These exceptions are explained in further detail in Appendix 2 to this SPS. If any of these exceptions apply the disputes process will end and the dispute will not go through the adjudication phase.

#### **Application of the exceptions in section 89N**

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

89. In this circumstance, the taxpayer can challenge the Commissioner's assessment by filing proceedings in the TRA or the High Court within the applicable response period, that is, within two months starting on the date that the notice of assessment is issued.

**NOTICE OF RESPONSE (NOR)**

**Taxpayer's response to the commissioner's NOPA: NOR**

90. If a taxpayer disagrees with the Commissioner's proposed adjustment, then, under section 89G(1), they must advise the Commissioner that any or all of the proposed adjustments are rejected by issuing a NOR within the two-month response period. That is, within two months starting on the date that the Commissioner's NOPA is issued. The Commissioner interprets this as requiring Inland Revenue's receipt of the NOR within the response period.
91. For example, if a NOPA is issued on 9 April 2010, the taxpayer must advise the Commissioner that it is rejected by issuing a NOR to the Commissioner for receipt on or before 8 June 2010. However, taxpayers are encouraged to issue their NOR to the Commissioner once they have completed it.
92. If a taxpayer has not responded to a NOPA issued by the Commissioner reasonable efforts will be made to contact the taxpayer or their tax agent two weeks before the response period expires to ascertain whether the taxpayer will issue a NOR. Such contact may be made by telephone or letter.
93. Section 89G(2) specifies the content requirements of a NOR. The taxpayer must state concisely in the NOR:
- (a) the facts or legal arguments in the Commissioner's NOPA that they consider are wrong, and
  - (b) why they consider that those facts and arguments are wrong, and
  - (c) any facts and legal arguments that they rely upon, and
  - (d) how the legal arguments apply to the facts, and
  - (e) the quantitative adjustments to any figure proposed in the Commissioner's NOPA that results from the facts and legal arguments that the taxpayer relies upon.
94. In respect of the requirement under section 89G(2)(c) that the taxpayer specifies the facts and legal arguments upon which they are relying, the taxpayer can also refer to legislative provisions, case law and any legal arguments that are raised in the Commissioner's NOPA. The taxpayer does not have to refer to different legislative provisions, case law and legal arguments.
95. Pursuant to section 89G(2)(e), the requirement for a quantitative adjustment establishes to what extent the taxpayer considers that the Commissioner's adjustment in the NOPA is incorrect. This amount need not be exact, however, every attempt should be made to ensure that it is as accurate as possible. The amount in dispute can be altered, as the dispute progresses irrespective of whether the parties have agreed on the new figure.

**Deemed acceptance**

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

- (a) has not issued a NOR within the two-month response period, and
- (b) the Commissioner does not accept a late NOR in terms of section 89K,

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

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

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

*Exceptional circumstances*

98. The legislation defines exceptional circumstances very narrowly. The cases regarding "exceptional circumstances", such as *Treasury Technology Holdings Ltd v CIR* (1998) 18 NZTC 13,752, *Milburn NZ Ltd v CIR* (1998) 18 NZTC 14,005, *Fuji Xerox NZ Ltd v CIR* (2001) 17,470 (CA), *Hollis v CIR* (2005) 22 NZTC 19,570 and *Balich v CIR* (2007) 23 NZTC 21,230, are also relevant.

99. Section 89K(3) reads:

- (a) an exceptional circumstance arises if—
  - (i) an event or circumstance beyond the control of a disputant provides the disputant with a reasonable justification for not rejecting a proposed adjustment, or for not issuing a notice of proposed adjustment or statement of position, within the response period for the notice:
  - (ii) a disputant is late in issuing a notice of proposed adjustment, notice of response or statement of position but the Commissioner considers that the lateness is minimal, or results from 1 or more statutory holidays falling in the response period:
- (b) an act or omission of an agent of a disputant is not an exceptional circumstance unless—
  - (i) it was caused by an event or circumstance beyond the control of the agent that could not have been anticipated, and its effect could not have been avoided by compliance with accepted standards of business organisation and professional conduct; or
  - (ii) the agent is late in issuing a notice of proposed adjustment, notice of response or statement of position but the Commissioner considers that the lateness is minimal, or results from 1 or more statutory holidays falling in the response period.

100. The case law confirms that the definition of "exceptional circumstances" in sections 89K(3) and 138D should be applied consistently. The following guidelines have emerged from the case law:

- (a) a taxpayer's misunderstanding or erroneous calculation of the applicable response period will usually not be regarded as an event or circumstance beyond the taxpayer's control under section 89K(3)(a),
- (b) an agent's failure to advise their client that they have received a notice of assessment or other relevant document that causes the taxpayer to respond

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outside the applicable response period will not generally be considered to be an exceptional circumstance under section 89K(3)(b) (*Hollis v CIR*), and

- (c) an exceptional circumstance can arise if the taxpayer has relied on misleading information regarding the applicable response period given to them by the Commissioner that has caused them to respond outside that response period (*Hollis v CIR*).
101. See *Tax Information Bulletin* Vol 8, No 3 (August 1996) for some examples of situations that can be an "exceptional circumstance" beyond a taxpayer's control.
  102. The exception for lateness arising because of statutory holidays is self-explanatory. The Commissioner can also accept a late NOR where the lateness is minimal, that is, the document was only one to two days late and the other factors relevant to the exercise of the discretion under section 89K(1) are satisfied. (See discussion in paragraph 104.)
  103. For example, the response period ends on Saturday and the taxpayer provides a NOR on the following Tuesday. The Commissioner treats the response period as ending on Monday on the basis of section 35(6) of the Interpretation Act 1999 and accepts that the lateness of the NOR was minimal. That is, the Commissioner has received the NOR within one to two days of Monday, the last day of the response period. If the response period ended on Friday and the taxpayer provided the NOR on the following Monday, the Commissioner would also accept that the lateness is minimal.
  104. Besides the degree of lateness, the Commissioner considers that the exercise of the discretion under section 89K(1) requires that the following factors are also taken into account:
    - (a) the date on which the NOR was issued, and
    - (b) the response period within which the NOR should be issued, and
    - (c) the real event, circumstance or reason why the taxpayer failed to issue the NOR within the response period, and
    - (d) the taxpayer's compliance history in relation to the tax types under consideration (for example, has the taxpayer paid tax or filed a tax return or NOR late in the past?).
  105. For example, a taxpayer issues a NOR to the Commissioner two days after the applicable response period has expired. The taxpayer does not provide a legitimate reason for the lateness. The taxpayer also has a history of filing late NORs within the minimal allowable lateness period (that is, up to two days outside the applicable response period) and has been advised on the calculation of the response period on more than one occasion.
  106. Although the degree of lateness was minimal on each occasion, the Commissioner would not accept that exceptional circumstances exist in this circumstance. This ensures that the exception is not treated as an extension of the response period in all circumstances.
  107. The Commissioner will consider a taxpayer's application made under section 89K(1)(b) after receiving the relevant NOR or SOP. Where the application is rejected, the Commissioner is required to issue a "refusal notice" within one month of receipt of the application (which must include the late notice or SOP). The disputant may challenge the Commissioner's refusal notice in the Taxation Review

Authority. If the taxpayer's application is accepted that decision will be communicated in writing to the taxpayer within one month of receipt of the application.

108. The taxpayer must provide reasons to support their claim that exceptional circumstances exist under section 89K(3). The taxpayer should address the factors referred to in paragraph 104. If the reasons provided are unclear, further information may be sought, giving the taxpayer an opportunity to provide that information before determining whether section 89K applies.
109. If the Commissioner rejects a taxpayer's application made under section 89K to treat a NOR or SOP as made within the response period, the taxpayer will be deemed to have accepted the proposed adjustment made in the Commissioner's NOPA.

*Demonstrable intention*

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

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

113. To support this general proposition Inland Revenue will consider the following further factors in reaching a view as to whether a taxpayer had a demonstrable intention to dispute:
  - whether the taxpayer has responded to any Inland Revenue correspondence and has consistently asserted their contrary position regarding the substantive issues;
  - whether the taxpayer has complied with other parts of the disputes process and their overall tax obligations (for example, if the late document in question is the taxpayer's SOP, have they filed a timely NOR);
  - whether the taxpayer has corresponded with other relevant parties regarding the dispute, for example, the Minister of Revenue, the Ombudsman or Inland Revenue's Complaints Management Service.
114. In a dispute where the taxpayer or their agent has not filed a SOP because they have miscalculated the response period (and the degree of lateness does not amount to exceptional circumstances), it could be said that having participated in the earlier

stages of the disputes process (including complying with timeframes) that, at the end of the response period, the disputant had a genuine intention to continue with the dispute.

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

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

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

#### **Receipt of a taxpayer's NOR**

117. When Inland Revenue receives a taxpayer's NOR, it will usually be forwarded to the responsible officer within five working days. Upon receipt, the responsible officer will ascertain and record the following:
- (a) the date on which the NOR was issued, and
  - (b) whether the NOR has been issued within two months starting on the date that the Commissioner's NOPA is issued, and
  - (c) the salient features of the NOR including any deficiencies in its content.
118. Where it is practicable, the Commissioner will advise the taxpayer or their tax agent by telephone or in writing within 10 working days the NOR has been received.
119. The Commissioner will make reasonable efforts to advise the taxpayer or their tax agent within one month after receiving the NOR whether it is being considered or has been accepted, rejected in full or in part.
120. If the NOR is accepted in full, the Commissioner will usually confirm (in writing) that the NOR has been accepted in full and, if applicable, a notice of assessment will be issued within one month.
121. If the Commissioner must investigate further before deciding to accept or reject a NOR, the responsible officer will regularly update the taxpayer or their agent on the progress of the further analysis or enquiry work that is undertaken.

#### **Deficiencies in the content of the NOR**

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



123. The taxpayer will be advised as soon as practicable that the Commissioner considers that the NOR may not meet the requirements of section 89G(2) and why. They will also be advised that any additional or corrected information should be provided within the response period.
124. Taxpayers are encouraged to issue their NOR immediately after they have completed it because they could have insufficient time to rectify any deficiencies if the response period is due to expire.
125. Generally where the deficiencies are not able to be remedied but the NOR advances sufficient argument to allow the dispute to progress, then the Commissioner will continue with the dispute. The Commissioner's argument that the NOR is deficient will be incorporated into the Commissioner's SOP which will also fully argue the substantive issue.
126. However, if the NOR received is highly unsatisfactory the Commissioner is unlikely to continue with the dispute. This will be on the grounds that the NOR does not satisfy the requirements set out in section 89G(2).
127. A NOR is likely to be considered highly unsatisfactory only where the taxpayer's position is materially inconsistent and not capable of coherent explanation, or there is no observable explanation at all of the taxpayer's grounds for dispute. In these situations the taxpayer will be deemed to have accepted the proposed adjustment under section 89H(1), unless section 89K applies.
128. In considering the adequacy of the taxpayer's NOR, the Commissioner's view will not be based on the strength or weakness of the taxpayer's argument. The Commissioner will only be concerned with whether the NOR meets its statutory requirements.
129. The approach outlined above is consistent with that taken by the Court of Appeal in *CIR v Alam and Begum* (2009) 24 NZTC 23,564.

## **CONFERENCE PHASE**

### **What is the conference phase of the disputes process?**

130. The conference phase of the disputes process allows the taxpayer and Inland Revenue officers directly involved in the dispute to exchange material information relating to the dispute (if this has not already been done prior to the conference phase). More importantly it is an opportunity for the parties to the dispute to try to resolve the differences in their understanding of facts, laws and legal arguments.
131. The word "resolve" in this context is not limited to final resolution of the dispute. Settlement is a possibility but this is not the only objective of the conference phase. The parties may "resolve" part of the dispute by agreeing on some of the facts and clarifying some of the legal arguments, while agreeing to disagree on other matters, which will become the focus in the later phases of the disputes process.
132. Generally, if a dispute remains unresolved after the NOR phase, the conference phase will follow. However, the Commissioner will have fully considered the taxpayer's NOR, including any new records, documents and information mentioned in that document, before determining that the dispute remains unresolved.
133. The conference phase is an administrative process that aims to clarify and, if possible, resolve the dispute. However, the conference phase should not be used by either party for the purpose of delaying the completion of the disputes process. The

conference phase can involve more than one meeting between the parties and it is not necessarily complete just because the parties have held the final meeting. For example, the parties may need further information or to consider further submissions made at the meeting.

### **Legal and other advisers attending a conference**

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

### **Conference facilitation**

135. Conference facilitation is a feature in the conference phase. A facilitated conference will involve an independent internal facilitator who will promote and encourage structured discussion between Inland Revenue officers and the taxpayer on an informed basis and with the *bona fide* intention of resolving the dispute. The conference facilitator will be a senior Inland Revenue officer who will not have been involved in the dispute or given advice on the dispute prior to the conference phase. The facilitator will have sufficient technical knowledge to understand and lead the conference meeting.
136. The conference facilitator will not be responsible for making any decision in relation to the dispute, except for determining when the conference phase has come to an end. In particular, it is not the role of the facilitator to undertake settlement of the dispute. If this possibility arises it is the responsibility of the taxpayer and the Inland Revenue officers involved in the dispute.
137. Having a conference facilitated is optional and a conference can be held without a facilitator but, conference facilitation will be offered to all taxpayers as part of the disputes process. The Commissioner's offer of a facilitated conference will be made in writing ("the conference facilitation letter") within one month from the date of issue of the taxpayer's NOR. The conference facilitation letter marks the commencement of the conference phase.
138. The format of the conference meeting need not be limited to a face-to-face meeting. The parties to the dispute may agree to hold a telephone or video conference. (For reasons of simplicity, the SPS refers to "meetings" to include these different conference formats.)
139. The taxpayer is expected to respond within two weeks from the date of the conference facilitation letter. The taxpayer should indicate whether they will attend the conference meeting, whether they will accept the conference facilitation offer, whether there are any special needs or requirements at the meeting and who else will be attending the meeting. If the taxpayer does not respond within this timeframe, the Inland Revenue officers involved in the dispute will contact the taxpayer about the conference facilitation letter.

### **Preparation for the conference meeting**

140. When a taxpayer agrees to attend a conference meeting, Inland Revenue will contact the taxpayer within two weeks from the taxpayer's agreement, to establish a timeframe, and agree on how the meeting will be conducted.
141. Prior to the conference meeting, the taxpayer should advise Inland Revenue whether their advisers will attend the conference meeting.

142. The parties to the dispute may agree to exchange information relevant to the dispute before the conference meeting. A copy of that information will be provided to the facilitator. The Inland Revenue officers will provide the taxpayer with a list of information that has been given to the facilitator. The taxpayer may seek a copy of any information on that list if it is not already in their possession. It is also crucial for the parties to exchange the information prior to the meeting if the agreed format of the conference is a telephone or video conference.
143. Inland Revenue may decide to concede the dispute after considering the taxpayer's information. The whole disputes process (including the conference phase) would come to an end in these cases.
144. The conference phase will generally be expected to be completed within three months, but this may vary depending on the facts and complexities of the specific case. A longer conference phase may be justified in some disputes if the parties are engaged in meaningful discussions.
145. An agenda will be useful for both parties at the conference meeting. An agreed agenda should divide the conference meeting into two parts. The first part of the meeting should involve an exchange of material information and discussion of contentious facts and issues relating to the dispute. Any procedural matters such as the timeframe for completing the disputes process, the adjudication process, time bar waivers and the possibility of opting out of the disputes process will also be discussed. The second part of the meeting, if applicable, would involve negotiation of possible areas of resolution of the dispute. Any communication made and any materials prepared for the purpose of negotiating a settlement or resolution during this part of the meeting will be treated as being on a "without prejudice" basis.
146. Where there is no agenda the conference facilitator will guide the taxpayer and the Inland Revenue officers to discuss the contentious facts and issues at the conference meeting.
147. Where the option of conference facilitation has been declined, the parties to the dispute should work out the appropriate structure at the conference meeting, bearing in mind that one of the aims of any conference is to reach agreement on some or all the facts and issues and thus, resolve the dispute.

### **At the conference meeting**

#### *Facilitated conference*

148. The facilitator will:
  - (a) explain the objectives of the conference phase on the basis of the agreed agenda;
  - (b) remind the parties of any rules relating to the conference (these will generally have been set out in the conference facilitation letter);
  - (c) clarify who the parties are at the conference meeting and the capacities they hold (eg, whether they are the authorised tax advisors; whether they have authority to settle the dispute at the meeting);
  - (d) ask whether the parties agree to record the meeting discussions using audio or video technology (refer to SPS 12/01: *Recording Inland Revenue Interviews* or any replacement SPS);

- (e) run through the agenda;
- (f) encourage the parties to present evidence in support of their perceived facts (either at the conference meeting or on a later date if the evidence cannot be provided at the time of the meeting). Where possible, encourage the parties to reach agreement on all the facts of the dispute. If no agreement can be made, encourage the parties to establish the common grounds and address the matters that they agree to disagree. These agreements will be recorded in writing. The agreements will be sent to the taxpayer to verify the correctness and sign by a specified date;
- (g) promote constructive discussion of only the contentious tax issues and where possible, encourage both parties to explore the issues, resolve or settle the dispute (subject to our internal revenue delegations and guidelines on settlement). If the contentious tax issues cannot be resolved, suggest both parties to do one or more of the following:
  - At the end of the conference meeting, suggest the parties consider whether the conference phase comes to an end. Consider whether there is need for another meeting, noting that another meeting can be justified if both parties need to exchange further information in support of their tax technical arguments but continuous meetings are discouraged if this is seen as a delaying tactic.
  - Where the parties agree to end the conference phase and the facilitator considers that the objectives of the conference phase have been achieved, the facilitator can clearly signal the end of the conference phase to the parties.
  - Agree on the timeframe for completing the disputes process and submitting the dispute to the adjudication process. This includes the timeframe for taxpayers to meet outstanding information requests and Inland Revenue officers' undertaking to provide copies of information relevant to the disputes. The agreed timeframe will also factor in time bar waivers if given by the taxpayer and the time required for any court challenge that relates to documents, which are claimed to be protected by professional legal privilege and tax advice documents, which are claimed to be protected by the non-disclosure rights. Ask the taxpayer whether a time bar waiver will be given if the time bar applicable to the assessment in dispute is imminent.
  - Clearly indicate whether the communication made and/or documents prepared for the purpose of negotiating potential settlement or resolution of the dispute will be treated as being on a "without prejudice" basis.
  - Suggest the taxpayer consider whether the opt-out process applies and advise the taxpayer of the right to opt out within the required timeframe, so that it is not necessary to complete the disputes process as required under section 89N and that the dispute will be more efficiently resolved by a hearing authority.
- (h) note that any agreement between the parties will be recorded in writing and signed either at the conference meeting by both parties or on a later date after the taxpayer has verified the correctness of the agreement;
- (i) note that the Inland Revenue officers directly involved in the dispute will remain as the first point of contact.

*Unfacilitated conference*

149. In an unfacilitated conference, the parties at the conference should agree on and perform tasks similar to those listed in paragraphs 148(a) to (h) above.
150. At the end of the conference meeting, it is important for the Inland Revenue officers and the taxpayer to discuss whether they consider that the conference phase has come to an end and record any agreement in writing.

**After the conference meeting**

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

*Facilitated conference*

152. The facilitator will:

- (a) follow up on the agreed matters including the agreed timeframe and exchange of information (but does not include enforcing the agreement between the taxpayer and the Inland Revenue officers directly involved in the dispute);
- (b) assess any need to attend a further meeting;
- (c) suggest to the parties that the conference phase has ended and ask them to reach an agreement on this matter, then clearly notify the parties of the date on which the conference phase has ended.

*Unfacilitated conference*

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

**End of the conference phase**

154. It is important for the taxpayer and the Inland Revenue officers to be fully aware of when the conference phase comes to an end. The conference phase is not necessarily complete just because the parties have held the final meeting. For example, the parties may need further information or to consider further submissions made at the meeting. In most cases, it is expected that the parties involved in the dispute will agree on when the conference phase has ended. Such agreement will be put in writing.

*Facilitated conference*

155. After a facilitated conference, the facilitator will be responsible for clarifying the agreed end date of the conference phase with the parties.
156. If the facilitator considers that both the taxpayer and Inland Revenue officers have exchanged all the material information relevant to the dispute, have fully discussed the tax technical issues and have not resolved the dispute, the facilitator may suggest to the parties that the conference phase can come to its end.

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

*Unfacilitated conference*

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

**After the conference phase**

160. When a dispute remains unresolved after the conference phase has been completed, the Commissioner must issue a disclosure notice together with a SOP, unless the Commissioner and the taxpayer have agreed to the taxpayer opting out of the disputes process. The disclosure notice and Commissioner's SOP will generally be issued within three months from the end of the conference phase (see paragraphs 199 to 215 for further discussion on the timeframes for issue of the Commissioner's disclosure notice and SOP).
161. If the taxpayer seeks the Commissioner's agreement to opt out of the disputes process under section 89N(1)(c)(viii), they will be required to sign a declaration that all material information relating to the dispute has been provided to the Commissioner.

**OPT OUT OF THE DISPUTES PROCESS**

162. Section 89N(1)(c)(viii) provides that the Commissioner and a taxpayer can agree not to complete the disputes process if they are satisfied that the dispute can be more efficiently resolved at a hearing authority (referred to as "opt out").
163. A taxpayer may seek to opt out of the remainder of the disputes process. If they do, a decision on whether or not the Commissioner will enter into an opt-out agreement

will be made by a senior Inland Revenue officer. In making a decision on opt out, that person will consult with Legal and Technical Services, the Litigation Management Unit, and the Office of the Chief Tax Counsel. The decision-maker will consider the taxpayer's request with reference to all of the specific criteria listed and will also consider if any other factors exist which mean that the dispute can be resolved more efficiently at a hearing authority.

164. Before agreeing to a taxpayer's preference to opt out the Commissioner must be satisfied that the taxpayer has participated meaningfully during the conference phase. In addition, the taxpayer must have signed a declaration that all material information has been provided to the Commissioner. Any agreement will be recorded in a document.
165. The Commissioner will not agree to opting out unless there has been a conference.
166. In addition to attending the conference, the Commissioner considers that a taxpayer will have participated meaningfully during the conference phase where:
  - (a) the taxpayer has provided all relevant information as indicated by Inland Revenue (if it has not already been provided prior to the conference phase); and
  - (b) the taxpayer has discussed the contentious facts and issues of the dispute with Inland Revenue. This discussion will have involved identifying and clarifying what the dispute turns on, seeking potential resolution of the dispute or reaching agreements to enable the dispute to move forward to the next phase if it remains unresolved.
167. If the taxpayer has participated meaningfully during the conference phase and signed a declaration that all material information has been provided, the Commissioner will agree to the taxpayer's preference to opt out of the disputes process in circumstances where one of the following applies:
  - (a) the total amount of tax in dispute is \$75,000 or less except where the dispute is part of a wider dispute;
  - (b) the dispute turns on issues of fact (eg, facts that are to be determined by reference to expert opinions or valuation) only;
  - (c) the dispute concerns facts and issues that are waiting to be resolved by a court; or
  - (d) the dispute concerns facts and issues that are similar to those considered by the Disputes review Unit of the Office of the Chief Tax Counsel ("OCTC") if similar issues have been considered in a dispute in the past.
168. Where the dispute does not fall within the criteria listed above at paragraph 167, the Commissioner may still agree to opt out of the disputes process if it is considered that the dispute can be resolved more efficiently at a hearing authority.
169. The taxpayer may seek to opt out of the disputes process within two weeks from the end of the conference phase. The Commissioner will advise the taxpayer in writing within two weeks from the date of the request whether the request to opt out has been agreed to.
170. Where the opt-out has been agreed to and the dispute remains unresolved after taking into account the information and discussion during the conference phase, the Commissioner will issue an amended assessment.



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

**(a) The \$75,000 or less threshold**

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

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

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

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

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

**(b) The dispute turns on issues of fact only**

175. The Commissioner will agree to opt out if the dispute turns on issues of fact or evidence only.

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

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

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

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

179. A taxpayer may become aware of a current court case that concerns facts and issues that they consider to be similar to their dispute. The Commissioner will consider this position when deciding whether to agree to opt out. In considering whether to agree to opt out, Inland Revenue will advise the taxpayer of its views as to the similarity, but will not comment on the merit of the current court case or the plaintiff's tax affairs due to the secrecy provisions of the TAA.
180. In some cases, a taxpayer may not be aware at the time of issuing the NOR or during the conference phase of the existence of similar cases that are subject to court proceedings. The taxpayer may still seek to opt out of the disputes process without this knowledge. In considering whether to agree to opt out, the decision maker will consult with the Litigation Management Unit to determine whether there are any current court cases that concern facts and issues that are considered to be similar to the taxpayer's dispute.

**(d) The dispute concerns facts and issues that are similar to those considered by the Disputes Review Unit**

181. The opt-out process is available if the facts and issues relating to the dispute are similar to those already considered by the Disputes Review Unit. A taxpayer may seek to opt out of the disputes process because a previous adjudication decision was in favour of the Commissioner and they consider it would be unlikely that the Commissioner's view will change. In considering the taxpayer's request, Inland Revenue will advise the taxpayer of its views as to the similarity, but will need to bear in mind the secrecy provisions of the TAA.
182. In some cases, a taxpayer may not be aware of similar disputes that have been considered by the Disputes review Unit when the taxpayer issues the NOR or participates at a conference meeting. Inland Revenue officers may be aware of such other similar disputes, and may choose to advise the taxpayer that, should the taxpayer seek an opt out, Inland Revenue would be very likely to agree. However, Inland Revenue will need to bear in mind the secrecy provisions of the TAA when considering other disputes.

**Grounds of assessment where the Commissioner has agreed to opt out**

183. In agreeing to the taxpayer's request for opt out the Commissioner will make an amended assessment and issue a notice of assessment to the taxpayer. In doing so the Commissioner will have taken into account the information and legal arguments raised in the NOPA, the NOR and during the conference phase. The taxpayer can then challenge the assessment by commencing proceedings in a hearing authority within the applicable response period, ie two months of the issue of the notice of assessment.
184. In making an amended assessment, the Commissioner is not bound by the facts, issues, evidence and propositions of law stated in the NOPA and NOR, and the Commissioner is able to take into account information and arguments raised during the conference phase. The Commissioner's administrative practice is that grounds of assessment which have not previously been referred to in the Commissioner's NOPA and the taxpayers' NOR will not be relied on, if they have not been notified or sufficiently discussed during the conference phase.
185. Where the parties have agreed to opt out the Commissioner will send to the taxpayer at or near the time of the assessment, a letter confirming briefly the grounds of assessment.

**PROGRESSING DISPUTES THROUGH THE DISPUTES PROCESS WHERE THE DISPUTE AFFECTS MULTIPLE TAXPAYERS**

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

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

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

188. The Commissioner's approach to the different situations which arise where a large number of taxpayers are all affected by the same disputed matter is outlined in paragraphs 189 to 198.

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

189. As discussed in detail previously at paragraphs 162 to 182, the Commissioner will agree to the taxpayer's request to opt out of the remaining parts of the disputes process if the facts and issues relating to the dispute are similar to those previously considered by the Disputes Review Unit.

190. Therefore, in situations where the Disputes Review Unit has looked at an issue a number of times and consistently taken a view supporting the Commissioner agreement between the parties to opt out is an option available to avoid the full disputes process.

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

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

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

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

194. However, care will need to be taken to ensure that the time bar will not be breached, and consideration should be given to obtaining a time bar waiver.
195. Again, as this approach requires the taxpayer to agree, the Commissioner can offer it to individual taxpayers but they still have the choice to progress the dispute through the full disputes process.
196. Taxpayers who agree to place their case "on hold" while the Disputes Review Unit considers the issues in question in relation to another taxpayer will not be bound by any decision reached by the Disputes Review Unit and will be free to continue with their dispute should they wish.

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

197. It is the Commissioner's policy that a finding for the taxpayer in the initial dispute will usually lead to the other disputes being withdrawn, particularly if the disputes are in respect of the same transaction.
198. However, in some situations further consideration of the issue is required at a national level before the Commissioner will apply the conclusions reached in a particular adjudication report more broadly to other taxpayers. In those cases, Inland Revenue officers may be advised that a specified or contrary approach (to that adopted by the Disputes Review Unit) is to be followed pending further consideration of the issue at a national level.

**DISCLOSURE NOTICE**

199. The Commissioner must issue a disclosure notice under section 89M(1), unless the Commissioner:
  - (a) does not have to complete the disputes process because any of the exceptions under section 89N(1)(c) applies (see earlier discussion), or
  - (b) does not have to complete the disputes process because the High Court has made an order that the dispute resolution process can be truncated pursuant to an application made by the Commissioner under section 89N(3), or
  - (c) has already issued to the taxpayer a notice of disputable decision that includes or takes account of the adjustment proposed in the NOPA pursuant to section 89M(2).
200. When issuing a disclosure notice the Commissioner must also provide to the taxpayer the Commissioner's SOP (as discussed below) and include in the disclosure notice a reference to section 138G and a statement regarding the effect of the issues and propositions of law exclusion rule pursuant to section 89M(3).
201. The Commissioner will usually advise the taxpayer two weeks before issuing the disclosure notice and SOP that these documents will be issued to them.
202. Where practicable, the Commissioner will contact the taxpayer shortly after the disclosure notice and SOP are issued to ascertain whether the taxpayer has received these documents.
203. If the taxpayer has not received the Commissioner's disclosure notice, for example, due to a postal error or an event or circumstance beyond the taxpayer's control, the Commissioner will issue another disclosure notice to the taxpayer. In this circumstance, the response period within which the taxpayer must respond with their

SOP will commence from the date that the Commissioner issued the initial disclosure notice.

204. Where the taxpayer cannot issue a SOP within the applicable response period, they may issue a late SOP with an explanation of why it is late. The Commissioner will consider the late SOP in terms of the discretion under section 89K(1). (See paragraphs 98 to 116 for further discussion.)

*Issues and propositions of law exclusion rule*

205. A disclosure notice is the document that triggers the application of the issues and propositions of law exclusion rule. The Commissioner must explain the effect of this rule and refer to section 138G in the disclosure notice. (See paragraph 229 for further discussion.)

*Issue of a disclosure notice*

206. The Commissioner can issue a disclosure notice at any time on or after the date that either party issues their NOPA.
207. Usually, the Commissioner will issue a disclosure notice after receiving a NOR, following the conference phase and in accordance with the timeframe agreed with the taxpayer.
208. Where a disclosure notice is issued earlier (for example, the facts are clear, the taxpayer has agreed on the disputed issues or a conference is not required) the reasons must be documented and explained to the taxpayer.
209. When deciding whether to issue a disclosure notice before the conference phase has been completed, Inland Revenue officers must be aware that, if the taxpayer discloses any new or novel matters in their SOP, they only have two months to reply under section 89M(8) barring a High Court application before the two-month period expires. (See section 89M(10).)
210. Where a dispute commenced by the Commissioner remains unresolved after the conference phase, an Inland Revenue officer will usually issue a disclosure notice together with a SOP:
- within **three months** from the end of the conference phase; or
  - within **three months** from the date when the Commissioner advises that the taxpayer's opt out request has been declined;

subject to any further time allowed by an appropriate senior manager. (See paragraphs 213 to 215.)

211. The three-month timeframe will exclude any statutory holidays.
212. If the last day of the three-month timeframe falls on a weekend, Inland Revenue must issue the disclosure notice and the SOP by the next working day.
213. While the Commissioner is able to extend the three-month timeframe these extensions should be very rare, because in most disputes, the timeframe is considered to be sufficient for Inland Revenue officers to complete and issue to the taxpayer a disclosure notice and the Commissioner's SOP.
214. The ability for Inland Revenue to extend the three-month timeframe is provided for because it is recognised that even with good planning and the best endeavours of the

Inland Revenue officers involved, there might be occasions on which the disclosure notice and the Commissioner's SOP cannot be issued within the three-month timeframe. This might occur when:

- (a) the facts, issues, and law are complex, and/or
- (b) the case involves an important issue of precedent and/or the Litigation Management Unit or external advisors are involved in advising on the Commissioner's SOP.

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

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

### **STATEMENT OF POSITION (SOP)**

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

217. When the disputed issue relates to a tax type that is subject to the statutory time bar (for example, income tax, GST) that falls within the current income year, the parties will endeavour to complete the disputes process before the time bar starts. The parties can agree to a statutory time bar waiver if they have issued a SOP to each other and there is insufficient time to complete the adjudication process.

218. However, if no such agreement is reached, section 89N(2)(b) allows the Commissioner to advance to the next stage if the Commissioner has considered the taxpayer's SOP and completed the compulsory elements of the disputes process. The Commissioner can amend the assessment by exercising the discretion under section 113.

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

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

### **Contents of a SOP**

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

222. For disclosure notices issued before 29 August 2011, the “evidence exclusion rule” still applies and limits the parties to the facts, evidence (excluding oral evidence), issues and propositions of law that either party discloses in their respective SOPs, unless a court order is made under section 138G(2) allowing new facts and evidence to be raised.
223. However, under either rule, a mistaken description of facts, evidence, issues or propositions of law and submissions made in the SOP can later be amended if the parties agree to include additional information in the SOPs under section 89M(13).
224. Under section 89M(4) the SOP must be in the prescribed form and must contain sufficient detail to fairly inform the taxpayer of the facts, evidence, issues and propositions of law that the Commissioner wishes to rely on.
225. The minimum content requirements for a SOP under section 89M(4) are an outline of the relevant facts, evidence, issues and propositions of law. However, to allow the Disputes Review Unit to successfully reach a decision, the SOP must also contain full, complete and detailed submissions.
226. An outline that consists of a frank and complete discussion of the issues, law, arguments and evidence supporting the argument is implicit in the spirit and intent of the disputes process. In very complex cases a full explanation of the relevant evidence and summary of less relevant evidence will be accepted.
227. The disputes process does not require that relevant documents are discovered or full briefs of evidence or exhaustive lists of documents exchanged. Rather, providing an outline of relevant evidence in the SOP will ensure that both parties appreciate the availability of evidence in respect of the factual issues in dispute. The Commissioner should ensure that an outline of any expert evidence on which they intend to rely is included in the SOP.
228. Submissions made in the NOPA phase must be sufficiently concise to enable the parties to progress the dispute without incurring substantial expense. However, at the SOP phase, if the issues are unresolved and likely to proceed to a court for resolution, then full, complete and detailed submissions should be made.
229. Subject to section 138G(2), the issues and propositions of law exclusion rule prevents the court considering issues and propositions of law that are not included in:
- (a) the Commissioner or disputant’s SOP, or
  - (b) any additional information that:
    - (i) the Commissioner provides under section 89M(8), that is deemed to be part of the Commissioner’s SOP under subsection (9), and
    - (ii) the parties provide pursuant to an agreement under section 89M(13), that is deemed to be part of the provider’s SOP under subsection (14).
230. Section 89M(6B) reads:

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



231. Pursuant to section 89M(6B), only documentary evidence and not potential witnesses must be listed in the SOP. Any witnesses' identities will continue to be protected without undermining the effect of the evidence exclusion rule.
232. If the SOP discusses shortfall penalties it must also state any other appropriate penalties of lesser percentages and shortfall penalty reductions (for example, voluntary disclosure or previous behaviour reductions) as alternative arguments. This ensures that the appropriate penalties are assessed in all cases. However, the Commissioner cannot propose shortfall penalties at the SOP phase that have not previously been proposed in the Commissioner's NOPA.

**Receipt of a taxpayer's SOP in response**

233. Where the Commissioner has issued a disclosure notice and SOP, the taxpayer must, subject to section 89M(11), issue a SOP within the two-month response period that starts on the date that the disclosure notice was issued.
234. Therefore, the Commissioner cannot consider a document that the taxpayer purports to issue as a SOP before the Commissioner has issued the disclosure notice because it will not have been issued within the response period. The taxpayer should resubmit this document after the disclosure notice is issued.
235. Pursuant to section 89M(11), the taxpayer can apply to the High Court within the response period for more time to reply to the Commissioner's SOP. The taxpayer must show that they had not previously discussed the disputed issue with the Commissioner and, thus, it is unreasonable to reply to the Commissioner's SOP within the response period.
236. The Commissioner will make a reasonable effort to contact the taxpayer or their tax agent two weeks before the response period expires to determine whether the taxpayer will issue a SOP in response to the disclosure notice. Such contact can be made by telephone or in writing.
237. The taxpayer's SOP will be referred to the responsible officer within five working days after Inland Revenue receives it. Upon receipt, the responsible officer will ascertain and record the following:
  - (a) the date on which the SOP was issued, and
  - (b) whether the SOP has been issued within the relevant response period, and
  - (c) the SOP's salient features including any deficiencies in its content.
238. Where it is practicable, Inland Revenue will acknowledge the taxpayer's SOP as received within 10 working days after receiving it. However, the Commissioner will advise the taxpayer or their agent of any deficiencies in the SOP's content as soon as practicable.
239. A taxpayer who has issued a SOP outside the applicable response period can apply for consideration of exceptional circumstances or that the disputant had a demonstrable intention to continue the dispute under section 89K. The responsible officer must notify the taxpayer of the decision in writing within one month of receiving the disputant's "late" SOP (rejection is by way of a "refusal notice").
240. A taxpayer is deemed to have accepted the Commissioner's SOP if they do not reply to it with their own SOP within two months after the date that the disclosure notice is issued and where section 89K does not apply. Where practicable, the Commissioner

will usually advise the taxpayer that deemed acceptance has occurred within two weeks after the date that the response period for the disclosure notice expires.

**The Commissioner's response**

241. Pursuant to section 89M(8), the Commissioner can, within two months after the taxpayer's SOP is issued, provide to the taxpayer additional information in response to matters that they have raised in their SOP.
242. The Commissioner can only provide additional information in response to new or novel information or arguments that the taxpayer has raised in their SOP or agreed to add to their SOP under section 89M(13). The Commissioner cannot add further information simply because it was omitted from the Commissioner's SOP (for example, information that was received under a section 17 notice after the SOP was issued).
243. The additional information must be provided as far as possible in the same format as the SOP to which it relates (that is, in accordance with section 89M(4)). As mentioned above, the additional information can include documentary evidence but not lists of potential witnesses.
244. If the Commissioner intends to provide additional information to the taxpayer under section 89M(8), the Commissioner will usually advise the taxpayer or their tax agent of this within two weeks after the taxpayer's SOP is received. However, the timing of this advice can vary depending on the facts and complexity of the dispute. The additional information provided under section 89M(8) is deemed to be part of the Commissioner's SOP. Any new issues or propositions of law forming part of the additional information will be subject to section 138G.
245. The taxpayer cannot reply to the additional information that the Commissioner provides, unless the parties agree that additional information will be accepted under section 89M(13).

**Agreement to include additional information**

246. Either party can agree to include additional information in their SOP under section 89M(13) at any time during the disputes process including after the dispute has been referred to the Disputes Review Unit. Although there is no statutory time limit, the Commissioner's practice is to allow one month (from the date that the Commissioner provides additional information under section 89M(8)) for such an agreement to be reached and information provided.
247. However, before agreeing to include additional information under section 89M(13) the Commissioner will consider the taxpayer's prior conduct and whether they could have provided the information earlier through the application of due diligence.
248. The Commissioner will usually also consider the materiality and relevance of the additional information and its capacity to help resolve the dispute and may decide to take it into account in coming to an assessment. In this circumstance, both parties will be expected to cooperate in resolving the relevance and accuracy of any such material. The Commissioner may wish to apply resources to verification and comment and this will be considered by the adjudicator.
249. If a taxpayer seeks to include additional information in their SOP is declined, the reasons must be documented with detailed reference to the taxpayer's conduct, level of cooperation before the request was made and why the information was not provided earlier. The responsible officer will also advise the taxpayer or their tax agent of the reasons why their request was declined.

250. Any agreement to add further information to the SOP will be made subject to the taxpayer agreeing that the Commissioner can include a response to the additional information to the SOPs, if required, within an agreed timeframe.
251. Any additional information that the parties provide under section 89M(13) will be deemed to form part of the provider's SOP under section 89M(14). Section 138G applies to the additional information.

### **Preparation for Adjudication**

252. The Disputes Review Unit is part of Inland Revenue's Office of the Chief Tax Counsel and represents the final step of the disputes process. The adjudicator's role is to review unresolved disputes by taking a fresh look at a tax dispute and the application of law to the facts in an impartial and independent manner and provide a comprehensive and technically accurate decision that will ensure the correctness of the assessment.
253. Generally, the adjudicator will make such a decision within three months after the case is referred to the Disputes Review Unit (although sometimes a decision can be made in a few weeks). The length of time taken to make a decision will depend on the number of disputes that are before the Disputes Review Unit, any allocation delays and the technical, legal and factual complexity of those disputes.<sup>1</sup>
254. The adjudication process is an administrative (rather than a legislative) one. Judicial comments have been made in *C of IR v Zentrum Holdings Limited and Another, Ch'elle Properties (NZ) Limited v CIR* (2004) 21 NZTC 18,618 and *ANZ National Bank Ltd and others v C of IR (No. 2)* (2006) 22 NZTC 19,835 indicating that, as a matter of law, it is not strictly necessary for Inland Revenue officers to send all disputes to the Disputes Review Unit for review and Inland Revenue officers are not necessarily bound by the Disputes Review Unit's decisions.
255. Notwithstanding the above judicial comments, if the parties have not agreed on all the issues at the end of the conference and disclosure phases or to opting out under section 89N(1)(c)(viii), it is the Commissioner's policy and practice that all disputes are to be sent to the Disputes Review Unit for review, irrespective of the complexity or type of issues or amount of tax involved unless any of the following exceptions arise:
- (a) the Commissioner has considered the taxpayer's SOP for the purposes of section 89N(2)(b) and referred the dispute to the Disputes Review Unit for their preliminary consideration and the Disputes Review Unit has determined that it has insufficient time to reach a decision in respect of the dispute before a statutory time bar would prevent an assessment from being increased (see paragraphs 218 to 220 for further discussion), or
  - (b) any of the legislative exceptions specified in section 89N(1)(c) apply (see Appendix 2 for further discussion) so that the Commissioner can amend an assessment without first completing the disputes process, or
  - (c) the High Court has made an order that the disputes process can be truncated pursuant to an application made by the Commissioner under section 89N(3) (see Appendix 2 for further discussion).

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

256. The decision not to refer the case to adjudication must be made by a senior person in Service Delivery (for example, at the time of writing the delegation was with Area Manager level or above). In respect of the first exception mentioned in paragraph 255(a) it is necessary that the parties have exchanged a SOP and it is a matter solely for the Disputes Review Unit to determine whether it has insufficient time to fully consider the dispute.
257. If the dispute is to be referred to the Disputes Review Unit, the Commissioner should not issue an assessment or amended assessment before the adjudication process is completed unless a time bar is imminent. In this circumstance, the responsible officer will prepare a cover sheet that will record all the documents that must be sent to the Disputes Review Unit.
258. The cover sheet together with copies of the documents (NOPA, NOR, notice rejecting the NOR, conference notes, both parties' SOP, additional information, material evidence including expert opinions and a schedule of all evidence held) and any recordings of discussions held during the conference must be sent to the Disputes Review Unit.
259. If the dispute is to be referred for adjudication, the responsible officer will issue a letter together with a copy of the cover sheet to the taxpayer before sending the submissions, notes and evidence to the Disputes Review Unit. The cover sheet and letter are usually completed within one month after the date that the Commissioner's reply to the taxpayer's SOP (if any) is issued or the response period for the taxpayer's SOP expires.
260. The purpose of this letter is to seek concurrence on the materials to be sent to the adjudicator – primarily concerning documentary evidence that has been disclosed at the SOP phase. This letter will allow no more than 10 working days for a response.
261. Once the taxpayer has concurred on the materials to be sent to the Disputes Review Unit, those materials will be so forwarded. However, if no response is received from the taxpayer the materials will be forwarded after the 10 working days allowed for the taxpayer's response have elapsed. The adjudicator may also contact the parties after the initial materials have been received to obtain further information.
262. Where an investigation has covered a number of issues, the cover sheet will outline any issues that the parties have agreed upon and any issues that are still disputed. The adjudicator will only consider the disputed issues and not those issues that have been agreed upon.
263. Generally, the adjudicator only considers the materials that the parties have submitted. They do not usually seek out or consider further information, unless it is relevant. The adjudicator may consider such additional information notwithstanding that the parties have not agreed that the provider can include this information in their SOP under section 89M(13).
264. However, any additional material which amounts to a legal or factual issue, or a proposition of law, that the parties have not disclosed in their SOP (or agreed to include in their SOP under section 89M(13)) cannot later be raised in court because the issues and propositions of law exclusion rule in section 138G(1) will apply (as discussed in paragraphs 229 to 231).

### **Adjudication decision**

265. Once a conclusion has been reached, the Disputes Review Unit will advise the taxpayer and responsible officer of the decision. The responsible officer will implement any of the Disputes Review Unit's decisions and follow up procedures

where required including issuing a notice of assessment to the taxpayer where applicable.

266. Where the Disputes Review Unit makes a decision against the Commissioner, the Commissioner will not challenge that decision. The dispute will come to an end.
267. Where the Disputes Review Unit makes a decision against the taxpayer, they can challenge the assessment (whether made by the Commissioner or taxpayer) or disputable decision if they are within the applicable response period.
268. If the Commissioner has commenced the disputes process, the taxpayer, if disagreeing with the adjudicator's decision and any later notice of assessment or amended assessment that is issued, can file proceedings in the general jurisdiction of the TRA or the High Court if any of the following conditions under section 138B(1) are met:
  - (a) the assessment includes an adjustment that the Commissioner has proposed and the taxpayer has rejected within the response period, or
  - (b) the assessment is an amended assessment that imposes a fresh or increases an existing liability.
269. A taxpayer can also challenge an assessment that the Commissioner issues before the dispute goes through the adjudication process (for example, when an exception under section 89N(1)(c) applies).
270. The taxpayer must file proceedings with the TRA or High Court within the two-month response period that starts on the date that the Commissioner issues the notice of assessment or amended assessment.
271. If applicable, the responsible officer will implement any decision made by the hearing authority and follow up procedures where required including issuing a notice of assessment or amended assessment to the taxpayer.

This Standard Practice Statement is signed on 10<sup>th</sup> October 2016.

**Rob Wells**

**LTS Manager – Technical Standards**

**APPENDIX 1**

**EXCEPTIONS TO THE REQUIREMENT THAT THE COMMISSIONER MUST ISSUE A NOPA BEFORE MAKING AN ASSESSMENT**

**Exception 1: The assessment corresponds with a tax return**

1. Section 89C(a) reads:

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

2. The application of section 89C(a) is limited under the self-assessment rules. Generally, a taxpayer makes an assessment and files a tax return that includes that assessment. If the taxpayer's assessment is supported by the information in the tax return and any underlying source documents that the taxpayer has provided and the Commissioner agrees with the taxpayer's return and assessment there is no need for the Commissioner to invoke the disputes process.
3. In these circumstances, instead of issuing a notice of assessment the Commissioner will issue a statement of account that confirms the taxpayer's assessment. The statutory response period for the purposes of the disputes process will commence from the date that Inland Revenue receives the taxpayer's assessment.
4. Sometimes, if there is a deficiency in the taxpayer's tax return, the Commissioner will issue an assessment without first issuing a NOPA to the taxpayer because section 89C(a) applies. For example, the Commissioner can issue an assessment, where the taxpayer has provided all their income details but omitted to calculate their income tax liability in the tax return.

**Exception 2: Simple or obvious mistake or oversight**

5. Section 89C(b) reads:

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

6. This exception is intended to apply to a simple calculation error or oversight that Inland Revenue's Processing Centres generally discover with computer edits and simple return checks. This maintains the status quo for the many assessments arising in this situation.
7. The Commissioner will generally treat the following as a simple mistake or oversight:
  - (a) an arithmetical error;
  - (b) an error in transposing numbers from one box to another in a tax return;
  - (c) double counting, such as inadvertently including in the taxpayer's income the same item twice;
  - (d) not claiming a rebate to which the taxpayer is entitled or that was incorrectly calculated, for example, the low income rebate for a taxpayer.
8. A "simple or obvious mistake or oversight" can be determined on a case-by-case basis with no dollar limit. The Commissioner may consider whether this exception applies irrespective of whether the taxpayer seeks that the Commissioner makes an amendment under section 113 or applies the exception under section 89C(b).

9. Where the Commissioner issues an assessment to correct a taxpayer's simple or obvious mistake or oversight, the Commissioner may consider imposing shortfall penalties on the taxpayer, if there is a tax shortfall and the taxpayer has committed one of the culpable acts, for example, lack of reasonable care and not relied on the action or advice of their tax advisor for the purposes of section 141A(2B).

**Exception 3: Agreement to amend previous tax position**

10. Section 89C(c) reads:

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

11. This situation can occur if the issue is raised by either the Commissioner or the taxpayer. There is no need to issue a NOPA because no dispute arises.
12. If the Commissioner proposes the adjustment, this exception cannot apply unless the taxpayer accepts the adjustment. For the purpose of section 89C(c), the agreement between the parties can be oral, but the Commissioner's practice will be to seek written agreement. Section 89C(c) applies if Inland Revenue officers can demonstrate that the Commissioner and taxpayer have agreed on the proposed adjustment.
13. However, if the parties agree on only one adjustment and dispute others in respect of the same assessment, the Commissioner cannot issue an assessment on the basis of the agreed adjustment because the tax position is not necessarily correct.
14. Where a taxpayer proposes an adjustment outside the disputes process and the Commissioner agrees, for example a taxpayer seeks to amend an assessment, the particulars must be recorded in writing and state that the assessment is made in accordance with the Commissioner's practice on exercising the discretion under section 113. (See SPS 16/01: *Requests to amend assessments*.) The Commissioner must also consider if shortfall penalties are applicable.

**Exception 4: The assessment otherwise reflects an agreement**

15. Section 89C(d) reads:

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

16. The same procedures apply for section 89C(c) and (d). However, the agreement that the parties reach does not have to relate to a tax position that the taxpayer has previously taken.
17. For example, if the taxpayer has disputed, but now agrees, that they are a "taxpayer" for the purpose of the definition in section YA 1 of the Income Tax Act 2007 and has not provided a tax return. The Commissioner may issue an assessment to the taxpayer under section 89C(d) to reflect this agreement. The Commissioner must also consider whether shortfall penalties are applicable.
18. Another example is where, pursuant to section 6A, the Commissioner settles a tax case and disputes process. In such cases, the Commissioner will usually enter into an individual settlement deed and agreed adjustment in writing with the taxpayer to confirm the settlement.
19. The Commissioner will then give effect to that settlement deed and agreed adjustment by issuing an assessment to the taxpayer under section 89C(d) without first issuing a NOPA.



**Exception 5: Material facts and law identical to court proceeding**

20. Section 89C(db) reads:

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

21. Pursuant to section 89C(db), the Commissioner can issue an assessment to the taxpayer in relation to the other period that is the subject of court proceedings, without first issuing a NOPA. The Commissioner does not have to follow the disputes process for the same issue in the other period because the matter is before the court to resolve. A dual process towards resolution does not need to be adopted. The Commissioner will also consider whether shortfall penalties are applicable.
22. However, a taxpayer who has been issued with an assessment in relation to another period under section 89C(db), can dispute that assessment by issuing a NOPA to the Commissioner under section 89D within the applicable response period.
23. Section 89C(db) is intended to reduce compliance costs. Notwithstanding this provision, the Commissioner can elect to issue a NOPA in respect of the other period in order to resolve the dispute through the disputes process.

**Exception 6: Revenue protection**

24. Section 89C(e) reads:

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

- (i) to leave New Zealand; or
- (ii) to take steps, in relation to the existence or location of the taxpayer's assets, making it harder for the Commissioner to collect the tax from the taxpayer.

25. This exception is intended to ensure that the revenue is protected in the relevant circumstances. Section 89C(e) does not require that the taxpayer has physical possession of their assets.
26. If Inland Revenue officers apply the exception under section 89C(e), this should be supported by evidence of the "reasonable grounds" relied on (for example, the taxpayer's correspondence with third parties, application to emigrate overseas and any transcripts of interviews with the taxpayer).

**Exception 7: Fraudulent activity**

27. Section 89C(eb) reads:

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

28. Pursuant to section 89C(eb), a taxpayer has been involved in a fraudulent activity if they have engaged or participated in, or been connected with, any fraudulent activity that would have tax consequences for them.
29. If the taxpayer has not been convicted of an offence relating to a fraudulent activity section 89C(eb) can still apply provided that the Commissioner believes on reasonable grounds that the taxpayer has been involved in a fraudulent activity.

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

**Exception 8: Vexatious or frivolous**

31. Section 89C(f) reads:

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

32. If Inland Revenue officers apply this exception, this should be supported by documentation that evidences:
- (a) the action or inaction giving rise to the tax positions previously taken, and
  - (b) why that action is considered to be vexatious or frivolous and any shortfall penalties/prosecution consideration. Examples of a tax position taken as result of a vexatious or frivolous act are a tax position that is:
    - (i) clearly lacking in substance, for example, where the taxpayer continues to take the same position that has previously been finalised, or
    - (ii) motivated by the sole purpose of delay.
33. Where this exception applies, the Commissioner must also consider the imposition of shortfall penalties in respect of the taxpayer's tax position resulting from a vexatious or frivolous act.

**Exception 9: Taxation Review Authority or court determination**

34. Section 89C(g) reads:

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

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

**Exception 10: "Default assessment"**

37. Section 89C(h) reads:

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

38. If section 89C(h) applies because the taxpayer has failed to provide a tax return the Commissioner can make an assessment or amended assessment pursuant to section 106(1) (commonly known as a "default assessment").

39. Where a taxpayer seeks to dispute a default assessment through the disputes process, the taxpayer must, within the applicable response period (that is, four months from the date that the default assessment is issued):
  - (a) provide a tax return in the prescribed form for the period to which the default assessment relates (pursuant to section 89D(2C) for GST and section 89D(2) for all other tax types) notwithstanding that the tax return will not include the taxpayer's assessment, and
  - (b) issue a NOPA to the Commissioner in respect of the default assessment.
40. The requirement to provide a tax return in respect of a default assessment made under section 106(1) before issuing a NOPA is an additional requirement of the disputes process. This ensures that the taxpayer has provided the information that is required by the tax law before they are entitled to dispute the assessment.
41. If the Commissioner agrees with the taxpayer's NOPA and tax return, the Commissioner will generally amend the default assessment by exercising the discretion under section 113, subject to the statutory time bar in section 108 and any other relevant limitations. However, if the Commissioner does not agree with the taxpayer's tax return and NOPA the Commissioner can decide to not amend the default assessment and issue a NOR instead.
42. If a taxpayer cannot provide a NOPA because they are outside the applicable response period to dispute a default assessment or do not want to enter into the disputes process, they must still provide a tax return.
43. Although the Commissioner does not have to amend the initial assessment on receipt of the tax return from a defaulting taxpayer, the Commissioner can exercise the discretion to amend under section 113 subject to the time bar in section 108 or 108A and any other relevant limitations on the exercise of that discretion.
44. If the Commissioner decides not to exercise the discretion under section 113 the Commissioner can issue a NOPA in respect of the default assessment under section 89B(1) where, for example, new information received from the taxpayer suggests that the default assessment is incorrect.
45. The Commissioner is not precluded from further investigating an amended assessment issued on the basis of the taxpayer's tax return and, if necessary, issuing a NOPA to the taxpayer.

**Exception 11: Failure to make or account for tax deductions**

46. Section 89C(i) reads:

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

47. This exception is intended to address a taxpayer's failure to withhold, deduct or account to the Commissioner for an amount of tax including PAYE, schedular payments to non-resident contractors and resident withholding tax ("RWT"). The Commissioner must also consider whether shortfall penalties are applicable.
48. The Commissioner may not apply this exception if there is a dispute that involves statutory interpretation (for example, whether a particular item attracts liability for RWT meaning that the taxpayer was required to withhold or deduct RWT) and/or shortfall penalties.

**Exception 12: Non-assessed tax return**

49. Section 89C(j) reads:

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

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

**Exception 13: Consequential adjustment**

51. Section 89C(k) reads:

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

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

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

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

- (a) Group loss offsets: if a loss company has claimed losses to which it is not entitled and the Commissioner has amended the loss company's loss assessment to disallow those losses, pursuant to section 89C(k), the Commissioner can also make a separate assessment for the profit company that had offset the loss company's losses against its profits.
- (b) GST: the supplier and recipient of a supply have incorrectly assumed that a transaction was GST-exempt. The Commissioner later agrees that the recipient was entitled to a GST input tax credit and issues an assessment to them allowing the credit. The Commissioner can also issue an assessment to the supplier under section 89C(k) in respect of the output tax on the value of the supply.

**Exception 14: Look-through company**

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

**Exception 15: Income statement**

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

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

57. Under section 177C(5), if the Commissioner writes off outstanding tax for a taxpayer who has a tax loss, the Commissioner must extinguish all or part of the taxpayer's tax loss. Where the taxpayer is not a company, the amount written off is divided by 0.33, reducing the tax loss by that amount. Where the taxpayer is a company, the amount written off is divided by 0.28, reducing the tax loss by that amount.
58. Under section 89C(lb) the Commissioner does not have to issue a NOPA prior to issuing an assessment which extinguishes all or part of a tax loss in accordance with section 177C(5).

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

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

## **APPENDIX 2**

### **SECTION 89N – EXCEPTIONS – WHEN AN ASSESSMENT CAN BE ISSUED WITHOUT COMPLETING THE DISPUTES PROCESS**

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

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

2. Section 89N(1)(c)(i) reads:
  - (i) the Commissioner notifies the disputant that, in the Commissioner's opinion, the disputant in the course of the dispute has committed an offence under an Inland Revenue Act that has had an effect of delaying the completion of the disputes process:
3. This exception applies where the Commissioner may need to act quickly to issue an assessment because it is considered that the taxpayer has committed an offence under an Inland Revenue Act that has caused undue delay to the progress of the dispute.
4. For example, in the course of a dispute a taxpayer obstructed Inland Revenue officers in obtaining information from the taxpayer's business premise under section 16. The Commissioner will advise the taxpayer in writing that it is considered that an offence has been committed under section 143H. The offence has the effect of delaying the completion of the disputes process meaning that the Commissioner does not have to complete that process and can amend the taxpayer's assessment under section 113.
5. Another example of when the exception may apply is where, in the course of a dispute, a taxpayer wilfully refuses to attend an enquiry made under section 19 on the date specified in the Commissioner's notice. In these circumstances, the Commissioner will advise the taxpayer in writing that that it is considered that an offence has been committed under section 143F that has had the effect of delaying the completion of the disputes process. The Commissioner can then exercise the discretion to amend the taxpayer's assessment under section 113 without completing the disputes process.
6. In order to apply this exception, Inland Revenue officers must form an opinion that is honestly and reasonably justifiable on the basis of the evidence available, that the disputant has committed an offence under an Inland Revenue Act. The Inland Revenue officer's decision must be clearly documented and stipulate the grounds and reasoning on which it is based.

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

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

- (ii) the Commissioner has reasonable grounds to believe that the disputant may take steps in relation to the existence or location of the disputant's assets to avoid or delay the collection of tax from the disputant:
- (iii) the Commissioner has reasonable grounds to believe that a person who is an associated person of the disputant may take steps in relation to the existence or location of the disputant's assets to avoid or delay the collection of tax from the disputant:

8. In order to issue an assessment on the basis of either of the above exceptions, Inland Revenue officers must record any relevant correspondence and evidence (for example, the directors' written instructions to shift the company's assets overseas, evidence of electronic wiring of funds to overseas countries, transcripts of interviews with the taxpayer, etc) or other grounds for the reasonable belief.

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

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

- (iv) the disputant has begun judicial review proceedings in relation to the dispute:
- (v) a person who is an associated person of the disputant and is involved in another dispute with the Commissioner involving similar issues has begun judicial review proceedings in relation to the other dispute:

10. These exceptions apply to any judicial review proceedings that are brought against the Commissioner. In judicial review proceedings, the parties' resources are likely to be directed away from advancing the dispute through the disputes process.
11. For the purpose of section 89N(1)(c)(v), an associated person of a taxpayer may be involved in a similar issue to the taxpayer even if the issue relates to a different revenue type. For example, if the dispute between the Commissioner and taxpayer relates to PAYE issues, but the dispute between the Commissioner and person associated with the taxpayer relates to income tax the taxpayer may still be involved in similar issues to the person associated with them.
12. Even if the two disputes relate to the same revenue type, section 89N(1)(c)(v) will not apply in some circumstances. For example, the dispute with the taxpayer relates to the tax treatment of entertainment expenditure, whereas the dispute with the person associated with the taxpayer relates to the capital and revenue distinction of merger expenditure. The Commissioner would not regard these two disputes as involving similar issues.

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

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

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

14. Generally, a taxpayer provides information to Inland Revenue voluntarily. However, when this does not occur the Commissioner can seek information from the taxpayer under a statutory provision, for example sections 17 or 19. (The Commissioner's practice regarding section 17 is currently set out in OS 13/02: *Section 17 Notices*.) The requirement for statutory information will specify the period within which the information must be provided. This period will allow the taxpayer reasonable and sufficient time to comply.



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

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

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

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

17. Under this exception, where the Commissioner or taxpayer commences the disputes process, the parties can make such an agreement before either party issues their SOP. This would occur, for example, if the parties could incur excessive compliance and administrative costs in completing the full disputes process relative to the amount in dispute.
18. This exception allows the taxpayer to bring challenge proceedings against the Commissioner. The parties must have exchanged a NOPA and NOR before the taxpayer can bring challenge proceedings under section 138B(1).
19. The circumstances under which the Commissioner will enter into such an agreement are discussed in detail from paragraph 162 to 185. This SPS refers to this exception as opting out of the disputes process or "opt out".

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

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

(ix) the disputant and the Commissioner agree, recording their agreement in a document, to suspend proceedings in the dispute pending a decision in a test case referred to in section 89O.

21. Section 89O(2) allows a dispute to be suspended pending the result of a test case. Pursuant to section 89O(3), the parties can agree, recording their agreement in a document, to suspend the dispute from the date of the agreement until the earliest date that:
  - (a) the court's decision is made, or
  - (b) the test case is otherwise resolved, or
  - (c) the dispute is otherwise resolved.
22. If the parties agree to suspend the disputes process, any statutory time bar affecting the dispute is stayed. The Commissioner can then make an assessment that is consistent with the test case decision. (However, the taxpayer is not precluded from challenging the Commissioner's assessment under section 89D(1), even if it is consistent with the test case decision.)
23. The Commissioner must issue an amended assessment or perform an action within the time limit specified in section 89O(5).

24. Section 89O(5) reads:

The Commissioner must make an amended assessment, or perform an action, that is the subject of a suspended dispute by the later of the following:

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

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

26. For example, the Commissioner commences a dispute and on 1 March 2010 agrees with the taxpayer in writing to suspend the disputes proceedings pending the decision in a designated test case. The disputed issue is subject to a statutory time bar that commences after 31 March 2010 and the taxpayer does not agree to delay its application under section 108B(1)(a). A decision is reached in the test case on 31 July 2010.

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

- (a) The suspension period commences on the date of the agreement (1 March 2010) and ends on the date of the court's decision in the test case (31 July 2010). This is a period of 153 days.
- (b) The last date that the Commissioner can make an amended assessment falls on the later of the following two dates:
  - (i) 29 September 2010, that is 60 days after the date that the suspension period ends on 31 July 2010 pursuant to section 89O(5)(a), and
  - (ii) 31 August 2010, that is 153 days after the period commences on 1 April 2010 pursuant to section 89O(5)(b).

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

28. Section 89N(3) reads:

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

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

30. Any application made by the Commissioner under section 89N(3) must be based on reasonable grounds. Whether there are reasonable grounds will depend on considerations such as the complexity of the issues in the dispute, whether the taxpayer has caused delays; whether the dispute involves large amounts of revenue

or whether there were significant matters in the dispute that were unforeseen by either party and provided a justification for the delay.

31. For example, due to unusual circumstances the Commissioner does not learn about a proposed adjustment until late. Further delays by the taxpayer and the need for the Commissioner to obtain significant legal advice means that the Disputes Review Unit cannot consider the dispute before the time bar applies. In these circumstances, the Commissioner may apply to the High Court for an order that allows more time for the disputes process to be completed under section 89N(3). (Note: This is only an example of a possible unforeseen situation and it is anticipated that there will be a wide variety of circumstances under which an application under section 89N(3) will be appropriate.)
32. The Commissioner's application to the High Court under section 89N(3) must be made before the four-year statutory time bar falls due.
33. The Commissioner must also issue an amended assessment within the time limit specified in section 89N(5). Section 89N(5) reads:

If the Commissioner makes an application under subsection (3), the Commissioner must make an amended assessment by the last day of the period that -

  - (a) begins on the day following the day by which the Commissioner, in the absence of the suspension, would be required under the Inland Revenue Acts to make the amended assessment; and
  - (b) contains the total of -
    - (i) the number of days between the date on which the Commissioner files the application in the High Court and the earliest date on which the application is decided by the High Court or the application or dispute is resolved:
    - (ii) the number of days allowed by an order of a court as a result of the application.
34. Section 89N(5) allows the Commissioner more time to complete the disputes process where the statutory time bar under section 108 or 108A is imminent.
35. For example, the Commissioner commences the disputes process. On 1 March 2010 the Commissioner applies to the High Court under section 89N(3) for an order allowing more time to complete the process. The disputed issue is subject to a statutory time bar that commences after 31 March 2010 and the taxpayer does not agree to delay its application under section 108B(1)(a). On 30 June 2010, the High Court makes an order that allows the Commissioner's application and gives the Commissioner 30 further days to complete the disputes process.
36. Pursuant to section 89N(5), the Commissioner must make an amended assessment by 30 August 2010. This date is calculated as follows:
  - (a) The Commissioner would have one month to make the amended assessment before the statutory time bar commences. That is, 1 March 2010 to 31 March 2010. The period during which an amended assessment must be made under section 89N(5)(a) commences on 1 April 2010.
  - (b) The period during which the assessment must be made includes 122 days, that is the period between 1 March 2010 and 30 June 2010 (the date of the decision) under section 89N(5)(b)(i) and the 30-day period allowed by the High Court order under section 89N(5)(b)(ii). This is a total of 152 days.
  - (c) The Commissioner must issue an amended assessment to the taxpayer on the date that is 152 days from 1 April 2010. That is, by 30 August 2010.

## **WITHDRAWN**

37. During the period from 1 March to 30 August 2010, the parties may continue to attempt to resolve the dispute. This may include exchanging SOPs and going through the adjudication process.
38. The above example indicates that the Commissioner has more time to complete the disputes process. The time bar will not commence until 30 August 2010.
39. Where the Commissioner applies to the High Court under section 89N(3) for an order to truncate the disputes process, an assessment must be issued within the period as calculated under section 89N(5). Applying the same facts as in the above example, the Commissioner must issue an assessment to the taxpayer by 30 August 2010.